

THE INDIAN DECISIONS (NEW SERIES)

*Being a re-print of all the Decisions of the Privy Council on appeals from India
and of the various High Courts and other Superior Courts in India reported
both in the official and non-official reports from 1875*

EDITED BY

THE (LAWYER'S COMPANION) OFFICE
TRICHINOPOLY AND MADRAS

ALLAHABAD, VOL. VIII
(1894—1896)

I.L.R., 16 to 18 Allahabad

PUBLISHED BY

T. A. VENKASAWMY ROW

AND

T. S. KRISHNASAWMY ROW

Proprietors, The Law Printing House and The Lawyer's
Companion Office, Trichinopoly and Madras

1913

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MOUNT ROAD, MADRAS.

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DURING 1894—1896.

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Puisne Judges :

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THE
INDIAN DECISIONS
NEW SERIES.

ALLAHABAD—VOL. VIII.

I.L.R., 16 ALLAHABAD.

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APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Aikman.

TAPESRI LAL AND OTHERS (*Defendants*) v. DEOKINANDAN RAI
AND OTHERS (*Plaintiffs*).^{*} [6th July, 1893.]

Execution of decree—Civil Procedure Code, s. 320—Power of Collector to deal with money realized through his Court in execution of a Civil Court's decree.

Where a decree has been sent to the Collector for execution under s. 320 of the Code of Civil Procedure he holds any money which may be realised in execution of such decree at the disposal of the Civil Court by which the decree has been sent to him for execution, and he is not competent to distribute such money in contravention of an order from the Civil Court.

THE facts of this case were as follows :—

The plaintiffs and the defendants each held a money decree against one Agar Singh. The defendants put their decree into execution, but, before the proceeds of such execution had been paid into Court, the plaintiffs applied to the Court which passed the decree for a rateable distribution of the amount realised in consequence of the defendants' application for execution. The plaintiffs' application was granted and a notification to that effect was sent to the Court of the Collector in which the proceeds of the above-mentioned execution proceedings had been lodged. That Court, however, made over to the defendants the whole of the money thus realised, and the plaintiffs in consequence brought a suit for recovery of the share which would have fallen to them on a rateable distribution.

[2] The defendants raised a technical plea as to the invalidity of the plaintiffs' application to share in the proceeds of the execution proceedings, and the Court of first instance (the Munsif of Rasra) admitting this plea dismissed the plaintiffs' suit.

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APPEL-
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CIVIL.

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* Second Appeal No. 439 of 1891 from a decree of Rai Lalta Prasad, Additional Subordinate Judge of Ghazipur, dated the 16th February, 1891, modifying a decree of Babu Bhawani Chandar Chakarbati, Munsif of Rasra, dated the 14th October, 1890.

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—
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CIVIL.

The plaintiffs then appealed to the Subordinate Judge of Ghazipur, who reversed the Munsif's decision and decreed the plaintiffs' suit. The defendants then appealed to the High Court. Munshi *Jwala Prasad*, for the appellants. Mr. *Abdul Majid*, for the respondents.

JUDGMENT.

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KNOX and AIKMAN, JJ.—The matter for decision in this appeal is as follows :—

Certain proceeds had been realised in the execution of a decree transferred for execution to a Collector under s. 320 of the Civil Procedure Code, and lay in the hands of the Collector. A direction was sent by the Court which had forwarded the decree to the effect that the assets were to be distributed rateably between the decree-holder at whose instance execution had issued and a second decree-holder who had applied under s. 295 of the Code of Civil Procedure for a share in the proceeds. Under the above circumstances, was the Collector entitled to disregard the order for rateable distribution and to make over the whole of the proceeds to one decree-holder alone? We are of opinion that the payment of the proceeds of a decree is entirely within the jurisdiction of the Court which orders execution and that the Collector holds the proceeds of a decree sent to him for execution at the disposal of the Civil Court which transmits the decree. Section 295 would therefore apply to such proceeds. The pleas taken in appeal fail and the appeal is dismissed with costs.

Appeal dismissed.

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APPELLATE CIVIL.

[3] *Before Mr. Justice Tyrrell and Mr. Justice Knox.*

RAGHUBAR DIAL (*Defendant*) v. MADAN MOHAN LAL (*Plaintiff*).
[7th July, 1893.]

Act I of 1877, s. 30—Act X V of 1877, sch. ii, Art. 113—Suit for specific performance of an award—Limitation.

A suit for the recovery of a balance of money due under the terms of an award, being virtually a suit for the specific enforcement of the award is, by reason of s. 30 of the Specific Relief Act, 1877, subject to the limitation prescribed by art. 113 of sch. ii of the Indian Limitation Act, 1877. *Sukho Bibi v. Ram Sukh Das* (1) followed.

[*Diss.*, 33 C. 981=4 C.L.J. 162; 15 C.P.L.R. 115; 23 M 593; R., 34 A. 43 (45)=8 A.L.J. 1138 (1140)=11 Ind. Cas. 705 (706); 16 Ind. Cas. 804 (805)=265 P.W.R. 1912; 19 Ind. Cas. 376 (377); 4 Ind. Cas. 821=U.B.R. 1909, Limitation 9; 70 P.R. 1903=160 P.L.R. 1903; 32 P.R. 1913; 6 S.L.R. 148 (149); D, 23 A. 285 (288); 17 A.W.N. 144.]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *D. N. Banerji*, for the appellant.

The Hon'ble Mr. *Colvin* and Mr. *J. N. Pogose*, for the respondent.

* First Appeal No. 12 of 1893, from an order of J. G. Nicholls, Esq., District Judge of Farakhabad, dated the 14th December 1892.

(1) 5 A. 263.

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TYRRELL and KNOX, JJ.—This is a first appeal from an order of remand made under s. 562 of the Code of Civil Procedure by the District Judge of Farakhabad, reversing the decree of a Munsif who dismissed the respondent's suit as barred by limitation. The respondent is a man in whose favour arbitrators had made an award for a considerable sum of money. The defendant made some payments to him under that award, which was registered, but according to plaintiff, defendant, on the 23rd of September, 1892, still owed Rs. 534-9-6 of the sum, which, by the award, he was still bound to pay to defendant. The plaintiff sought for a decree for that sum. The defendant's answer was, amongst other things, mainly this, that he had paid plaintiff under the award till the year 1943 S. when plaintiff discharged him from further liability and that the suit was time-barred. The award was made in 1881. It was provided that the money awarded by the arbitrators should be paid off completely up to the year 1940 S. which corresponds, we are told, with 1883 A. D. The defendant continuously made payments up to the 17th of September 1886. The suit was not brought until September 1892. The question is, what is the article of the Limitation Act applicable to [4] this case? The Munsif adopted the ruling of Straight, J., in *Sukho Bibi v. Ram Sukh Das* (1) finding that this was a suit for money based on an award which directed its payment by the defendant to the plaintiff, and was virtually a suit to have that award specifically enforced. The article providing limitation for a suit for specific performance is art. 113; the time is three years from the date for the performance; that would be, in this case, either three years from 1883, which would terminate in 1886, or three years from the 17th of September, 1886, the date of the last payment in the sense of s. 20 of the Limitation Act, which would expire on the 17th of September 1889. In either event the plaintiff's suit would be barred, and the Munsif dismissed it accordingly. The Court of first appeal reversed the Munsif on this point, holding that the suit was not a suit for the specific performance of a *quasi* contract, but a suit for compensation for the breach of a contract in writing registered. The learned Judge refused to apply the law as laid down in *Sukho Bibi*, thinking that the learned Judges had "overlooked the point" that in the case before them the award was registered. As a matter of fact, the circumstance was prominently noticed. It is plain in our opinion that the respondent's suit was not for compensation for the breach of a contract in writing. The award is not a contract, though it is true that the provisions of procedure provided by Act I of 1877, for enforcing contracts in general, are by s. 30 of that Act analogically made applicable to a suit like the present to enforce obedience to an award. That section provides that the "provisions of this chapter as to contracts shall, *mutatis mutandis*, apply to awards." Moreover, the plaintiff's suit is not in terms or virtually a suit for compensation for the breach of any contract. The obligation of an award cannot be enforced by execution, and the only mode of obtaining practical relief under an award is to bring a suit to cause the party put under obligations by that award to fulfil them. This is the suit in terms which the plaintiff has brought, and is a short and simple claim for money. It was contended by the learned counsel who appeared for the respondent that this suit cannot be a suit for specific performance because it does not fall within the [5] terms of s. 12 of the Specific Relief Act. But s. 12 has particular

(1) 5 A. 263.

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reference to suits for specific performance of contracts proper, as such, under which category the present suit could not find a place. A suit like the present can only come within the scope and purview of the Specific Relief Act by virtue of the special section which stands at the end of Chapter II of the Act, which specifically provides that suits like the present, which would not ordinarily be suits for the specific performance of a contract, may be analogically treated as such for the particular purpose of the procedure of that Act. The learned Judge further went wrong in his assumption that because the particular suit provided for by arts. 116 and 117 of the Indian Limitation Act, 1877, *i.e.*, a suit for compensation for the breach of a contract not in writing registered, and for compensation for the breach of a contract in writing registered has particularly a limitation of three years for the first and six for the second contract, therefore the effect of registration of any contract *quoad* limitation is to give a period of six years instead of three. This is not so. That effect is limited, as we have said, to one suit only in the entire second schedule of the Limitation Act. It is true that in *Sukho Bibi's* case, Mr. Justice Straight overlooked this point, but only in the sense that the point was not there to be seen.

We hold that the Munsif was right in applying the limitation of art. 113, and we therefore reverse the remand order of the Judge and restore the decree of the Munsif with costs in favour of the defendant in all Courts.

Appeal decreed.

16 A. 5 = 13 A.W.N. (1893) 141.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

CHUNNI (*Plaintiff*) v. LALA RAM (*Defendant*).^{*} [13th July, 1893.]

Execution of decree—Jurisdiction—Order for sale under a decree previously satisfied; such order and the consequent sale ultra vires and nullities—Civil Procedure Code, s. 559—Addition of a party in second appeal.

An order for sale and a sale under such order are *ultra vires* and nullities if the decree which is ordered to be executed has been satisfied by payment into Court of the decretal money before the order is made.

[6] A Court cannot in a second appeal act under s. 559 of the Code of Civil Procedure, and add a party as a respondent unless such party was a party to the appeal below, and this notwithstanding that he was a party to the suit in the Court of first instance.

[*Diss.*, 19 M. 151 = 5 M.L.J. 279 ; 6 O.C. 159 (165).]

THE facts of this case were as follows :—

One Harna executed a bond in favour of Lala Ram, by which he hypothecated his zamindari share. Harna died without having paid the debt, and the share was recorded in the names of his daughter Musammat Sundar and his nephews Jagraj, Nathu, Kanhai and Chunni. Subsequently Musammat Sundar executed another bond in favour of Lala Ram hypothecating the zamindari share left by Harna. Lala Ram brought two separate suits on the two bonds, and in both of them he impleaded Musammat Sundar, Jagraj, Nathu, Kanhai and Chunni as defendants. The

* Second Appeal No. 459 of 1891 from a decree of Babu Abinash Chandra Banerji, Subordinate Judge of Agra, dated the 5th March, 1891, reversing a decree of Maulvi Muhammad Shafi, Munsif of Agra, dated the 2nd May 1890.

male defendants alleged that they were the heirs of Harna, and that Musammat Sundar was not his heir. The Court found that Musammat Sundar was the heir of Harna, and decreed both suits. The decrees provided for the sale of the property hypothecated, and further imposed a personal liability on the obligors, but the defendants Jagraj, Nathu, Kanhai and Chunni were made liable only for costs. Lala Ram in execution of these decrees attached the hypothecated zamindari share, and also another zamindari share belonging to Chunni personally. Thereupon Chunni on the 8th of March, 1888, paid into Court the amount due by him as costs, and prayed that his property might be released from attachment. This, however, was not done, and on the 20th of September 1888 Chunni's own zamindari was sold along with the hypothecated property, and purchased by Raja Ram, Durwa, Ram Prasad and Chunni himself. The sale having been confirmed, the sale proceeds were paid to the decree-holder; but, part of the decretal debt still remaining unpaid, Lala Ram on the 22nd of December 1888 drew out of Court the money which had been paid in by Chunni in satisfaction of the costs decreed against him.

Chunni then sued the decree-holder and the other auction-purchasers to set aside the sale of his own zamindari, on the allegations that the sale could not have been legally held after he had in fact [7] paid what was due by him under the decree, and that he had purchased at the auction sale in ignorance that his own property formed part of the subject of the sale. The Court of first instance decreed the plaintiff's claim.

The defendant, decree-holder, appealed, but omitted to join the auction-purchasers other than Chunni as respondents. He raised two pleas, one of limitation, the other of estoppel by the plaintiff's conduct. The lower appellate Court held that the suit was barred by limitation and dismissed it, decreeing the defendant's appeal. The plaintiff thereupon appealed to the High Court.

Babu *Durga Charan Banerji*, for the appellant.

Munshi *Gobind Prasad*, for the respondent.

JUDGMENT.

EDGE, C. J. and BURKITT, J.—It appears to us that the merits of this case are altogether with the appellant, but that the procedure which he has followed has debarred him of the relief which he claims in this appeal. The respondent before us obtained a decree against the present appellant for costs. The present appellant paid into Court the amount of that decree before any order for sale of his property was made, and on paying in the money he asked for the release of his property, which was then under attachment. The Court, whether through inadvertence or not, subsequently ordered the decree to be executed by sale of the present appellant's property. There was in fact no jurisdiction to make any such order. The appellant was no longer a judgment-debtor. He had satisfied and discharged the decree, so far as he and his property were concerned, by payment of the full amount decreed against him into Court. Under these circumstances it appears to us that the Court had no more jurisdiction to order a sale of the property of the appellant in execution of that decree than it would have had to order the sale of the property of a person totally unconnected with the suit. Under the Court's order the property was sold. The appellant brought this suit in effect for a declaration that the sale did not affect his rights and interests in the property.

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That was not precisely the way in which he prayed for his relief, but that is the relief which, if this suit had lain, this Court would have granted [8] to the appellant. The first Court decreed the plaintiff's claim. The decree-holder in the original suit brought an appeal, and on appeal in this suit the Subordinate Judge, apparently acting under s. 544 of the Code of Civil Procedure, reversed the whole decree of the first Court with costs in favour of the judgment-debtor, but as to the purchasers, who were defendants in the suit, but not parties to the appeal, the Subordinate Judge left them to pay their own costs. This appeal was brought from that decree of the Subordinate Judge. The auction-purchasers were not made parties to this appeal. If the suit lay at all they would be necessary parties to this appeal, because the effect of the decree of the lower appellate Court was to dismiss the suit as against them. We have no power under s. 559 of the Code of Civil Procedure to make these auction-purchasers parties to this appeal, as they were not parties in the Court against whose decree this appeal is brought. It is not necessary to decide whether, if they had been parties to this appeal, s. 244 of the Code of Civil Procedure would have barred the suit against them. We cannot interfere with the decree of the Court below so far as it is in their favour, as they are not parties here. The respondent in this appeal is the original judgment-creditor, decree-holder in the original suit. The appellant is one of the judgment-debtors in that original suit. It appears to us that the question as between the parties who are before us in this appeal was one falling within cl. (c) of s. 244 of the Code of Civil Procedure. What a Court is to do in cases like the present is to pay regard to the substance rather than to the form of the claim, and what undoubtedly would have to be determined in this suit, if it lay, would be the question as to whether the decree of the present respondent in the former suit had been discharged or satisfied before the order for sale was made. That would be a preliminary question and one material to the question as to whether there was jurisdiction to make the order for sale and to carry out the sale. Consequently, in our opinion, as between the parties to this appeal s. 244 of the Code of Civil Procedure applies and this suit does not lie as between these parties. It is more than doubtful whether there was any necessity for this suit even if it had lain. [9] In our opinion, as we have said, the Court which ordered the sale had no jurisdiction to make any such order, the decree having been in fact satisfied so far as the plaintiff-appellant and his property were concerned. A similar decision of this Court in the case of *Balwant Rao v. Muhammad Hussain* (1) and the decision of the Judicial Commissioner of Oudh, differing from the Additional Judicial Commissioner, in the case of *Abdul Kasim Khan v. Hari Singh* (2) confirm us in the view which we hold as to there having been no jurisdiction to order the sale in this case. As there was no jurisdiction to order the sale, the sale was made without jurisdiction and was consequently a nullity, and there was apparently no necessity to bring a suit to which art. 12 of sch. ii of Act No. XV of 1877 might apply. It does not appear here that any steps have been taken to oust the plaintiff-appellant, from possession of the property which purported to have been sold. We dismiss this appeal on the ground that owing to s. 244 of the Code of Civil Procedure there was no jurisdiction to entertain this suit, which was consequently on that short ground unmaintainable. The point as to s. 244 was not taken in the Court below, and further the defendant, respondent here, must have been perfectly

(1) 15 A. 324.

(2) Select Cases (J. C. of Oudh) No. 215.

well aware that he was executing as against the plaintiff, appellant here, a decree which, as against that plaintiff and his property, was dead; consequently we make it part of our order that the defendant, respondent here, bear his own costs of the litigation in this suit and in the appeals.

Appeal dismissed.

16 A. 9 = 13 A.W.N. (1893) 183.

MISCELLANEOUS CRIMINAL.

Before Mr. Justice Burkitt.

IN THE MATTER OF THE PETITION OF AMAR SINGH.*
[15th July, 1893.]

Criminal Procedure Code, ss. 110, 526—Security for good behaviour—Transfer.

Proceedings under s. 110 of the Code of Criminal Procedure cannot be transferred to any Court outside the district within which such proceedings have been lawfully instituted.

[Diss., 3 O.C. 247 (249); 1 S.L.R. 98 (102) (Cr.) = 8 Cr.L.J. 356 (359); Not F., 32 A. 642 (644) = 7 A.L.J. 813 (814) = 11 Cr.L.J. 412 (413) = 6 Ind. Cas. 874 (875); F., 30 A. 47 = A.W.N. (1907) 268 = 7 Cr.L.J. 214 (215); R., 28 C. 709 (715) = 5 C.W.N. 749; 11 Cr.L.J. 534 = 7 Ind. Cas. 861 = 20 M.L.J. 982 (983) = 8 M.L.T. 297 (298) = (1910) M.W.N. 459; D., 2 Weir 53 (54).]

[10] THE facts of this case sufficiently appear from the judgment of Burkitt, J.

Mr. W. S. Howell and Babu Rajendro Nath Mukerji, for the applicant.

The Public Prosecutor (for whom Porter), for the Crown.

JUDGMENT.

BURKITT, J.—This is an application for a transfer purporting to be made under s. 526 of the Code of Criminal Procedure, and it asks this Court to remove from the Court of the Magistrate of Meerut a case under s. 110 of the Code of Criminal Procedure now pending before a Deputy Magistrate of that district and to transfer it for trial to some other district. It is unnecessary at present to enter into the grounds on which the application is made, as I am of opinion that the application is one which this Court is not empowered to grant. In my opinion all proceedings under Chapter VIII of the Code of Criminal Procedure are intended by law to be taken in and completed within the district in which the person from whom it is sought to require security for keeping the peace or for good behaviour is living at the time when the proceedings were commenced. It has been held by this Court more than once that it is not competent for a District Magistrate to bring into the limits of his district by issue of a warrant or other process for the purposes of Chapter VIII of the Code, a person who at the time is not actually within the limits of his district. With reference to s. 110, I am of opinion that, even reading s. 526 with that section, the clear intention of the Legislature is that such proceedings must be held within the district in which a person from whom it is sought to take security is residing and not in any other district. Section 110 provides that a Magistrate of the district or other Magistrate of the

* Miscellaneous Application No. 72 of 1893, under s. 526 of Act No. X of 1882.

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first class on receiving certain information as to a person then within the local limits of his jurisdiction may call on such person to show cause why he should not give security. Further, it appears that such Magistrate must hold an inquiry as provided by the subsequent sections of the Act, and that if on the result of that inquiry he is satisfied that there is within the local limits of his jurisdiction a person to whom, *e.g.*, s. 110 applies, he then may make absolute [11] the order requiring that person to furnish security. In my opinion a Magistrate of another district to whom the case might be transferred would not be competent to arrive at the finding required before the order to give security could be made absolute: for the power given by the sections which prescribe the procedure for the inquiry is one which as a condition precedent to making absolute the order for security requires the Magistrate to find that there is *within the limits of his jurisdiction* a person to whom s. 110 applies. I hold that a first class Magistrate, for instance, of Bulandshahr, would be incompetent to act under this chapter in respect to a person residing in the district of Meerut against whom proceedings had been commenced in Meerut and who had been brought into the Bulandshahr district on transfer of those proceedings and not because he was residing within the limits of that district. The Bulandshahr Magistrate could not find that s. 110 applied to the accused within the local limits of his jurisdiction (Bulandshahr) and would have no jurisdiction as to Meerut. I am of opinion that the order of this Court transferring such a case, say, from Meerut to Bulandshahr, could not confer on a Magistrate of Bulandshahr a jurisdiction which belongs to the Magistrate of Meerut. For these reasons I reject this application.

Application rejected.

16 A. 11 (F B.) = 13 A.W.N. (1893) 211.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell, Mr. Justice Knox, Mr. Justice Burkitt and Mr. Justice Aikman.

BALLU RAM (*Plaintiff*) v. RAGHUBAR DIAL AND ANOTHER
(*Defendants*).^{*} [13th July, 1893.]

Civil Procedure Code, s. 285—Execution of decree—Money attached in execution in two Courts—"Court of highest grade"—Munsif's Court—Small Cause Court.

In the North-Western Provinces the Court of a Munsif must, for the purposes of s. 285 of the Code of Civil Procedure, be regarded as of a higher grade than a Court of Small Causes.

[12] So held by Edge, C. J., Tyrrell, Burkitt and Aikman, Knox, J., *dissentiente*.

Per Knox, J. The respective functions of a Munsif's Court and of a Court of Small Causes in the North-Western Provinces are such that the Courts do not admit of the comparison implied by the term "grade" being instituted between them for the purposes of s. 285 of the Code of Civil Procedure.

THIS was a reference to a Full Bench made at the instance of Knox and Burkitt, JJ., by their order of the 17th of May 1893. The question

^{*} Second Appeal No. 1288 of 1890 from a decree of Shah Ahmad-ullah, Subordinate Judge of Allahabad, dated the 18th September 1890, reversing a decree of H. David, Esq., 1st Munsif of Allahabad, dated the 23rd January 1890.

referred was whether, for the purposes of s. 285 of the Code of Civil Procedure, the Court of Small Causes at Allahabad was or was not a Court of higher grade than the Court of the Munsif at Allahabad.

The facts of the case were as follows:—

The plaintiff, Ballu Ram, held a money decree against Mahpal Singh (defendant No. 2) in the Court of the first Munsif of Allahabad. Raghubar Dial (defendant No. 1) obtained three decrees in the Court of Small Causes against Mahpal Singh on the 16th of December 1888. Ballu Ram made an application on the 21st of November 1888, for execution of his decree, dated the 6th of December 1876, to the Court of the Munsif for recovery of Rs. 1,277-1-0, and at the same time it was prayed that the money due to Mahpal Singh, and held in deposit in the District Engineer's office at Allahabad, might be paid to him, Ballu Ram.

On the same date an order was issued for the attachment of the money aforesaid, and it reached the office of the Executive Engineer on the 22nd of November 1888. The application for execution aforesaid was struck off on the 17th of January 1889.

Raghubar Dial made an application for execution of his decrees on the 21st of December 1888, and he also made an application on the 21st of December 1888, for attachment of the money due to Mahpal and held in deposit in the office of the Executive Engineer, and this was sent on to the said office on the 2nd of January 1889.

Rs. 316-1-3 were sent from the aforesaid office to the Court of Small Causes. Ballu Ram made an application to receive this money in payment of the money due under his decree, but this [13] application was rejected, and subsequently Raghubar Dial, realized Rs. 282-15-3, the amount due under his decrees.

Ballu Ram made an application for the attachment of the surplus money, and that money was caused to be paid to him in part payment of the amount of his decree. He then brought a suit in the Munsif's Court against Raghubar Dial and Mahpal Singh for the refund of the sum of Rs. 282-15-3 which was caused to be paid to Raghubar Dial by the Small Cause Court, alleging that he had a prior right to receive the money in question.

The Munsif passed a decree in favour of the plaintiff, though for a somewhat smaller amount than that claimed by him. The defendants then appealed to the Subordinate Judge, who reversed the decree of the Munsif and dismissed the plaintiff's suit with costs.

The plaintiff then appealed to the High Court, and the appeal coming before Knox and Burkitt, JJ., a reference to the Full Bench of the question of law involved therein was proposed.

Mr. *Abdul Majid*, for the appellant.

Pandit *Sunder Lal*, for the respondent.

The judgment of the majority of the Full Bench (EDGE, C.J., TYRRELL, BURKITT, and AIKMAN, JJ.) was delivered by EDGE, C.J.:—

JUDGMENT.

As s. 285 of Act No. XIV of 1882 is applied by s. 5 of that Act to Courts of Small Causes, it follows in our opinion that a Court of Small Causes must have a grade within the meaning of s. 285.

With reference to s. 285 of Act No. XIV of 1882, we think that the question as to whether a Court of Small Causes in these Provinces is of a higher, or of a lower, or of the same grade as a Court of a Munsif, must be determined on a consideration of the scope of the jurisdiction of those

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Courts respectively. We see no other test which can be applied to the question before us, which would be equally applicable to a determination as to the relative grade of other Courts so far as s. 285 is concerned.

The Court of a Munsif has jurisdiction in suits which are wholly excepted from the cognizance of a Court of Small Causes, and in suits not excepted by sub-section 1 of s. 15 of Act IX of 1887, a [14] Court of Small Causes has ordinarily no jurisdiction when the value exceeds Rs. 500, whereas in such suits the Court of a Munsif ordinarily has jurisdiction when the value exceeds Rs. 500 and does not exceed Rs. 1,000. We consequently come to the conclusion that for the purposes of s. 285 of Act No. XIV of 1882 the Court of a Munsif must be regarded as a Court of a higher grade than a Court of Small Causes. That is our answer to the question which has been referred to the Full Bench.

KNOX, J.—It is with a great regret that I find myself unable to agree with my learned brothers as to the answer which should be returned to the question which has been referred.

The word "grade," upon a proper understanding of which the answer to the question in my opinion mainly depends, has not been defined, either in the Code of Civil Procedure or in the General Clauses Acts of 1868 and 1887. So far as I have been able to ascertain, it has been defined in no other statute, or some help to the answering of this question might have been derived from considering such definition. In the ordinary use of the word it means a step in a series. As I understand the term, there can be no grade without a series, and persons and impersonal objects can only be graded when and so far as they both possess in common some quality which admits of being measured and compared. To illustrate the meaning which I attach to the word. It is not a misapplication of the term to use it in speaking of the offices of a Judge and of a Collector, if the mere accident of the salary which is attached to each office is under consideration, or when the matter under consideration is the judicial functions which are attached to each of those offices for the determination of certain rent disputes. It is a misapplication of the term to use it of the offices generally. In other words, the offices do admit of being graded *quoad* salary, they do not admit of being graded as offices generally. Again, I do not deny the possibility of an arbitrary "grade" being by statute attached to an office so as to bring offices dissimilar to each other into a series for a certain special purpose, and when they have been so treated the fact is one of which judicial notice will be taken. But [15] where the fact of a grade does not exist *per se* or owing to its having been created by statute or otherwise, so far as my judgment goes, a Court of justice must treat it as non-existent. It remains to be seen whether the Court of Small Causes at Allahabad, a Court created under Act XLII of 1860, does possess any quality, so far as its judicial functions are concerned in common with the Court of the Munsif of Allahabad, so that it is possible to conceive of a relative grade existing between them, or whether there is any provision in any statute grading them for any specific purpose.

The jurisdiction of the Court of Small Causes at Allahabad is laid down in s. 15 of Act No. IX of 1887. It is a Court which, within certain limits defined by the Local Government, takes cognizance of all suits of a civil nature of which the value does not exceed Rs. 500, save and except certain suits set out in the second schedule attached to the Act as suits excepted from the cognizance of a Court of Small Causes, and save and except any suits which may be specially excepted from its jurisdiction by

any special or local enactment for the time being in force. But this is not all. Section 16 further provides that, in the absence of any express provision in any statute to the contrary, a suit cognizable by the Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes.

The local limits of the jurisdiction of the Court are in no way dependent upon the local limits of the jurisdiction of any other Civil Court. There is nothing whatever which directs a Local Government to define those local limits so that they shall fall within the confines of one district.

The jurisdiction of the Court of the Munsif at Allahabad is defined by s. 19 of Act No. XII of 1887. It extends to all original suits cognizable by Civil Courts of which the value does not exceed rupees one thousand, save and except such suits as are otherwise provided for by any enactment for the time being in force. Special jurisdiction may be given to the Courts over certain proceedings set out in s. 23 of Act No. XII of 1887 and over suits cognizable [16] by a Court of Small Causes under the Provincial Small Cause Court Act, 1887. As a matter of fact, the Court of the first Munsif of Allahabad has no jurisdiction conferred upon it for the trial of suits cognizable by Small Cause Courts.

But it is to be noticed that even if the Local Government wished to confer such jurisdiction, it could not grant to the Munsif of Allahabad or any Munsif in these provinces jurisdiction over any suit of which the value exceeded one hundred rupees. If the Local Government wished to confer such jurisdiction over suits of a larger value it could only confer it upon the Subordinate Judge of Allahabad, or a Subordinate Judge.

This therefore is the state of matters when jurisdiction is contrasted. I will call for the sake of brevity suits cognizable by the Court of Small Causes at Allahabad "summary suits," those cognizable by the first Munsif of Allahabad "regular suits."

The jurisdiction of the Small Cause Court at Allahabad over summary suits is plenary, over regular suits none. The jurisdiction of the Munsif of Allahabad is over summary suits none, over regular suits plenary.

To my mind it is impossible to conceive of any grade as existing between two such Courts. They present, so far as their judicial functions are concerned, no quality of more or less that can be measured or assessed in any way. There is nothing that admits of being put into one and the same series.

Is there any statutory provision which has created an arbitrary grade between them? In the whole course of the argument we were referred to none, save and except ss. 13 and 28 of Act IX of 1887. There, for a certain specified purpose, in the one case, the appointment, punishment and transfer of ministerial officers, and, in the second case, for the purpose of subordination to the District Court and High Court and for administrative control generally, the relation of the Court of Small Causes is declared to be the same as that of a Civil Court of the lowest grade competent to try an original suit of the value of five thousand rupees. In the district of Allahabad [17] such Court would be the Court of the Subordinate Judge. Thus in the only case in which the Legislature has thought fit to create a grade for Small Cause Courts, it has declared that grade to be a grade superior to that of Munsif. For in these Provinces certainly, in all Provinces to which Act No. XII of 1887 applies certainly, and in the whole of British India so far as I can ascertain, no Munsif, as a Munsif,

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13 A.W.N.

(1893) 211.

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(F.B.) =
13 A.W.N.
(1893) 211.

is ever empowered to try an original suit of the value of five thousand rupees.

If there be any guide provided by statute to the intention of the Legislature as to what should be the relative grade of a Provincial Court of Small Causes, it would seem to be that, where necessary to create a grade, that grade would be the grade of a Civil Court superior to that of Munsif. In this light the provisions of s. 25 of Act No. XII of 1887 become natural and normal. If this were not the intention, that section would create an anomaly. But I admit that ss. 13 and 28 of Act No. IX of 1887 are no safe guide to the present matter before us. The Legislature was there dealing with the administrative functions of the Court of Small Causes; we are dealing with the judicial functions of the same Court and those functions as confined to the execution of certain decrees.

It is still more significant to find that when an opportunity did present itself for creating a grade the Legislature was at great pains to avoid the creation of any semblance of a grade even. On the occasion when Act No. X of 1877 was passed, the Legislature had before it the status of Provincial Small Cause Courts. Prior to the introduction of that Act they were in no way related to District Courts and formed no part of the series in which the Civil Courts of a district stood in relation to the High Court. Under Act No. XLII of 1860 no Civil Court, save and except the Sudder Court, could on any pretence interfere with any act, judicial or administrative, of a Small Cause Court created under that Act. It was thought in 1877 expedient to alter this status. It would have been easy to bring by statute the Court of Small Causes into a position relative to the other Civil Courts, in fact to grade it, but [18] in s. 2 of Act No. X of 1877 and in the amendments which have followed, s. 2, which provided for the change, has always run "every Court of a grade inferior to that of a District Court and every Court of a small causes shall, for the purposes of this Code, be deemed to be subordinate to the High Court and the District Court. In the light of these words I find it impossible to hold that a grade was created for the Court of Small Causes. In fact I understand from those words that the intention was not to grade the Court of Small Causes, at any rate, any further than in a series of which the steps might be :—1 High Court, 2 District Court, 3 Court of Small Causes.

This would explain also the language used in ss. 32, 39 and 40 of Act No. XII of 1887.

There remains s. 285, a section which undoubtedly applies both to the Court of Small Causes at Allahabad and to the Court of the Munsif at Allahabad. But that section contains no word creating a grade, it merely recognizes grades which exist or have been elsewhere created. It is a section which applies to all kinds and classes of Civil Courts throughout British India, it applies to Presidency Small Cause Courts, to Cantonment Small Cause Courts, and to Revenue Courts in these Provinces. Am I, simply because the section applies, to create a grade between the Court of Small Causes at Allahabad or the Court of the first Munsif at Allahabad and the Court of an Assistant Collector of the first class at Allahabad? No such grade exists, and, though it may perhaps be, as suggested, that the point was overlooked when s. 285 was enacted, I can only reply to the question that no grade exists at present. No grade existing, there can be and is no difference in grade, and questions to be determined under s. 285 must be and should be determined in the Court under whose decree the property was first attached; the rule in

fact that prevailed before Act No. X of 1877 found its place on the Statute Book.

On the case being sent back to the Division Bench for disposal, the following order was passed in accordance with the opinion of the Full Bench :

ORDER OF THE DIVISION BENCH.

[19] KNOX and BURKITT, JJ.— This Court having in a Full Bench decided that the Court of a Munsif must be regarded as a Court of higher grade than a Court of Small Causes, the preliminary point upon which this appeal was disposed of by the lower appellate Court is reversed, and the case will go back to that Court with directions to readmit the appeal to its original number on the register and to decide it on the merits. Costs will abide the event.

Appeal decreed.

16 A. 19 = 13 A.W.N. (1893) 189.

APPELLATE CIVIL.

Before Mr. Justice Burkitt.

JAGDESH CHAUDHRI AND OTHERS (*Defendants*) v. TULSHI CHAUDHRI AND OTHERS (*Plaintiffs*).^{*} [18th July, 1893.]

Civil Procedure Code, s. 373—"Order"—"Decree"—Appeal.

An order under s. 373 of the Code of Civil Procedure allowing a plaintiff to withdraw his suit with leave to bring another suit on the same cause of action is not appealable, being neither one of the orders specified in s. 588 nor a decree within the meaning of s. 2 of the said Code. *Kalian Singh v. Lekhraj Singh* (1) and *Jogodindro Nath v. Sarut Sunduri Debi* (2) followed. *Ganga Ram v. Data Ram* (3) dissented from.

[F., 17 A. 97.]

THIS was a suit by one body of co-sharers in a certain village in the Gorakhpur district against another body of co-sharers in the same village to obtain exclusive possession of a certain area of land in the said village of which land they alleged the defendants to be in possession.

The Court of first instance dismissed the plaintiffs' suit on the ground that they had failed to prove the case set up by them.

The plaintiffs appealed and the appeal went for disposal to the Additional Subordinate Judge of Gorakhpur, but before it came on for hearing the plaintiffs presented an application asking to be allowed to withdraw their suit with liberty to sue again. This [20] application was granted by the Additional Subordinate Judge on the 13th of September 1892. The defendants thereupon appealed to the High Court.

Babu Piriya Nath Chatterji, for the appellants.

Pandit Baldeo Ram Dave, for the respondents.

JUDGMENT.

BURKITT, J.—In this case the lower appellate Court, acting under the provisions of s. 373, of the Code of Civil Procedure, had permitted the

^{*} Second Appeal No. 1292 of 1892, from a decree of Rai Mohan Lal, Additional Subordinate Judge of Gorakhpur, dated the 13th September 1892, confirming a decree of Rai Bageshri Dayal, Munsif of Gorakhpur, dated the 23rd April 1892.

(1) 6 A. 211.

(2) 18 C. 322.

(3) 8 A. 82.

1893
JULY 13.

FULL
BENCH.

16 A. 11

(F.B.) =

13 A.W.N.

(1893) 211.

1893
JULY 18.
—
APPEL-
LATE
CIVIL.
—
16 A. 19=
13 A.W.N.
(1893) 189.

plaintiffs to withdraw from the suit on certain terms with liberty to bring a fresh suit on the same cause of action. From that order this appeal has been instituted by the defendants. On behalf of the plaintiffs-respondents a preliminary objection has been raised by Pandit *Baldeo Ram* to the effect that the order in question is not appealable. Admittedly no provision is made in s. 588 of the Code for any appeal against an order passed under s. 373. Unless, therefore that order can be considered to be a decree within the meaning of s. 2 of the Code, it is not open to appeal. Two reported cases of this Court and one from Calcutta have been cited in the argument. The first case is that of *Kalian Singh v. Lekhraj Singh* (1). In that case Oldfield and Brodhurst, JJ., were of opinion that an order passed under s. 363 was not a decree, and that therefore no appeal lay from it. To the same effect is the ruling of Trevelyan and Banerji, JJ., in the case of *Jogodindro Nath v. Sarut Sunduri Debi* (2). In that case the learned Judges, approving the case of *Kalian Singh*, said as follows:—“We do not think that this order is in any sense a decree. The setting aside or annulling of a decree by the appellate Court, as has been done in this case, does not set aside the decree, as that term is used in its ordinary sense. It does not substitute anything for the decree set aside, but simply wipes it out and leaves the parties to the determination of their rights in a subsequent suit.....the order does not express any adjudication on the thing claimed, and the setting aside of the first Court's decree or annulling, it whatever the term used may be, is also no adjudication upon any right claimed.” The third case cited is that of *Ganga Ram v. Data Ram* (3). In [21] that case Mr. Justice Straight held that the order passed by the appellate Court under s. 373 was a decree and therefore appealable as such. The reasons given by the learned Judge were as follows:—“It seems to me that the order with which the Judge closes his judgment must be treated and regarded as one disposing of the suit and the appeal before him. It must, I think, be held to have put an end to the decree which had been passed in the defendants favour by the Munsif, and it was therefore such an adjudication as must be regarded in the light of a decree.” Mr. Justice Tyrrell expressed no opinion on the point, and for other reasons concurred in the order proposed by Mr. Justice Straight. The result of the authorities is that four learned Judges out of five concurred in holding that no appeal lies against an order passed by an appellate Court under s. 373. After careful perusal of these authorities I must say for myself that the rule laid down in I.L.R., 6 All., 211 and I.L.R., 18 Cal., 322 and the reasoning on which it proceeds commend themselves to my judgment. In my opinion an order passed under s. 373 cannot be considered to be a decree, if for no other reason than because it does not adjudicate on any right claimed, or on any defence set up. It leaves all issues in the suit undetermined and relegates the parties to the position they occupied before the suit was filed. This is the reasoning on which the judgment of the Calcutta Court is founded. I fully concur in it, and acting on it I hold that no appeal lies in this case. The appeal is dismissed with costs.

Appeal dismissed.

(1) 6 A. 211.

(2) 18 C. 322.

(3) 8 A. 82.

16 A. 21 = 13 A. W. N. (1893), 191.

APPELLATE CIVIL.

Before Mr. Justice Tyrrell.

1893

JULY 27.

APPEL-
LATE
CIVIL.SHITAB DEI (*Applicant*) v. DEBI PRASAD (*Objector*).^{*} [27th July, 1893.]*Act VII of 1889, s. 7, cl. (4)—Certificate for collection of debts—Grant of certificate not to be partial.*16 A. 21 =
13 A. W. N.
(1893) 191.

A District Court acting under s. 7 of Act No. VII of 1889 must, if there are several applicants, elect to which, if any, a certificate should be granted. It is not competent to such Court to grant separate certificates to different persons for partial collection of the debts in respect of which a certificate is sought.

[R., 33 A. 327 (332) = 8 A.L.J. 79 (85) = 9 Ind. Cas. 127 (129); 19 M. 497; 70 P.R. 1904; U.B.R. (1897—1901) 563.]

[22] THE facts of this case sufficiently appear from the judgment of Tyrrell, J.

Babu *Ratan Chand*, for the appellant.

Mr. *J. N. Pogose*, for the respondent.

JUDGMENT.

TYRRELL, J.—Musammât Shitab Dei, mother and guardian of the person and property of a minor, Ram Chand, alleged to have been adopted by one Kundan Lal, deceased, on the 29th of September 1891, made an application under Act VII of 1889, for a certificate for the collection of debts due to the estate of Kundan Lal. The Additional Judge at Moradabad gave her a certificate for the collection of part of the debts of the estate, which he found to have been specially devised by Kundan Lal to his adopted son Ram Chand. Debi Prasad, brother's son of the same Kundan Lal, on the 3rd of December, 1891, preferred an objection to the grant of the certificate to Musammât Shitab Dei, and the Judge gave him a certificate for the collection of other debts due to the estate. Musammât Shitab Dei appeals. It is objected by Mr. *Pogose* on behalf of Debi Prasad, the respondent, that there is no appeal, but it seems to me perfectly plain from s. 19 of the Act that an appeal lies from an order of the District Court which has granted a certificate, as the Court granted a certificate here to Debi Prasad, and that an appeal will not the less lie because the Judge gave a partial certificate to the appellant also. The order of the Judge, it is contended for the respondent, is justified upon the provisions of cl. (4) of s. 7 of the Act, which provides that "when there are more applicants than one for a certificate, and it appears to the Court that more than one of such applicants are interested in the estate of the deceased, the Court may, in deciding to whom the certificate is to be granted, have regard to the extent of interest and fitness in other respects of the applicants." There can be no doubt as to the meaning of this clause, which justifies a Judge in selecting one out of many applicants for a certificate on consideration, amongst others, of the extent of their interest in the estate. But this does not imply that the Judge is competent to give a certificate for collection of debts to each of them. Such a procedure would [23] hardly tend to the accomplishment of the purposes of the Act, which was passed for the facilitation of the collection of debts on succession and to afford protection to persons paying debts to representative of deceased

^{*} First Appeal No. 52 of 1893, from an order of H. F. D. Pennington, Esq., Additional District Judge of Moradabad, dated the 14th December 1892.

1893
JULY 27. persons. It was the duty of the Judge to have made up his mind whether he would give a certificate to the person with the best *prima facie* case i.e., the son, if he is proved to be the son, or the nephew of Kundan Lal, in the event of the Judge thinking that his was the best claim. It is not alleged in the judgment below that the Court could not decide the right to the certificate without determining questions of law or fact of too intricate and difficult a character for determination in this proceeding; but, even if the case was such, it was the duty of the Judge to determine which of the several applicants appeared to him to be the person having *prima facie* the best title. The order of the Court below is set aside, and in lieu thereof it is ordered that a certificate as prayed for be given to the guardian of the minor, the so-called adopted son of Kundan Lal. The costs will be met from the estate.

Appeal decreed.

16 A. 23 = 13 A.W.N. (1893), 198.

APPELLATE CIVIL.

Before Mr. Justice Burkitt.

RANBIR SINGH (*Decree-holder*) v. DRIGPAL AND OTHERS
 (*Judgment-debtors*).^{*} [28th July, 1893.]

Act IV of 1842, s. 89—Act XV of 1877, sch. ii, art. 178—Limitation—Application for an order absolute for sale of mortgaged property.

Article 178 of sch. ii. of the Indian Limitation Act, 1877, does not apply to an application for an order absolute for the sale of mortgaged property under s. 89 of the Transfer of Property Act, 1882. *Bai Manekbai v. Manekji Kavasji* (1) approved.

[*Diss.*, 20 A. 302; *Not F.*, 24 A. 542; *F.*, 25 C. 133; *Appr.*, 22 C. 924; *R.*, 27 A. 501 = A.W.N. (1905) 70 = 2 A.L.J. 180; 23 B. 644 (650); 25 M. 244 (295) (F.B.); 6 Bom. L.R. 1043; 11 C.P.L.R. 141; 12 C.P.L.R. 82 (85); 6 O.C. 114.]

THE facts of this case sufficiently appear from the judgment of Burkitt, J.

Munshi Gobind Prasad, for the appellant.

The respondent was not represented.

JUDGMENT.

[24] BURKITT, J.—In this case it appears that the decree-holder, appellant, obtained a decree in the Court of final appeal in February 1887. That decree directed the sale of property in default of payment of certain money due on a hypothecation-bond. One or more attempts were made by the appellant to execute the decree before he made the present application for an order absolute for sale under s. 89 of the Transfer of Property Act. The Court of first instance gave him the order absolute he asked for. On appeal, however, the learned Subordinate Judge, reversing the order of the Court below, rejected the application. He held that an application under s. 89 is one to which the provisions of art. 178 of sch. ii of the Limitation Act apply, and that the application must be made within

^{*} Second Appeal No. 143 of 1893, from an order of Kunwar Mohan Lal, Additional Subordinate Judge of Gorakhpur, dated the 12th November 1892, reversing an order of Maulvi Abdur Rahman, Munsif of Bansgaon, dated the 25th July 1891.

(1) 7 B. 213.

three years from the date when the right to apply accrued. The Court then proceeded to hold that the decree-holder's right to apply for an order under s. 89 of the Transfer of Property Act accrued within three years from the expiry of the six months' grace granted under s. 88 of that Act. Consequently, as this application for such an order was not made till December, 1890, and as the six months' grace expired some time in August, 1887, the Subordinate Judge held that the application was time-barred. The decree-holder appeals.

In my opinion this view of the law of limitation which the Subordinate Judge has adopted is incorrect. The Subordinate Judge, referring to a former application for execution made by the decree-holder, quite correctly held that it was an application such as is contemplated by s. 235 of the Code of Civil Procedure and within the purview of art. 179 of sch. ii, of the Limitation Act. He then went on to say that the present application, *i.e.*, the application for an order under s. 89 of the Transfer of Property Act was not an application like the preceding one, and was therefore unquestionably governed by art. 178 of sch. ii of the Limitation Act. In this matter the Subordinate Judge is mistaken. The Limitation Act undoubtedly makes provision as to the limitation applicable to all suits and appeals. As to applications, however, the purview of the Act is by the preamble restricted to "certain applications," and therefore it evidently does not apply to all applications of all [25] kinds. It has been held in several cases, and the rule is now generally accepted that art. 178 applies only to applications "*ejusdem generis*" with the other applications mentioned in sch. ii, that is to say, to applications such as can be made under the Code of Civil Procedure. It was so held by the Chief Justice of Bombay and Mr. Justice Melvill in the case of *Bai Manekbai wife of Rastamji Beramji v. Manekji Kavasji* (1). That case has been frequently followed in other High Courts. Applying, then, the rule laid down in that case to the present appeal, it is clear that the order of the Subordinate Judge is wrong, for the application made to the Munsif was not one which under any circumstances could be presented under the Code of Civil Procedure. It is an application which could be made and granted only by virtue of the provisions of s. 89 of the Transfer of Property Act.

Therefore, as this application is not one which could be made under the Code of Civil Procedure, I hold that art. 178 sch. ii. of the Limitation Act, does not apply to it. The Limitation Act was enacted some years before the passing of the Transfer of Property Act, and I cannot find, nor has my attention been called to, any rule of Limitation *aliunde* which could be applied to an application under s. 89 of the latter Act. I am accordingly obliged to hold that there is no limitation rule under which the application made by the appellant in March, 1890, can be considered to fall and that it was not time-barred when made.

I must therefore set aside the order of the Subordinate Judge rejecting the application as barred by art. 178, and, allowing this appeal, I dismiss the respondent's appeal to the lower appellate Court and I restore the order of the Court of first instance with costs against the judgment-debtor, respondent, in all the three Courts. I remand the record for the purpose of further execution.

Appeal decreed.

1893
JULY 28.
—
APPEL-
LATE
CIVIL.
—
16 A. 23 =
13 A.W.N.
(1893) 198.

16 A. 26 = 13 A W.N. (1893) 197.

[26] APPELLATE CIVIL.

Before Mr. Justice Aikman.

1893
AUG. 1.
—
APPEL-
LATE
CIVIL.
—
16 A. 26 =
13 A.W.N.
(1893) 197.

MANGAL KHAN AND OTHERS (*Decree-Holders*) v. SALIM-ULLAH
KHAN AND OTHERS (*Judgment-Debtors*).^{*} [1st August, 1893.]

Act VII of 1889, s. 4, sub-s. (1), cl. (b)—Execution of decree—Application for execution unaccompanied by certificate.

Though under certain circumstances a Court may be prohibited by Act No. VII of 1889 from granting execution of a decree unless a certificate of succession as provided by the Act is produced before it, it does not therefore follow that under such circumstances an application for execution is a bad application because it is unaccompanied by a certificate. *Brojo Nath Surma v. Isswar Chundra Dutt* (1), followed.

[F., 18 A. 34 ; 20 B. 76 ; 9 C.L.J. 443 (449) = 13 C.W.N. 533 (538) ; **Appl**, 1 Ind. Cas. 57 (60) ; R., 31 M. 77 = 17 M.L.J. 566 ; 9 Ind. Cas. 800 ; 13 Ind. Cas. 78 (79) = 10 M.L.T. 532 (533) = (1911) 2 M.W.N. 559 (560).]

THE facts of this case were as follows :—

One Muhammad Ahsan Khan held a decree, dated the 24th of July, 1882 against Karim-ullah Khan. Several applications were made by the decree-holder for execution, but were struck off owing usually to non-payment of process fees. On the 3rd of February, 1888, application was made by one Mangal Khan as heir to the decree-holder for execution by sale of the property affected by the decree. That property being ancestral, the case was transferred to the Revenue Department, but on the 6th of September 1888, the application was rejected by reason of the absence of Mangal Khan. Subsequently, an application for sale of the property was made on the 29th of September, 1888, by Mangal Khan and Nawab Begam, as heirs of the original decree-holder, but that application was struck off on the ground that they had not obtained a certificate for the collection of the said decree-holder's debts. The eighth application for execution was made on the 29th of April, 1891, by Nawab Begam, Ghulam Nabi Khan, and Husain Ali Khan. That application was also rejected on the 4th of July, 1891, on the ground that the applicants were not furnished with the necessary certificate for collection of debts. On the 2nd of October, 1890, Mangal Khan, Nawab Begam, Husain Ali Khan, and Ghulam Nabi Khan (*i. e.*, all the present appellants) applied for an order for sale under s. 89 of the Transfer of Property Act, 1882, but that application too [27] was rejected, on the 13th March, 1891, on the ground of non-production of a certificate for collection of debts. The application which is the subject of the present appeal was an application for sale of the property made by all the present appellants on the 20th of July, 1892. To that application the heirs of the judgment-debtor filed objections. The Subordinate Judge of Shahjahanpur rejected the application, applying the ruling of the High Court in the case of *Pheku v. Prithi Pal Singh* (2). The applicants then appealed to the High Court.

Mr. *Roshan Lal*, for the appellants.

Mr. *Amir-ud-din* and *Munshi Govind Prasad*, for the respondents.

* First Appeal No. 37 of 1893 from an order of Rai Banwari Lal, Subordinate Judge of Shahjahanpur, dated the 21st. January, 1893.

(1) 19 C. 482.

(2) 15 A. 49.

JUDGMENT.

AIKMAN, J.—This is an appeal from an order of the Subordinate Judge of Shahjahanpur in the execution department. The decree-holders are the appellants. The learned Subordinate Judge dismissed their application for execution, relying upon the decision of this Court in the case of *Pheku v. Prithi Pal Singh* (1). That decision has since been overruled by a Full Bench in the case of *Dhonkal v. Phakkar Singh* (2). The order of the lower Court, which is based solely on s. 158 of the Code of Civil Procedure, cannot, consequently, be sustained. On the part of the judgment-debtors a petition of objection was filed under s. 561 of the Code, in which it is pleaded that the application for execution is time-barred. The application now before the Court was presented on the 20th of July 1892. The last preceding application was presented on the 29th of April 1891. If that was a good application it is clear that the present application was within time. The application of the 29th April of 1891, was, on the 4th of July 1891, struck off owing to the failure of the applicant to produce a certificate under the Succession Certificate Act, No. VII of 1889. It is contended by the learned counsel for the respondents that the failure of the applicants to furnish the required certificate invalidates the previous application. I am not prepared to accede to that contention. The provisions of s. 4, sub-s. 1, cl. (b) of Act [28] No. VII of 1889, preclude a Court from proceeding, upon the application of a person claiming to be entitled to the effects of a deceased person, to execute against a judgment-debtor of the deceased a decree for the payment of the debt, except upon the production of one or other of the certificates set forth in that section; but it is nowhere laid down that the application for execution must be accompanied by a certificate; it only provides that the Court shall not proceed to execution until a certificate has been produced. In like manner in the case of a suit the section prohibits a Court from passing a decree against the debtor of a deceased person on a suit filed by a person claiming to be the heir of the deceased without the production of a certificate, but it does not prohibit the institution of the suit. In the case of *Brojo Nath Surma v. Isswar Chundra Dutt* (3), it was held that an application to execute, although unaccompanied by a certificate was a good application in law. I entirely concur in this view. The application of the 29th of April 1891, was an application within the meaning of cl. (4), art. 179 of sch. ii of the Indian Limitation Act, 1877, and therefore the present application was within time. For the above reasons I allow the appeal with costs, and, setting aside the order of the lower Court, direct that Court, to restore the application to its file and proceed with the execution according to law. The objection filed by the respondents is dismissed with costs.

Appeal decreed.

1893

AUG. 1.

APPEL-

LATE

CIVIL.

16 A. 26=

8 13 A.W.N.

(1893) 197.

(1) 15 A. 49.

(2) 15 A. 84.

(3) 19 C. 482.

1893

AUG. 3.

16 A. 28 (F B) = 13 A.W.N. (1893) 214.

FULL BENCH

FULL
BENCH.*Before Mr. Justice Tyrrell, Mr. Justice Knox and Mr. Justice Burkitt.*

16 A. 28

(F.B.) =

13 A.W.N.

(1893) 214.

INDO (Plaintiff) v. INDO AND ANOTHER (Defendants).^{*}
[3rd August, 1893.]*Act XII of 1881, ss. 93 (h), 94—Suit by a recorded co-sharer for recorded share of profits—
—Suit for a settlement of accounts—Limitation.*

Where one collecting co-sharer in a *mahal* sued other collecting co-sharers, not being *lambardars* of the *mahal*, for a refund of profits which the plaintiff alleged the [29] defendants to have collected over and above the shares which they were entitled to collect. *Held* by TYRRELL and KNOX, JJ., that this was not a suit by a recorded co-sharer for a recorded share of the profits of a *mahal* within the meaning of the former portion of s. 93, cl. (h) of Act No. XII of 1881, but was a suit for a settlement of accounts within the meaning of the latter portion of the same clause; and, that, such being the case, the period of limitation applicable was that prescribed by the third paragraph of s. 94 of the above-mentioned Act. *Dabee Deen v. Doorga Pershad* (1) referred to by TYRRELL, J.

Per BURKITT, J., *contra*. "The suit" ** "may be considered to be a suit for profits within the meaning of the opening words of s. 93 (h) of the Rent Act, and cannot be considered to be a suit for 'a settlement of accounts' within the meaning of the concluding words of that clause." *Durga Prasad v. Dip Chand* (2), *Kushalo v. Ram Das* (3), *Dabee Deen v. Doorga Pershad* (1) referred to.

[D., 22 A. 334.]

THIS was a reference to a Bench of three Judges made at the instance of KNOX and BURKITT, JJ. The point referred for determination will be found stated in the judgment of BURKITT, J., where the order of reference is quoted.

The facts of the case were as follows:—

The plaintiff, being a collecting co-sharer in a certain village, sued the defendants, who were also collecting co-sharers in the same village to recover a sum of Rs. 177 principal and interest as balance of profits of the years ending 1294 and 1295 F., on the ground that the defendants had collected during those years more than their legitimate share of the profits of the village. The plaintiff alleged that her cause of action arose on the 1st of July 1887, and the 1st of July 1888, and she brought her suit in December 1889.

The defendants pleaded (1) that the plaintiff had already sued for the profits for 1293 F., in the Munsif's Court, omitting to claim for the profits for 1294 and 1295 F., and therefore the present suit was barred, (2) that the Revenue Court had no jurisdiction to entertain the present suit, and (3) that the plaintiff's account was incorrect.

The Court of first instance (Assistant Collector) dismissed the suit on the short ground that, the defendants not being *lambardars* [30] or in exclusive collecting possession, the suit for profits did not lie and that as a suit for adjustment of accounts it was time-barred.

On appeal by the plaintiff, the District Judge confirmed the Assistant Collector's decree, holding that the suit was one for a settlement of accounts.

^{*} Second Appeal No. 805 of 1890 from a decree of C. D. Steel, Esq., Officiating District Judge of Aligarh, dated the 29th April 1890, confirming a decree of Pandit Kamta Prasad, Assistant Collector of Aligarh, dated the 24th January 1890.

(1) 3 N.W.P. H.C.R. 49

(2) 1 A.W.N. (1881) 27.

(3) 9 A.W.N. (1889) 171.

The plaintiff then appealed to the High Court and the appeal coming before KNOX and BURKITT, JJ., the question of the nature of the suit was, as has been stated, referred to a Bench of three Judges.

Babu Jogindro Nath Chaudhri, for the appellant.

Pandit Sundar Lal, for the respondents.

JUDGMENT.

TYRRELL, J.—I wish to premise the observation that we have nothing to do now with the question whether this suit was rightly brought in a Revenue Court. We are asked to say what limitation applies to it on the assumption that it was rightly instituted in a Revenue Court and is one of the two suits of s. 93 (*h*) of the N. W. P. Rent Act, 1881.

The answer to this question depends on the interpretation to be placed on the terms of s. 93 (*h*) of that Act. It runs as follows:—
“Suits by recorded co-sharers for their recorded share of the profits of a *mahal*, or any part thereof, after payment of the Government revenue and village expenses, or for a settlement of accounts.” It is plain that the word “or” preceding “for a settlement” is disjunctive. The question is whether the suits by recorded co-sharers for their recorded share of the profits of a *mahal* are to be deemed to fall within the same category as, or to be *ejusdem generis* with, suits for a settlement of accounts or not. If the answer is in the affirmative, then the limitation for both the suits covered by s. 93 (*h*) alike will be “three years from the day on which the share became due,”—paragraph 1 of s. 94. But if the answer be in the negative, the limitation for a suit for a settlement of accounts will be found in the third paragraph of s. 94, *i.e.*, “all other suits must be brought within one year from the day [31] on which the right to sue accrues, unless otherwise specially provided for in this Act.” The Act contains no special provision for limitation applicable to a co-sharer's suit against another co-sharer or co-sharers for a settlement of accounts.

A suit by a co-sharer against a lambardar for a share of the profits of their *mahal* partakes of the nature of a suit against an agent or managing proprietor. A suit by a co-sharer, with a defined and limited right to collect specified rents from specified members of the common tenantry of himself and the defendant in the suit, to recover rents wrongfully collected and appropriated by his co-sharer, is not a suit against an agent or manager, but a suit of a different character with quite other rights and causes of action. Such a suit as the latter would hardly arise in a *mahal*, the collections of which are made and the profits ascertained by a lambardar or lambardars lawfully charged with the exclusive functions of collecting the rents and accounting for the profits to the other co-sharers. The suits under such village conditions would ordinarily be for “a share of the profits” of the *mahal*. But there are *mahals* without any lambardar; and there are some, though I believe few, *mahals* with a lambardar who has not the exclusive right and duty of collecting all the village income and distributing all the nett profits. The *mahal* of the case out of which this reference has proceeded, seems to be a *mahal* in which the parties to the suit have the right to collect the rents (*a*) from certain batches of tenants respectively, (*b*) from certain individual tenants exclusively, and (*c*) even from the same tenants, taking, each for himself, a definite share of the entire rent payable by such tenant. Conditions like these would probably give occasion for frequent suits among these rent-collectors and profit-distributors on allegations that encroachments had been made by one

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sharer on the rents of tenants bound to pay their rents in whole or in part to a different sharer, with the result, as in the case before us, that a collecting co-sharer has to sue another similarly collecting co-sharer to recover excess collections, implying excess appropriation of profits in the *mahal*. Such a suit would almost necessarily involve [32] questions arising out of obscure accounts, of collections of receipts, of expenditure, of collection charges, and the like, and the decision on such issues would be a "settlement of accounts" between the parties. It would be a misnomer, in my opinion, to call such a suit "a suit for a share of the profits," or its result a decree for such share. But it is the "*day on which the share became due*" that is the *terminus a quo* for this latter suit. On the other hand, not only is the suit "for a settlement of accounts" different in respect of the legal character of the parties to some extent, and of the rights and causes of action, from an ordinary co-sharer's suit for a share of the profits, but while the *terminus a quo* of the latter is appropriately fixed by the time when the share became due, this would not be an appropriate starting point for a suit for a settlement of accounts in which no "share of profits" is alleged to be due and payable by the defendant, but a settlement is claimed on the basis of improper collection and appropriation of the plaintiff's moneys by the defendant. The more fitting limitation for the suit for a settlement of accounts would be a period calculated from the day on which the right to sue accrues, that is to say, the limitation of the third paragraph of s. 94. It would be easy to assign reasons why the shorter time of one year from such a day should be fixed for the suit for a settlement raising several, and perhaps complicated, questions, for which fresh and accurate contemporary evidence would be needed, while three years may safely be allowed for the determination of the simpler issues raised in a suit for a share. Moreover, the three years' limitation of the first paragraph of s. 94 is in harmony with the limitation of the general statute for civil suits of a similar character, while the suits of Part IV of schedule II of Act No. XV of 1877, which are in some respects more analogous to the suit before us than is the suit for a share of profits, have a different starting point and a different period. I make these remarks, not with any intention to suggest that the suit now in question is a suit for civil, rather than for revenue jurisdiction, but as possibly indicating that the suit for a settlement of accounts of s. 93 (h) is not a mere variation of a suit for a share of profits, but an independent suit of a different character and scope.

[33] Lastly, I am led to the conclusion that the Legislature meant to place suits for a settlement of accounts in the third paragraph of s. 94 for the purposes of limitation by the consideration that the Act No. XIV of 1863 expressly assigned this limitation to such suits.

The judgment of this Court in *Dabee Deen and others v. Dcorga Pershad and another* (1) is authority for the view that a sharer's suit for a share of profits under Act XIV of 1863 was a suit generically and particularly different from his suit for an account.

My answer then is that this is not a suit for a share of recorded profits; and that the limitation for a suit for a settlement of accounts under s. 93 (h) of Act No. XII of 1881, is to be found in s. 94, paragraph 3 of the Act.

KNOX, J.—I concur with my brother Tyrrell that the suit before us is certainly not a suit by a recorded co-sharer for her recorded share of

(1) 3 N. W. P. H. C. R. 49.

the profits of a *mahal* or any part thereof after payment of the Government revenue and village expenses.

The appellant, it is true, in her plaint, called her claim one for profits under s. 93 (h) of the North-Western Provinces Rent Act, 1881, but if her claim be not one properly falling under the portion of that clause which relates to profits, the fact that she styles it as she does will not make it a suit for profits. The suits under the first half of clause (h), are suits to recover the share of profits recorded in the papers known as the *khewat* and *naksha bujharat hissadaran*, papers kept up in every village by the village accountant. Concerning the preparation of the latter paper one of the rules made by the Board of Revenue under s. 257 of Act No. XIX of 1873, provides that it shall be kept up concurrently with the *siyaha*, and contemplates its preparation as soon as possible after the community has gone through the form of annually balancing accounts. A second rule, No. 42, runs thus:—"The *patwari* is bound at the times fixed by local custom for audit of accounts to explain to the sharers assembled how their accounts stand for the season or year for which audit is made, and, in the event of any sharer demanding a written statement of his account the *patwari* is [34] bound to furnish him with such statement prepared from his official papers." That paper records the settlement of accounts by the co-sharer in a village. It shows under "Collections :"

- (1) The name of the sharer who made the collection.
- (3) On what account realized.
- (4) Amount.
- (7) To whom paid.
- (8) On what account.
- (9) Amount.

and after this has been prepared and profits ascertained, a suit for profits would naturally lie.

It is upon these records and the *khewat* and *bujharat hissadaran* for the recorded share of the profits of a *mahal* or any part thereof, that in my opinion a suit under s. 93 (h) lies, and the present suit is not one based either upon these records or upon a statement of accounts held and profits ascertained. The very form of the plaint shows this.

I would reply that the suit is one for settlement of accounts and therefore governed by the limitation of one year.

BURKITT, J.—The reference from the Division Bench to this Bench is in the following words:—"This appeal presents a question not free from difficulty. The appellant and the respondents are co-sharers in one and the same *mahal*. Both appellant and respondents have collected rents, and now appellant, alleging that respondents have collected more than their due, sues to recover from respondents the sum collected by them in excess. It is contended before us that this is not a suit for the recorded share of the profits of a *mahal* as described in the plaint, but a suit for a settlement of accounts, and barred because more than one year has elapsed from the date on which the cause of action is laid."

Then, after stating that the respondents are not *lambardars*, and that no local custom or special contract under s. 106 of the Rent Act has been proved, the reference proceeds:—"We think, [35] as the questions raised are important ones, that the case should be heard by a Bench of three Judges, and we direct that the case be laid before the learned Chief Justice for orders."

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Now, as I understand the reference, it raises two questions for decision, namely, can the suit, the nature of which is described in the referring order, be considered to be (1) a suit to recover a share of the profits of a *mahal* or any part thereof within the meaning of the first portion of s. 93, cl. (h) of the Rent Act: or (2) a suit for a settlement of accounts? The limitation question will depend on the answer to these questions. If (1) be answered in the affirmative, then the limitation will be that prescribed by the first clause of s. 94 of the Rent Act. But if (1) be answered in the negative, and if (2) be answered in the affirmative, then the suit would be one of the "other suits" to which the third clause of s. 94 would apply.

As to (1), there is a direct authority in this Court proceeding from Judges whose opinion is entitled to the greatest deference: I refer to the case of *Durga Parsad v. Dip Chand* (1). In that case, like the present, the respondent was not a lambardar, but had made collections. He was sued by co-sharers for their share of those collections, as is the case here. The learned Judges (Pearson and Spankie, JJ.) who heard the appeal, held that there was "nothing in the terms of clause (h) of s. 93 of Act No. XVIII of 1873, to warrant the conclusion that a suit of the nature therein described could only be brought against a co-sharer who was a lambardar;" and as the suit had for its object the recovery of three years' profits, it is evident that the Court applied the three years' limitation period prescribed by the first clause of s. 94 of the Rent Act. That case was followed in the subsequent case of *Khushalo v. Ram Das* (2).

My brother Tyrrell has written a very closely reasoned judgment showing that the term "profits" would not strictly apply to the moneys the recovery of which is sought by this suit. I fully concur in most of his arguments, but I hesitate to apply them to [36] this case. Considering the object with which the Rent Act was enacted, namely, to give exclusive jurisdiction to Revenue Courts over all litigation between lambardars, co-sharers, inferior proprietors and tenants as *such*, we ought, I think, to interpret the provisions of that Act in all doubtful cases in favour of the Revenue Court jurisdiction. Accordingly, in this case we might well, in my opinion, follow the authority of *Durga Prasad v. Dip Chand* (1) and hold that there is nothing in the first clause of s. 93 (h) which excludes from its purview a suit like the one we are now considering.

At the same time I am quite willing to admit that in my opinion the suit might also well be described as a suit for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use, and as to this I would refer to the case of *Bansidhar v. Behari Lal* (3).

As to question (2), I have no hesitation in saying that in my opinion the suit in this case cannot be considered to be one for a "settlement of accounts." A perusal of the plaint is, I think, sufficient to show that that description is inapplicable. The plaint does not either expressly or impliedly ask for any such settlement. It alleges that the defendants owe the plaintiff a certain specified sum and prays judgment for that amount against the defendants. The cause of action alleged is that defendants had collected the whole of the rents from the joint tenantry and had refused on demand to pay plaintiff her share.

Now it is to the plaint only and not the defence that we must look to see what is the nature and description of the suit. The plaint here

(1) 1 A.W.N. (1881) 27.

(2) 9 A.W.N. (1889) 171.

(3) 8 A.W.N. (1888) 74.

asks for a certain sum as profits, and does not ask for any settlement of accounts. I have the authority of the case of *Dabee Deen v. Doorga Pershad* (1) for holding that, though in a suit for profits it may be necessary to go into the accounts for the purpose of ascertaining whether the sum claimed is due, *that* necessity does not alter the character of the suit so as to turn it into one [37] for a settlement of accounts. In the proposition laid down in that case, I fully concur, and, applying it to the case now before us, I hold that the answer to question (2) must be in the negative.

Accordingly the answer I would make to the reference is:—(1) that the suit out of which the appeal has arisen may be considered to be a suit for profits within the meaning of the opening words of s. 93, clause (h) of the Rent Act, and (2) that it cannot be considered to be a suit for a "settlement of accounts" within the meaning of the concluding words of that clause.

The appeal being returned to the Bench concerned, was subsequently (on the 13th of November, 1893) dismissed in accordance with the opinion expressed by the majority of the Bench as to the question referred.

Appeal dismissed.

16 A. 37 = 13 A.W.N. (1893) 203.

APPELLATE CIVIL.

Before Mr. Justice Burkitt.

JANKI DAS (*Decree-holder*) v. RAM PARTAB AND ANOTHER
(*Judgment-debtors*).^{*} [3rd August, 1893.]

Civil Procedure Code, s. 336—Bond for production of judgment-debtor—Conditions in bond unprovided for by s. 336.

Where in a bond under s. 336 of the Code of Civil Procedure, besides the usual covenants to produce the judgment-debtor before the Court, and that the judgment-debtor would apply to be declared an insolvent, further stipulations were contained as to what should happen if the judgment-debtor's application to be declared insolvent were refused, it was held that the latter stipulations were not such as were contemplated by s. 336 and could not be enforced under that section.

[*Rel. on*, 7 Ind. Cas. 917(918); *R.*, 100 P.R. 1894. *D.*, U.B.R. (1892-1896) Civil 269.]

In this case the appellant caused the respondent to be arrested in execution of a decree held against him by the appellant. The judgment-debtor on being brought before the Court expressed his intention of applying to be declared an insolvent, and, under the provisions of s. 336 of the Code of Civil Procedure, filed the necessary security for his so applying. The security-bond given on behalf of [38] the judgment-debtor contained the following condition, that if the judgment-debtor failed to apply to be declared insolvent, or if, in the event of his so applying and the application being dismissed, the surety failed to bring him into Court, he, the surety, should be liable for the decree.

The judgment-debtor applied within the specified time to be declared an insolvent, but his application was rejected. The decree-holder accordingly applied to the Court that, in accordance with the condition of the

^{*} Second Appeal No. 1315 of 1892, from an order of E. O. Leggatt, Esqr., District Judge of Mirzapur, dated the 6th September, 1892, confirming an order of Syed Zain-ul-ablin, Subordinate Judge of Mirzapur, dated the 7th May, 1892.

(1) 3 N.W.P. H.C.R. 49.

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1893 security-bond above-mentioned, the surety might be ordered to produce
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 — This application was rejected by the Court executing the decree (the
APPEL- Subordinate Judge of Mirzapur), and the decree-holder thereupon appealed
LATE to the District Judge, making the surety also a part to the appeal. The
CIVIL. District Judge dismissed the appeal, holding that the order of the Subor-
 — dinate Judge not being an order under s. 244 of the Code of Civil Proce-
16 A. 37 = dure, no appeal lay from it.
13 A.W.N. The decree-holder then appealed to the High Court.
(1893) 203. Pandit *Sundar Lal*, for the appellant.
 Babu *Viddya Charan Singh*, for the respondents.

JUDGMENT.

BURKITT, J.—In this appeal, with reference to the reported cases of *Koylash Chandra Shaha v. Christophoridi* (1) and *Ramzan v. Gerard* (2), I fully concur in the opinion expressed by my brother Aikman in the recent case of *Banna Mal v. Jamna Das* (3), that when a surety gives the bond prescribed by s. 336 of the Code of Civil Procedure to produce a judgment-debtor before the Court and in order that the judgment-debtor may apply to be declared an insolvent, that engagement is discharged as soon as the judgment-debtor has so appeared, and has applied to be declared an insolvent. It appears, however, that the bond in this case contains a certain other covenant by the surety as to what would happen in case the [39] application to be declared an insolvent were refused. Such covenants in my opinion do not come within the purview of s. 336 and cannot be enforced in the manner prescribed by that section. I therefore dismiss this appeal with costs.

Appeal dismissed.

16 A. 39 = 13 A.W.N. (1893) 199.

REVISIONAL CIVIL.

Before Mr. Justice Aikman.

DASRATH RAI AND OTHERS (*decree-holders*) v. SHEODIN RAI AND ANOTHER (*Judgment-Debtors*).^{*} [7th August, 1893.]

Civil Procedure Code, s. 622—Revision—Construction of document.

The fact that a Court has misunderstood the effect of a document in evidence does not constitute a ground upon which the High Court can interfere in revision under s. 622 of the Code of Civil Procedure.

[R., 4 N.L.R. 184.]

THE facts of the case, so far as they are necessary for the purposes of this report, appear from the judgment of Aikman, J.

Munshi *Gobind Prasad*, for the applicants.

Mr. *Abdul Raoof*, for the opposite parties.

JUDGMENT.

AIKMAN, J.—This is an application asking this Court to exercise its powers under s. 622 of the Code of Civil Procedure. The applicants are

^{*} Civil Revision No. 7 of 1893, against an order of Pandit Raj Nath Sahib, Additional Subordinate Judge of Ghazipur, dated the 7th November, 1892.

(1) 15 C. 171.

(2) 13 A. 100.

(3) 13 A.W.N. (1893), 68.

decree-holders, and the opposite parties are their judgment-debtors. The lower Court, that of the Subordinate Judge, held that the applicants' decree was time-barred. It is admitted that no appeal lies from the order of the lower appellate Court. In revision it is contended that the Subordinate Judge, in holding that the execution of the decree was barred by limitation, acted illegally in the exercise of his jurisdiction. The case for the applicants was very ably argued by Mr. *Gobind Prasad*, but, after giving due consideration to his contentions and to the cases cited by him, I am of opinion that this is not a case in which this Court has power to interfere under the provisions of s. 622 of the Code of Civil Procedure. The gist of the contention on behalf of the applicants is [40] that the lower Court, in holding the decree to be time-barred, did not properly appreciate the effect of a deed of compromise, dated the 18th of May, 1887, at which the parties arrived, and by which instalments for the payment of the decree were fixed. It appears to me that if on such a ground this Court could interfere in revision, it would be difficult to draw a line as to the cases in which it could not interfere. If the applicant's contention was a sound one, it might in some other case be argued with equal force that a Subordinate Court has failed to appreciate properly what was said by a witness. It is quite clear that the lower Court's attention was drawn to the compromise. It is possible that it did not properly appreciate the terms of that document, but, if so, it cannot be said to have thereby "acted in the exercise of its jurisdiction illegally or with material irregularity." I agree with what was said by my brother *Burkitt* in the case of *Raghunath Sahai v. Official Liquidator of the Himalaya Bank* (1). In my opinion this application cannot be entertained, and I reject it with costs.

Application rejected.

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FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Burkitt
and Mr. Justice Aikman.*

SADHU SAHU (*Defendant*) v. RAJA RAM AND OTHERS (*Plaintiffs*).^{*}
[8th August, 1893.]

Pre-emption—Claim based upon custom—Evidence afforded by obsolete wajib-ul-arz—Rules of the Board of Revenue for the settlement of the Gorakhpur and Basti districts (B.E.C., 8—1. s. 38).

The plaintiffs brought their suit in 1890 to pre-empt certain property situated in the Gorakhpur district. Their claim was based upon two grounds: one an alleged contract said to be recorded in and proved by a *wajib-ul-arz* of 1860 relating to the village in question, and the other a custom of pre-emption alleged to be existing in the village. The period during which the *wajib-ul-arz* of 1860 was in force expired prior to the sale which gave rise to the right of pre-emption sought to be enforced. Subsequently to the expiration of that *wajib-ul-arz* certain rules had been [41] framed, with reference to the settlement of the Gorakhpur and Basti districts, the material portions of which, for the purposes of the present case, were as follows: "A memorandum of the village customs will be appended to each *khewat* by the Assistant Settlement Officer, when he

^{*} Second Appeal No. 121 of 1893, from a decree of Kunwar Mohan Lal, Additional Subordinate Judge of Gorakhpur, dated the 3rd November 1892, reversing a decree of Maulvi Abdur Rahim, Munsif of Bansaon, dated the 24th June 1891.

(1) 15 A. 139.

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verifies the *jamabandi*, and it will take the place of the document hitherto known as the *wajib-ul-arz* " * * * "In regard to any custom or constitution peculiar to the *mahal* the following matters should be noticed [class (a), section 25] ; (a) Pre-emption (as regards *mahals* which belong to other than Muhammadan proprietors) when the proprietors expressly demand that it may be noted and prove conclusively that the custom exists." At the new settlement made in accordance with these rules no mention of the right of pre-emption as obtaining in the *mahal* in question was recorded.

Upon these facts it was *held* by EDGE, C.J., and BURKITT, J., that, having regard to the rules above-mentioned framed by the Board of Revenue for the settlement of the Gorakhpur and Basti districts, the mere absence of any mention of the right of pre-emption in the new memorandum of village customs was in itself no evidence that the custom of pre-emption had ceased to exist, and that the *wajib-ul-arz* of 1860 might be used as evidence of the existence of such a custom.

Per AIKMAN, J.—The absence from the new memorandum of village customs of any mention of the existence of a right of pre-emption was a circumstance which the Court would be entitled to take into consideration in any conflict of evidence as to whether or no the custom of pre-emption did exist.

[R, 21 A.W.N. 29 ; 2 A.L.J. 6 = A.W.N. (1905) 16 ; D., 25 A. 90 (96).]

THIS appeal was, at the instance of Burkitt, J., referred to a Bench of three Judges. The facts of the case will be found in the judgment of Edge, C.J. They are also stated in the referring order, which is as follows :—

BURKITT, J.—This is an appeal in a pre-emption suit. The plaintiffs based their suit on the provisions of the *wajib-ul-arz* of 1860, which declared the custom of pre-emption to exist in the village and set out its incidents. The defendants, while not denying the fact that the *wajib-ul-arz* of 1860 had contained such provisions, alleged that that *wajib-ul-arz* had been cancelled at the recent settlement, because the memorandum of village customs contains no mention of any custom of pre-emption. This "memorandum of village customs," by paragraph 38 of the rules for the Gorakhpur and Basti settlement, takes the place of the document hitherto known as the *wajib-ul-arz*. The Court of first instance accepted the view contended for by the defendants and dismissed the suit. The lower appellate Court, however, in a very excellent and careful [42] judgment, held that there was no evidence to show that the custom of pre-emption declared to be in existence in 1860 had ceased to prevail in the village. The vendee-defendant appeals. His contention is that, as the custom of pre-emption was not mentioned in the "memorandum of village customs," prepared at the recent revision of settlement, it must be held to have been cancelled. It will be useful here to cite the case of *Isri Singh v. Ganga* (1) for the purpose of showing the value which this Court attached to a settlement *wajib-ul-arz*. In that case it was held that a *wajib-ul-arz* prepared and attested according to law is *prima facie* evidence of the existence of any custom of pre-emption which it records, though liable to be rebutted ; that it is evidence of a contract binding upon all the parties to it and their representatives, and that it raises a presumption that all the shareholders assented to the making of the record and were consenting parties to the contract. Consequently, on the authority of that case, it must be held that in 1860 there was a custom of pre-emption existing in this village, and (in the absence of evidence to the contrary) that it continued in force, at any rate up to the time when the "memorandum of village customs" was prepared.

(1) 2 A. 876.

I have now to consider what was the effect of the omission of any mention of the custom of pre-emption from the " memorandum of village customs " prepared at the recent revision of settlement in Gorakhpur. It has already been seen that a new name, *viz.*, " memorandum of village customs " was given in the rules for the Gorakhpur and Basti settlement to the *wajib-ul-arz*, and I also find that a new rule was introduced as to the manner in which the custom of pre-emption should be recorded in that memorandum. That rule, so far as it concerns the custom of pre-emption, is as follows:—

" In regard to any custom or constitution peculiar to the mahal the following matters should be noticed :—

" (a) Pre-emption (as regards mahals which belong to other than Muhammadan proprietors) when the proprietors expressly [43] demand that it be noted and prove conclusively that the custom exists."

This memorandum is by rule 38 to be prepared and appended to the *khewat* by the Assistant Settlement Officer, who, as I gather from rule 1, will usually be a Deputy Collector appointed to settlement work. With him it will rest to decide whether a custom of pre-emption has been " conclusively proved " to exist in any mahal. Looking, then, at the wording of the rules set out above, I find that two conditions must exist before any record of a custom of pre-emption can be noted under it :—

Firstly, " the proprietors must expressly demand that it be noted." The words " the proprietors," I assume, mean *all* the proprietors, and not merely some of them or even a majority of them. The result of this then is that, if some of the proprietors for any reason abstain from joining in or refuse to join in the " express demand," the Assistant Settlement Officer is precluded from noting a custom of pre-emption which may have existed in the village for more than half a century, and, assuming that the absence of any note as to pre-emption by the Assistant Settlement Officer has the legal effect for which the appellant contends, the result would be that one or more co-sharers who, for personal reasons easily intelligible, disliked the custom of pre-emption, would in this way have it in their power to make a most vital change in the village customs against the wishes of all the other co-sharers.

Secondly, when the " express demand " has been made by the whole co-parcenary body, the Assistant Settlement Officer has to decide whether they have produced conclusive evidence of the existence of the custom.

If, in his opinion, the evidence produced in favour of the custom is " conclusive," he is then to " note " it, so that instead of a custom recorded by the co-sharers before the Settlement Officer and verified by them, as under the old procedure, we now get only the *opinion* of the Assistant Settlement Officer as to whether the evidence produced by the proprietors was or was not " conclusive ; " [44] and if he chooses to consider it not to be conclusive, he simply abstains from noting the custom. It is impossible to say what evidence an Assistant Settlement Officer would consider to be conclusive. One officer might be satisfied with proof of one or two instances in which the custom had been enforced, while another might require a dozen or more such instances. One officer, again, might consider the fact that no pre-emption suit had been instituted during the currency of the settlement to be conclusive evidence that the custom (though recorded at the previous settlement) had fallen into disuse, while another might consider the same fact to prove conclusively that the co-sharers had, in consequence of the custom, obeyed the law and had avoided transferring to strangers, and he accordingly would note the custom as existing. Similar instances might

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easily be multiplied, but the result of all would be the same, namely, that under the present rule we have nothing to guide us but the *opinion* of the Assistant Settlement Officer as to whether the evidence produced before him conclusively proved the existence of a custom of pre-emption. In cases where the custom has been noted, that opinion may be of some value, especially when it is shown that the custom was recorded in the previous settlement. But in cases where no note is made, and where presumably the Assistant Settlement Officer was of opinion that the evidence in favour of the existence of the custom was not conclusive, I regard his opinion as useless and of no legal weight whatever. To take the case of the village with which this suit is concerned, it is indisputable that a custom of pre-emption did prevail in it and was recorded at the previous settlement. Why, then, did the Assistant Settlement Officer refrain from making any note of that custom at the late revision of settlement? It is impossible to answer that question. Possibly *all* the proprietors did not make an "express demand," as would appear probable from the conduct of the vendor-defendant in this case; or possibly the Assistant Settlement Officer did not consider the evidence in favour of the custom to be conclusive. But that at any rate some of the proprietors did not desire the custom of pre-emption to be swept away is evident from the plaint in this case.

[45] On the whole, I cannot accept the absence of any note as to pre-emption in the "memorandum of village customs" as being anything more than, at the utmost, an expression of the Assistant Settlement Officer's *opinion* that the evidence tendered, if any were tendered, of which I know nothing, did not conclusively prove the existence of the custom. I decline to regard it as being evidence of the slightest value against the continued existence of that custom, or as being presumptive evidence that no such custom existed at the date of the institution of this suit.

I therefore hold that the absence of any note respecting a custom of pre-emption from the "memorandum of village customs" does not show that the custom of pre-emption in this village recorded in the *wajib-ul-arz* of the 1860 settlement has either been abrogated or cancelled, or that it has fallen into disuse. I fully concur with the learned Subordinate Judge in holding that the burden of proving such a vital change in the village customs lay on the defendant-appellant, who has failed to prove it, except by producing the new memorandum of village customs, which, in my opinion, establishes nothing in his favour.

But as this matter is an important and novel one, I think it well that it should be decided by a Bench of two Judges. I therefore order accordingly. I should also suggest that it be laid before a Bench of three Judges, and I direct that the record be laid before the Chief Justice for such orders as he may be pleased to make.

In pursuance of this recommendation, the appeal was laid before a Bench of three Judges by whom the following judgments were delivered:—

Babu *Pirya Nath Chatterji*, for the appellant.

Babu *Viddya Charan Singh*, for the respondent.

JUDGMENT.

EDGE, C. J.—The plaintiffs, who are respondents here, have brought a suit claiming to pre-empt certain property which had been sold in the village by a co-sharer. The village in question was situated in the district of Gorakhpur, and the suit was brought in December 1890. The claim for pre-emption was based upon [46] two grounds: one was an alleged

contract said to be recorded in and proved by a *wajib-ul-arz* of 1860 relating to the village, and the other a custom of pre-emption alleged to be existing in the village. At the completion of the recent settlement, the *wajib-ul-arz* of 1860 determined, and, so far as it was relied upon as evidence of a contract, the case based upon a contract failed, because the contract, if there was one, entered in that *wajib-ul-arz*, determined with the determination of that *wajib-ul-arz*, and the period during which the *wajib-ul-arz* of 1860 was in force expired prior to the sale which gave rise to this suit. The *wajib-ul-arz* of 1860, as appears from the judgment of the lower appellate Court, contained a statement that this alleged custom of pre-emption existed in the village. It was consequently evident that at the time when that *wajib-ul-arz* was recorded, *i.e.*, in 1860, the custom of pre-emption relied upon here was an existing custom in the village.

For the purposes of the recent settlement in Gorakhpur and Basti the Board of Revenue passed certain rules and orders which were duly sanctioned by the Government. These rules and orders, it must be borne in mind, relate only to the districts of Gorakhpur and Basti. By rule 38 of the Circular Orders of the Board of Revenue, 1890, Part II, p. 22, it was ordered that a "memorandum of the village customs will be appended to each *khewat* by the Assistant Settlement Officer when he verifies the *jamabandi*, and it will take the place of the document hitherto known as the *wajib-ul-arz* * * * ." "In regard to any custom or constitution peculiar to the *mahal* the following matters should be noticed [class (d), s. 25] : (a) Pre-emption (as regards *mahals* which belong to other than Muhammadan proprietors) when the proprietors expressly demand that it may be noted and prove conclusively that the custom exists." In the memorandum of village customs which, at the recent settlement, was prepared there is no reference affirming, negating or alluding to the custom of pre-emption. The non-existence in that memorandum of village customs of all reference to a custom of pre-emption might be accounted for on the hypothesis that a custom of pre-emption which existed in 1860 had fallen into desuetude, or on the hypothesis that the [47] proprietors had amongst themselves entered into an agreement excluding any right of pre-emption in the village, or an agreement that there should be a right of pre-emption different from that which existed under the custom of 1860, or on the hypothesis that they had neglected to demand expressly that the custom should be noted, or that, although they had expressly demanded that the custom should be noted, they had, in the opinion of the Settlement Officer, failed to prove conclusively that the custom existed at the date of the then settlement. It is apparent to my mind, having regard to the specific instructions contained in rule 38, that from the mere fact that the memorandum of village customs made at the recent settlement is silent on the question of pre-emption, it is impossible to draw an inference that the custom has fallen into desuetude, that the custom is still in existence, or that the Settlement Officer refused to record it, being of opinion that the proprietors had failed to prove conclusively that the custom existed. Although the silence in that memorandum of village customs on the question of pre-emption by itself does not, in my opinion, afford evidence as to whether the custom of pre-emption does or does not exist, still it is a fact to be noted, and one which would have considerable bearing on the inference to be drawn, if there was even some slight evidence independently of the memorandum of village customs that the custom of 1860 had fallen into desuetude and was no longer observed,

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or that it had been agreed that it should not be followed, or that by agreement some other arrangement as to pre-emption had been come to in the village.

The case stands thus in my opinion. The *wajib-ul-arz* of 1860, although it has determined by effluxion of time, still affords evidence that in this village in 1860 the custom of pre-emption relied upon here did exist. There is the mere fact that the memorandum of village customs of the recent settlement is silent on the question of pre-emption, and there appears to be no further evidence one way or another as to whether the custom of 1860 is still in existence and in force in the village. Under these circumstances, there being evidence that in 1860 this custom of pre-emption did exist, and there being, [48] strictly speaking, no evidence that owing to desuetude or private agreement or otherwise it has ceased to exist, I am of opinion that the Subordinate Judge in appeal was entitled to find that the custom existed at the date of the sale out of which this suit arose.

The view which I take is the view which I think was present to the minds of Mr. Justice Pearson and Mr. Justice Oldfield, when delivering judgment in *Chadami Lal v. Muhammad Bakhsh* (1). That was a case in which the right of pre-emption was claimed as a matter of contract. The evidence of the contract was a prior *wajib-ul-arz* which had come to an end at the subsequent settlement. This Court declined to allow the plaintiff in that case to shift his ground and claim in appeal the right of pre-emption, as a right existing by custom. I think from the passage which I am about to quote that those learned Judges were of opinion that on the determination of a *wajib-ul-arz* a contract recorded in it came to an end, but that it would still be evidence of a custom recorded in it. The passage runs as follows:—"Whether or not any similar condition of pre-emption was entered in the previous administration paper cannot affect this claim, which is brought on the contract under the recent settlement paper, and not on any well-established custom apart from the contract made under the administration paper, nor would the entry of the right of pre-emption in a former administration paper necessarily establish, though it might be evidence towards proving, such a custom." In expressing my view as to the effect of the documents in this case, I wish to guard myself again by saying that the rules to which I have referred are the rules relating to the recent settlement of Gorakhpur and Basti, and it is possible that the rules of the Board relating to other settlements may not be similarly worded. They seem to provide for a departure from the old principle upon which the Settlement Officer recorded all the village customs, and to direct as to pre-emption, that the custom shall only be recorded when the proprietors demand that it shall be noted and prove conclusively that [49] it exists. The inference which might be drawn from one of the older *wajib-ul-arzes* being silent as to the existence of the custom of pre-emption, that the custom did not exist, or it would have been recorded, cannot, in my opinion, be drawn merely from the fact that in the memorandum of village customs prepared under rule 38 of the rules relating to the Settlement of Gorakhpur and Basti, pre-emption is not referred to. I would dismiss this appeal with costs.

BURKITT, J.—In my referring order of the 2nd instant, I set forth fully the views which I entertained as to the value to be put upon an entry of a custom of pre-emption, or upon the absence of such an entry in the memorandum of village customs prescribed for preparation under

(1) 1 A. 568.

the rules for revision of settlement in Basti and Gorakhpur. I see no reason for altering or modifying any of the opinions I then expressed, and I am glad to find that, so far at least as the silence of the memorandum of village customs as to pre-emption is concerned, they are consistent with the views expressed by the learned Chief Justice in the judgment just delivered by him. I concur in that judgment, and in accordance with it I would dismiss this appeal with costs.

AIKMAN, J.—This was a suit for pre-emption brought by the plaintiffs, who are respondents before us. Their claim was based according to the language of plaint on two grounds : first, on a custom of pre-emption, and next, on the *wajib-ul-arz*. It is admitted that in the *wajib-ul-arz* which was prepared for this village at the settlement of 1860, a right of pre-emption (whether arising from custom or from a contract between co-sharers, is not clear) was recorded. It is admitted that at the recent settlement there was no mention of any such right in the “ memorandum of village customs ” which by the rules framed by the Board of Revenue under the provisions of Act No. XIX of 1873, s. 257, has taken the place of the document which was known as the *wajib-ul-arz*. This *wajib-ul-arz* or memorandum of village customs forms part of the record of rights, and it is clear that, with reference to the provisions of s. 198 of Act No. XIX of 1873, the former *wajib-ul-arz* has been superseded by the new record of village [50] customs and is no longer in force. Consequently, had the plaintiffs’ claim been based upon the *wajib-ul-arz* alone, it would, I think, have failed. But they rely not only on the *wajib-ul-arz* but on a custom of pre-emption alleged to exist in the village, and the question before us is in this appeal as to what amount of significance is to be attached to the silence of the “ memorandum of village customs ” as to the existence of a right of pre-emption. I may say at once that I decline to draw the inference which the appellants by their appeal wish us to draw, namely, that the mere fact of there being no record of the custom made at the recent settlement is of itself sufficient to prove that the custom no longer exists ; but I regret that I cannot concur with what has been said by my brother Burkitt in his referring order in this case. He is of opinion that the absence of any mention of the right of pre-emption in the record of rights made at the recent settlement is not evidence of the slightest value. I cannot at all agree with this view. In my opinion the silence as to the existence of any right of pre-emption is a circumstance which the Court would be entitled to take into consideration in any conflict of evidence as to whether or no the custom did exist although, as pointed out by the learned Chief Justice, the wording of the new rules renders the significance of the omission much less than it would have been under the rules which formerly governed the preparation of records of rights. In one other point too I am constrained to differ from my brother Burkitt, and that is the view that according to cl.(a) of rule 38 a Settlement Officer is debarred from making any record as to pre-emption unless every proprietor in the *mahal* expressly joins in demanding that such a record should be made. It would, in my opinion, be sufficient to justify a Settlement Officer in taking action under this clause if a majority of the proprietors made the demand. In the result I arrive at the same conclusion as the learned Chief Justice and my brother Burkitt, namely, that this appeal fails and should be dismissed.

Order of the Court.

This appeal fails and is dismissed with costs.

Appeal dismissed.

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[51] APPELLATE CIVIL.

Before Mr. Justice Aikman.

MOHIB ALI KHAN (*Defendant*) v. F. S. MARTIN AND ANOTHER
(*Plaintiffs*).^{*} [9th August, 1893.]

Act XII of 1881, s. 189—*Appeal—Landholder and tenant—Rent payable by tenant—Rate of rent.*

The criterion to be used in deciding whether an appeal lies under s. 189 of Act No. XII of 1881 is whether the decision would merely affect a particular year, or whether it would supply a plea of *res judicata*, if not appealed against for all succeeding years in which the landlord and tenant stood in the same relation as when the suit was brought: *Radha Prasad Singh v. Mathura Chaube* (1) referred to.

[R., 21 A. 247.]

THE facts of this case sufficiently appear from the judgment of AIKMAN, J.

Mr. H. C. Niblett, for the appellant.

The Hon'ble Mr. Colvin and Mr. A. H. S. Reid, for the respondents.

JUDGMENT.

AIKMAN, J.—The only question for decision in this appeal is as to whether any appeal lay to the District Judge under the provisions of s. 189 of the North-Western Provinces Rent Act No. XII of 1881. The clause, if any, under which an appeal would lie is as follows:—"An appeal shall lie in all suits mentioned in s. 93 in which the rent payable by the tenant has been a matter in issue and has been determined." In this case it is admitted that while the plaintiffs, zamindars, alleged that the rent payable by the defendant, who is appellant here, was Rs. 32-1-6 per annum, the defendant asserted that the rent payable by him was only Rs. 31 per annum. But it has been contended by Mr. Niblett on behalf [52] of the appellant that, as the parties were at issue, not only as to the amount of rent annually payable but as to the area of land held by the defendant, and as the rent alleged by the plaintiffs on the area which they asserted to be in the cultivation of the defendant and the rent admitted by the defendant on the area which he admittedly held, would work out to the same rate of rent per *bigha*, therefore no appeal lay; and he relies, in support of this view, on the decision of this Court in the case of *Radha Prasad Singh v. Mathura Chaube* (1) where it was laid down that the words "rent payable by the tenants" mean the rate of rent payable by the tenant. In my opinion no such restricted meaning is to be put upon the words 'rate of rent' as used in that judgment. I think this is evident from the following passage which I quote from the judgment. "It appears to us that where the dispute is as to the rate of rent that dispute may be raised in many different ways, as, for example, where the landlord said the rent payable was Rs. 100 and the tenant said it was Rs. 50 a year, then there would be a dispute as to the rent payable. It might in another case be necessary to ascertain the area in order to find *what was the rent payable* or rate of rent for any particular

^{*} Second Appeal No. 96 of 1893, from a decree of C. L. M. Eales, Esq., Officiating District Judge of Azamgarh, dated the 31st of October 1892, reversing a decree of J. E. Gill, Esq., Officiating Collector of Azamgarh, dated the 25th of May 1892.

year under the terms of a particular contract or according to the custom which prevailed." The criterion, which, in my judgment, should be used in deciding whether an appeal lies under the clause I have quoted, is whether the decision merely affects a particular year, or whether it would supply a plea of *res judicata*, if not appealed against, for all succeeding years during which the landlord and tenant stood in the same relations as when the suit was brought. In this case the effect of the decision of the Court of first instance, if not appealed against, would be to determine for all succeeding years that the amount of rent annually payable by the tenant was that asserted by the plaintiff and not that asserted by the defendant. To take another instance, both parties might agree that the amount of rent annually payable was Rs. 50, but the zamindar might allege that that sum was payable for a holding, say, of 20 *bighas*, whilst the defendant asserted that for that sum he held 25 *bighas*. A decision on this issue [53] would clearly affect the rate of rent, and, according to the criterion laid down above, would furnish ground for an appeal under s. 189, as being a decision, which is left undisturbed, would affect the relation of the parties during the subsequent years and not only for the year in suit. I am clearly of opinion that in this case an appeal did lie to the District Judge. This appeal is therefore dismissed with costs.

Appeal dismissed.

16 A. 53 = 13 A.W.N. (1893) 205.

APPELLATE CIVIL.

Before Mr. Justice Knox.

THE MUSSOORIE BANK, LIMITED (*Applicant*) v. THE HIMALAYA BANK, LIMITED (*Opposite party*).^{*} [14th August, 1893.]

Act VI of 1882, s. 169—*Company—Winding up—Power of Judge to review order made in course of liquidation—Secured and unsecured creditors—English law, application of, where Indian Statutes are silent—"Justice, equity and good conscience."*

Section 169 of Act No. VI of 1882 is not intended to refer to a case in which a Judge upon the discovery of fresh matter considers it expedient to pass a fresh order or to review an order passed by him. *In re the National Assurance and Investment Association ex parte Munday* (1) referred to.

There being no provision in the Indian statute law by which, in the winding up of a Company, secured creditors are entitled to any preference over unsecured creditors; in such proceedings the rule of English law—that secured creditors can only prove for the balance of their debts after deducting the value of their securities—should prevail, as being consonant with justice, equity and good conscience. *Waghela Rajsanji v. Shekh Masludin* (2) referred to.

[R., 55 P.W.R. 1907.]

THE facts of this case are fully stated in the judgment of the Court.
Mr. F. W. Quarry, for the appellant.
Mr. A. Strachey, for the respondent.

JUDGMENT.

KNOX, J.—On the 20th of December 1892, the manager of the Mussoorie Bank, Limited, applied to the District Judge of [54] Saharanpur for payment of a sum of Rs. 10,945-14-0, a sum claimed on a dividend

^{*} First Appeal No. 23 of 1893, from an order of T. Benson, Esq., District Judge of Saharanpur, dated the 1st of January 1893.

(1) 31 Beavan 206.

(2) 14 I. A. 99.

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of one anna in the rupee, due upon a claim of the said Bank duly proved and certified by the official liquidator of the Himalaya Bank, Limited, in liquidation, on the 16th day of November 1891, as a sum due from the latter to the first-named Bank.

The Judge dismissed the application, and it is from this order of dismissal that the present appeal has been filed.

Before entering upon the appeal it is well to set out the facts and circumstances out of which the present proceedings arose, so far as the same appear from the record and are material to the matters now in issue.

The Himalaya Bank, Limited, is a company incorporated under the Indian Companies Act, and it is now being wound up by the Court of the District Judge of Saharanpur with the assistance of an official liquidator.

One of the creditors of the said Himalaya Bank, Limited, is the appellant, the Mussoorie Bank, Limited.

The order for winding up was an order passed under the Indian Companies Act of 1882, and, as no rules have been made under s. 254 of the Act, concerning the mode of procedure to be had for winding up Companies, the Court at Saharanpur declares itself to have adopted the rules made for such purpose by the High Court at Bombay.

The debt, as allowed by the Judge to be due to the Mussoorie Bank, Limited, was a sum of Rs. 1,63,408-13-11, carrying interest from the 1st of July 1891, and the result of this adjudication was set out in a certificate and communicated to the Mussoorie Bank, Limited, on the 16th of November 1891.

The certificate ran thus :—

“In the matter of the Indian Companies Act, 1882, and the Himalaya Bank, Limited, in liquidation.

[55] No. 37.

Mussoorie, the 16th November 1891.

To

The Manager,
Mussoorie Bank, Limited,
Mussoorie.

Sir,

The debt claimed by you in this matter has been allowed by the Judge at the sum of Rs. 1,63,408-13-11, carrying interest from 1st July 1891.

I am,
Yours faithfully,

(For Alliance Bank of Simla, Limited,)

(Sd.) W. D. HENRY,
Official Liquidator, Himalaya Bank, Limited,
in liquidation.

It will be seen that there is no mention made as to whether the debt had been allowed as against any particular assets, or was in any way qualified.

On the 6th of August 1892, upon a report made by the official liquidator, the Judge of Saharanpur issued a fresh order to the effect that the debt, which had been admitted as for Rs. 1,63,408-13-11 on the 14th of December (sic) 1891, had been incorrectly admitted and scheduled, the said debt being fit to be allowed as against particular assets only * * * and not against the general assets of the bank in liquidation, “the said particular assets having been conveyed to the Mussoorie Bank by the mortgage-deed aforesaid, dated 13th of March 1891, and being in

its possession with power of sale at their own option from and after 3rd of December 1891.

"The official liquidator is therefore directed to call upon the Mussoorie Bank to return the certificate of limited claim granted them under this Court's order of the 14th of December (sic) 1891, [56] so that an amended certificate may be granted to them in the terms of the present order, or to show cause to the contrary."

This order was forwarded by the official liquidator to the manager of the Mussoorie Bank, Limited, and was received by the manager on or about the 8th of August 1892.

The certificate was not returned for amendment, and no cause to the contrary was ever shown before the Court at Saharanpur.

On the 3rd November 1892, a dividend of $6\frac{1}{4}$ per cent. was declared payable to creditors of the Himalaya Bank, Limited, but no notice of such dividend was sent to the manager of the Mussoorie Bank, Limited.

On the latter bank applying for payment, the official liquidator sent the demand and correspondence connected therewith to the Judge for orders, and the only order passed was an order dated the 10th of November 1892, to the effect that the papers be filed.

Upon this followed the application of the 20th of December 1892. Upon this application the Judge held that there was no statute law laying down express provisions upon the question whether a creditor standing like the Mussoorie Bank, Limited, in the position of a secured creditor, could claim to be paid out of the general assets of the bank in liquidation, and at the same time to retain in his hands indefinitely the securities, postponing realization at his own option, and that equity, justice and good conscience would not favour the contention that he could so claim, and accordingly dismissed the application.

The first plea taken in appeal is that the Judge had no power to reconsider his order of the 16th of November 1891, after the period limited by s. 169 of the Indian Companies Act, 1882.

As regards this plea it is contended that the Judge's order of the 16th of November 1891 was an order subject, so far as any re-hearing of or appeal from it was concerned, to the provisions of s. 169 of Act No. VI of 1882, and that it was not within the power of the Judge to pass an order of a different nature upon the same [57] matter when three weeks had elapsed from the date of the first order.

I am, however, of opinion that s. 169 was not intended to refer to a case of this kind in which a Judge, upon the discovery of fresh matter, considers it expedient to pass a fresh order or to review an order passed by him. In the present case there was no re-hearing or appeal properly so called. New matter was brought to the notice of the Judge by the official liquidator and upon that matter the Judge reviewed his previous order. I see nothing in the words of the Act to forbid such procedure on the part of the Judge, and apparently the English Courts, subject to a rule almost identical with that contained in s. 169, do not consider themselves precluded by the language of s. 124 (see s. 124 of the English "Companies Act," 1882) from reviewing orders passed by them. Thus in *In re the National Assurance and Investment Association ex parte Munday* (1) the Master of the Rolls on the 30th of May 1862 reversed orders passed by him on the 19th of February 1862.

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But, even if the order could not have been in strict law reviewed, I hold that the appellant, by not appearing to show cause against the new order after notice received by him, cannot now object that the order was illegal. He knew that the order was in contemplation and he should have contested it. The only reason given to this Court for his not doing so was the entirely erroneous and insufficient reason that he was not bound to notice orders and letters issuing from the official liquidator in the Judge's name. If he was advised to this effect, the advice was grievously in error. Under s. 144 of the Act of 1882, the official liquidator was undoubtedly acting within his powers.

The second contention in appeal is that, according to Indian statute law, all duly proved creditors of a company in liquidation are entitled to share *pari passu* in the funds available for distribution to general creditors. It is urged that the practice in English bankruptcy law which was followed by the learned Judge does not accord with equity and good conscience. In other words, the [58] contention on behalf of the appellants is that, both by Indian statute law and by equity and good conscience, a creditor who is partially secured should be allowed to retain his securities removing them from the general assets of the Bank available for distribution among all creditors, and to put off realization until he has obtained what he can get along with unsecured creditors from the general assets of the Bank. It is obvious that if this privilege be accorded to secured creditors they will be in a far better position than unsecured creditors. The contention is that this advantage is one conferred by Indian statutes and is in consonance with equity and good conscience.

The counsel for the appellant could not refer me to any Act or statute which in express terms enacted the principle for which he contended. Section 147 of the Indian Companies Act, 1882, to which he first referred the Court, simply proves that the Court which directs that a company shall be wound up is to cause the assets of the company to be collected and applied in discharge of its liabilities existing at the date of the order for winding up. Reference was also made to s. 176 of the Indian Contract Act, 1872, and s. 99 of the Transfer of Property Act, 1882. Both of these are manifestly irrelevant and have no bearing upon the question in issue. Great stress was laid upon the absence from ss. 352 and 356 of the Code of Civil Procedure, 1882, of the words "and in the winding up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up." The words just recited are to be found in s. 10 of the Supreme Court of Judicature Act, 1875, a section whereby the rules in force for the time being under the law in bankruptcy are to prevail and be observed in several other proceedings for the winding up of a company. It is argued that their absence from ss. 352 to 356 of the Code of Civil Procedure proves an intention on the part of the Indian Legislature not to introduce the rules prevailing in bankruptcy proceedings into proceedings connected with the winding up of companies. The appellant wishes me to go still further and hold that it was the [59] intention of the Legislature that the practice prevailing in the Court of Chancery at home, prior to 1875, as to the respective rights of secured and unsecured creditors, should be applied to the winding up proceedings of companies held by Courts in India. The argument has only to be stated to show how extravagant and fanciful it is. There would be no end to the interpretations of Indian statutes if they were to be interpreted in the manner indicated in the above argument. Our duty as Judges is to be

guided by the plain language of the statute, and not by inferences drawn from comparison of Indian with English statutes. There is, so far as the Indian statute book is concerned, no provision made for giving any preference to secured over unsecured creditors.

There remains the question whether any such preference is consonant with the rules of equity and good conscience. In considering this matter I cannot do better than adhere to the definition of what those rules are given by their Lordships of the Privy Council in *Waghela Rajsanji v. Sheikh Masludin* (1). There their Lordships interpreted equity and good conscience to mean the rules of English law, if found applicable to Indian society and circumstances.

Now, it is admitted that since 1875 the rule in English law has been, that secured creditors can only prove for the balance of their debts after deducting the value of their securities. This is the rule which the learned Judge has adopted. None of the remaining pleas were urged. The appeal fails and is dismissed with costs.

Appeal dismissed.

16 A. 59 = 13 A.W.N. (1893) 209.

APPELLATE CIVIL.

Before Mr. Justice Aikman.

KUBRA BIBI (*Defendant*) v. WAJID KHAN (*Plaintiff*).^{*}
[13th November, 1893.]

Regulation XVII of 1806, s. 8—Mortgage by conditional sale—Foreclosure—Procedure—Demand of payment—Parwanah—"Official signature"—"Stipulated period."

In proceedings for foreclosure of a mortgage under Bengal Regulation No. XVII of 1806, it is not necessary that the fact that a demand for payment was made before [60] the petition for foreclosure was presented should appear on the face of the proceedings; it is sufficient if the plaintiff in his suit for possession shows that the demand was so made.

A *parwanah* issued under the provisions of s. 8 of the above-mentioned Regulation is not signed as required by that section with the "official signature" of the Judge when it bears merely the initials of that officer. *Maaho Persad v. Gajudhar* (2) referred to.

The term "stipulated period" as used in s. 8 of Regulation No. XVII of 1806, means the full term on the expiry of which the mortgage money is payable, notwithstanding that under the strict terms of the mortgage the mortgagee might be entitled to foreclose at an earlier period. *Srimati Sarasibala Debi v. Nand Lal Sen* (3) and *Imdad Husain v. Mannu Lal* (4) referred to.

[*Dies*, 29 A. 145 = 3 A.L.J. 857 = A.W.N. (1905) 309; R., 63 P.L.R. 1902.]

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Madho Prasad*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

AIKMAN, J.—The plaintiff in this case is the representative in interest of certain persons in whose favour a deed of conditional sale had been executed by the predecessor in title of the defendant. The plaintiff sues to recover possession of a plot of land which is admittedly a portion of the

^{*} Second Appeal No. 286 of 1893, from a decree of Pandit Rajnath Sahib, Additional Subordinate Judge of Ghazipur, dated the 9th December 1892, reversing a decree of Babu Chandi Prasad, Munsif of Saidpur, dated the 31st March 1892.

(1) 14 I. A. 89.

(2) 11 C. 111.

(3) 5 B L.R. 389.

(4) 3 A. 509.

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property mortgaged by the deed of conditional sale, alleging that the mortgage was foreclosed and the conditional sale rendered absolute by proceedings taken under s. 8, Regulation XVII of 1806.

The plaintiff's suit was dismissed in the Court of first instance, but decreed on appeal by the Additional Subordinate Judge of Ghazipur. The defendant now comes here in second appeal.

Several grounds are set forth in the memorandum of appeal, but the learned pleader for the appellant has confined himself to one, namely, that the plaintiff's suit must fail owing to the invalidity of the foreclosure proceedings. The first defect alleged is that there is nothing on the face of the foreclosure proceedings to show that payment was demanded from the borrower or his representative. There can be no doubt that a demand for payment is a [61] necessary preliminary to an application under s. 8 of the Regulation, and before a plaintiff can succeed in a suit like the present he must show that this condition was complied with. But I find nothing in the words of the section to support the contention that the fact of the demand having been made must appear on the face of the foreclosure proceedings. I think it is open to the plaintiff to show in the course of his suit for possession that payment was demanded before the petition for foreclosure was presented. In this case the plaintiff has called witnesses to show that a previous demand was made, and the evidence of these witnesses has not been rebutted. I hold therefore that this objection to the regularity of the foreclosure proceedings fails.

Another ground upon which the validity of the foreclosure proceedings is impugned is that the mortgagees included in their application for foreclosure the amount of another bond which the appellant contends was a simple money bond. There is nothing in this latter bond which expressly renders the property in suit liable for the money secured, but the bond provides that certain book debts were to be paid before the amount secured by the conditional sale-deed and the bond were paid, and expressly stipulates that both the conditional sale-deed and the bond were to be satisfied on the date fixed for the redemption of the conditional sale-deed. In my opinion this indicates that it was the intention of the parties that the conditional sale-deed was not to be paid off without the other bond being satisfied at the same time. Although no charge on the property is expressly created by the second bond, its terms are, I hold, such as to debar the mortgagor from redeeming without at the same time paying it off. In this view there was nothing irregular in the mortgagee's setting forth the amount of the second bond in the petition they presented under s. 8 of the Regulation.

But, even if the intention of the contracting parties was not what I assume it to have been, I am of opinion that the inclusion of the amount of the second bond in the mortgagee's demand would not invalidate the foreclosure proceedings. As observed by their Lordships of the Privy Council in the case of *Forbes v. Ameeroo-nissa Begum* (1)—“The issue, in so far as the right of redemption is concerned, will be whether anything at the end of the year of grace remained due to the mortgagee, and, if so, whether the necessary deposit had then been made. If that be found against the mortgagor the right of redemption is gone.” Again at p. 356 of the Report, their Lordships

(1) 10 M. I. A. 340 (351).

say—"Their Lordships are disposed to think that upon the true construction of the Regulation and of the Circular Order, it is not necessary that the demand should be for the specific sum ultimately ascertained to be due." If the mortgagee asks too much, the mortgagor can protect himself by paying into Court what is really due. In the present case the amount secured by the conditional sale-deed was undoubtedly due at the end of the year of grace, and that amount was not paid. Consequently, if the proceedings were in all other respects valid, the mortgagor's right of redemption was lost, and the plaintiff is entitled to a decree.

But it is further objected on behalf of the defendant-appellant that the foreclosure proceedings are defective, inasmuch as the "*parwanah*" is not under the "official signature" of the Judge as required by s. 8 of the Regulation. The *parwanah* bears the initials J. W. P., and it is admitted that these are the initials of Mr. Power, the then presiding Judge. It is argued on behalf of the appellant that the Judge's initials cannot be regarded as his "official signature," and, as it has been held that the provisions of the section must be strictly complied with, it is contended that this flaw is sufficient to vitiate the proceedings. Looking to the frequency with which official documents are signed merely by initials, I should have hesitated to hold that initials cannot be regarded as an official signature, were it not that this appears to have been the view taken by the Privy Council in the case of *Madho Persad v. Gajadhar* (1). In that case the *parwanah* bore the initials H. B. H., which were said to be the initials of the District Judge. With regard to this document, their Lordships remark that it is not a compliance with the Regulation, and the first of the reasons given for this view is that it was [63], not "under the seal and official signature of the Judge." The conclusion I draw from this is that their Lordships declined to accept initials as an official signature within the meaning of s. 8 of the Regulation.

There is one other ground upon which the appellant contends that the foreclosure proceedings were bad, and that is that the petition to foreclose was presented before the expiration of the stipulated period. If this contention is correct, there is no doubt that the proceedings must be held to be invalid. It is admitted that the petition to foreclose was presented several months before the date fixed for the payment of the loan; but the respondent relies on a clause in the conditional sale-deed which authorized the mortgagees to take foreclosure proceedings upon the occurrence of anything injuriously affecting the property. The occurrence upon which the mortgagees took action was the transfer of the plot which forms the subject of the present suit.

The meaning of the expression "stipulated period" was discussed in the case *Srimati Sarasibala Debi v. Nand Lal Sen* (2). In that case the terms of the deed, which was in the English form, set forth a date upon which the payment of the principal sum would entitle the mortgagors to a reconveyance of the property, provided the interest had been punctually paid. The mortgagors failed to pay the interest, and the mortgagees applied before the date fixed for repayment of the principal or for foreclosure, on the ground of default in payment of the interest. The Court in that case made the following remarks in its Judgment:—"The stipulated period of redemption referred to by the Legislature in this Regulation appears to us to be the whole period prescribed by the mortgage-contract for the

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performance of the conditions upon the fulfilment of which the mortgagor is entitled to a reconveyance. We do not think that it in any case means less than this, or depends upon whether the mortgagor duly performs all these conditions or not. We see no reason for supposing that the Legislature by those words spoke, not of the period of redemption originally specified in the contract [64] (as the words themselves certainly imply), but merely of the shorter period during which the mortgagor by performance of the conditions may have preserved his strict right to redeem under the contract. From the very object of the Regulation it is obvious that the framers of it had expressly in view the case of a mortgagor who fails to perform the conditions necessary to give him the contract right to redeem, and if they thought of the 'stipulated period' as a period terminating on the first default of the mortgagor, they would surely have used some other expression than this to convey their meaning."

The same view of the meaning of the Regulation was adopted by a Division Bench of this Court in the case of *Imulad Husain v. Mannu Lal* (1). In that case the condition of the deed was that if the principal sum were not repaid within seven years, then after the expiry of that term the deed would become an absolute sale-deed; but there was also a stipulation that, if in any year the mortgagor failed to pay the interest, the mortgage-deed was to be deemed a sale-deed. Default was made in the payment of the interest before the expiry of the seven years. When the default occurred foreclosure proceedings were taken, and on the expiry of the year of grace from the notice of foreclosure the mortgage was declared foreclosed. Notwithstanding this the mortgagee's suit for possession failed, the Court holding that "the foreclosure proceedings taken by the plaintiff before the expiration of a period stipulated for the repayment of the principal sum were irregular."

Here then we have two cases in which foreclosure was held to be illegal before the expiry of the period for payment of the principal sum, notwithstanding the fact that under the strict terms of the deed the mortgagees were entitled to foreclose at an earlier date. The learned pleader for the respondent refers to a case, *Wooma Churn Chowdhry v. Beharee Lall Mookerji* (2), as an authority in his favour. Although the Court there remarked that the intention of the parties was to be collected from the whole of the deed, it still held that what was to be looked to was the time [65] stipulated for the payment of the principal sum. It is true that in the cases referred to above the default was in the payment of interest, and here the default alleged was of a different nature, but the principle is the same. It seems to me, however, doubtful whether even on a strict interpretation of the deed under consideration the mortgagees were entitled to foreclose at a date earlier than that fixed for the payment of the loan. As stated above, the clause relied upon by the mortgagees as authorizing them to take foreclosure proceedings was that which gives them the power to foreclose on the occurrence of anything injuriously affecting the property, and the occurrence upon which the mortgagees took action was the alienation by the mortgagor of a part of the property. I doubt whether any private alienation of the property by the mortgagor could be considered an occurrence injuriously affecting the property. Such an alienation could only be made subject to the mortgagees' rights. This point does not appear to have been taken in the Courts below, but it was raised by this Court at the argument of the case.

(1) 3 A. 509.

(2) 21 W.R.C.R. 274.

For the reasons given in the latter part of this judgment, I come to the conclusion that the foreclosure proceedings were bad, and that the plaintiff's suit was properly dismissed by the Munsif.

I therefore allow the appeal, and, setting aside the decree of the lower appellate Court, I dismiss the plaintiff's suit with costs in all Courts.

Appeal decreed.

16 A 65 = 13 A.W.N. (1893) 222.

APPELLATE CIVIL.

Before Mr. Justice Aikman.

SHEIKH WAZIR (*Judgment-debtor*) v. DHUMAN KHAN (*Decree-holder*).^{*}
[17th November, 1893.]

Act IV of 1882, s. 92.—Redemption of mortgage—Decree for redemption omitting to state consequence of non-payment of mortgage-money within time specified—Limitation.

Where a Court gave plaintiff a decree for redemption of a mortgage conditioned on payment by him of the mortgage-money within a specified time from the date of the decree, but omitted to state in such decree what would be the consequence of the [66] plaintiff's default in so paying in the mortgage-money. *Held*, that such omission could not operate to extend the period available to the plaintiff for payment beyond the maximum term provided for by s. 92 of Act No. IV of 1882. *Jai Kishn v. Bhola Nath* (1) referred to. *Bandhu Bhagat v. Muhammad Taqi* (2) dissented from.

[R., 48 P. R. 1906 = 104 P.L.R. 1906; 44 P.L.R. 1913 = 53 P.W.R. 1913 = 18 Ind. Cas. 48.]

THE facts of this case are fully stated in the judgment of Aikman, J.
Mr. *Amir-ud-din*, for the appellant.
Mr. *Kazim Husain*, for the respondent.

JUDGMENT.

AIKMAN, J.—These are connected appeals and may be conveniently disposed of together. The appellant in both is one Sheikh Wazir; and the respondent in both is one Dhuman Khan. The father of Sheikh Wazir executed in favour of Dhuman Khan, a usufructuary mortgage of his cultivatory holding as surety for a loan of Rs. 340. It was stipulated in the mortgage-deed that the mortgagor might, by repaying the loan, on the full moon of Jeth in any year, redeem the mortgage. The mortgagor having died, a suit was instituted by his son, the present appellant, for redemption. On the 22nd of September, 1890, the Court of first instance passed a decree declaring the appellant entitled to red-emption on payment of Rs. 340. The mortgagee appealed to the District Judge, who, on the 14th of April 1891, modified the decree of the first Court, by declaring that the mortgagee was entitled to recover from the mortgagor a sum of Rs. 180 with proportionate costs in both Courts, in addition to the amount found due by the Munsif. The decree of the District Judge directed that the whole amount was to be paid within six months from the date of the decree, but was silent as to what was to happen in the event of the money not

^{*} Second Appeals Nos 44 and 45 of 1893, from orders of C. L. M. Eales, Esq., District Judge of Azamgarh, dated the 16th November, 1892, reversing orders of Babu Jai Lal, Munsif of Azamgarh, dated the 15th of July, and the 12th of August, 1892.

(1) 14 A. 529.

(2) 14 A. 350.

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being paid within the period fixed. Whilst the appeal to the District Judge was pending, the mortgagor deposited the amount found due by the Court of first instance and obtained possession of the property. He, however, allowed six months to elapse after the date of the District Judge's appellate decree, without paying in the additional sum found due by the Judge. Thereupon the mortgagee applied to be restored to possession of the [67] property, on the ground that the mortgagor's failure to pay the money within the time fixed had rendered the decree incapable of execution. The mortgagee, either through the Court or by consent of the mortgagor, it is not clear which, did get back possession from the mortgagor. The mortgagor then applied to the Munsif urging that as the decree of the appellate Court did not specify what would be the result of the non-payment of the additional sum of Rs. 180, he was entitled to pay in this additional sum any time within three years from the date of the decree, and in support of his contention referred to the ruling of Mr. Justice Mahmood in the case of *Bandhu Bhagat v. Muhammad Taqi* (1). The Munsif sustained the mortgagor's contention, allowed him to pay in the additional money found due by the Judge, and directed him to be put in possession of the mortgaged property. This order was passed on the 16th of July, 1892. On the 12th of August, 1892, the Munsif passed an order of a similar nature directing that the mortgagor should be put in possession, and declaring that he was entitled to get possession of the land along with the crops thereon. Both of these orders were appealed to the District Judge, who, for the reasons set forth in his judgment, dated the 16th of November, 1892, allowed the appeals and set aside the Munsif's orders. I may mention here that the Munsif's order of the 16th of July, 1892 also dealt with the question as to the right of the mortgagee to attach, in satisfaction of the costs decreed to the mortgagee in the appeal in the redemption suit, the money deposited for redemption. This question has not been specially raised in the grounds of appeal before me, and I do not feel called upon to deal with it, more especially as it will become immaterial in view of the order I am about to pass.

The main question raised in this appeal is as to who should have possession of the mortgaged property, and this has been very fully and ably argued by the counsel on both sides. The question is by no means free from difficulty, but I have arrived at the conclusion that the appellate Court's decrees are right and ought to be affirmed. [68] The ruling upon which the Munsif relied, namely, *Bandhu Bhagat v. Muhammad Taqi* (1) was, as is pointed out by the District Judge, dissented from the case of *Jai Kishn v. Bhola Nath* (2). The learned counsel for the appellant contends that the observations dissenting from the former ruling were *obiter dicta* and had nothing to do with the question which was before the Court. Be this as it may, I agree with what was said by the learned Judges who decided the latter case. Section 92 of the Transfer of Property Act fixes a period beyond which a Court cannot allow time to a plaintiff claiming redemption, for payment of the money necessary to redeem the property, and the silence of the Court as to what is to happen if the money is not paid within the time fixed, cannot, I think, in any case have the effect of giving the plaintiff an extension beyond the statutory period. As this was usufructuary mortgage, the Court could not declare that a failure to deposit the mortgage-money within the time fixed should debar him of all right to redeem.

(1) 14 A. 350.

(2) 14 A. 529.

The Judge says "that his intention was that a failure of payment within the fixed time was to have the effect of rendering void the decree allowing redemption." It is unfortunate that he did not clearly express his meaning, but I do not think it would be putting any strained interpretation upon his decree to hold that this is the meaning of it. We have then the decree of an appellate Court rendering the decree of a Court of first instance subject to a certain condition, and so far modifying the first Court's decree. It is the decree of the appellate Court which has to be executed. If, previous to the passing of that appellate order, the mortgagor got possession, and if he allowed the first Court's decree to become inoperative by his neglect to comply with the condition imposed by the appellate Court, I think the opposite party is entitled to be replaced in possession, on the ground that the mortgagor had been let in under a decree which by the force of the appellate decree had become of no effect. This is really the only point in the case. The learned counsel for the appellant [69] argues that, as the mortgagor is in possession, the mortgagee's remedy was to bring a separate suit for restitution to possession, and he refers to the case of *Aminabi v. Sidu* (1). The facts of that case are not on all fours with this. Multiplicity of suits should be avoided, and this matter was properly disposed of in the execution department. The learned counsel for the appellant asks me to make it clear that the effect of the Judge's order, which is now upheld, is not to debar his client for all time from redeeming. I have no hesitation in saying that that cannot be the effect of the order, and Mr. *Abdul Majid*, who appears for the respondent, admits this is so. The right to redeem is by the terms of the deed a recurring right, and the present decision will not bar the appellant from redeeming the mortgage in future by taking proper steps and complying with the terms of the deed. The money which appellant has paid into Court will of course be refunded to appellant, subject to any claims the mortgagee or others may succeed or may have succeeded in establishing against it.

For the above reasons, I dismiss the appeal with costs.

Appeal dismissed.

16 A. 69 = 13 A.W.N. (1893) 217.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Knox.

ABDUL RAHMAN (*Defendant*) v. D. EMILE (*Plaintiff*)*

D. EMILE (*Plaintiff*) v. ABDUL RAHMAN (*Defendant*).*

[13th November, 1893.]

Easement—Custom—Right of privacy.

The customary right of privacy which prevails in various parts of the North-Western Provinces is a right which attaches to property and is not dependent on the religion of the owner thereof.

[R., 3 N.L.R. 114 (124) ; D., 18 M. 163 = 5 M.L.J. 26.]

* Second Appeals Nos. 83, 84 and 110 of 1892, from decrees of H.B. Punnett, Esq., Officiating Judge of Saharanpur, dated the 30th August 1890, partly modifying and partly confirming a decree of C. Steel, Esq., Subordinate Judge of Mussoorie, dated the 26th October, 1889.

(1) 17 B. 547.

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THESE were three appeals arising out of the same suit. The plaintiff, Emile, sued as owner of a house in the Cantonment of Landour, alleging that the defendant, Abdul Rahman, who was owner of a house situated at a short distance from the plaintiff's, [70] had rebuilt his house making the lower story higher, than it was before, and adding an upper story with a verandah and windows looking on to the upper story of the plaintiff's house, thereby destroying the privacy of the rooms on the upper story of the plaintiff's house, and also interfering with the access of light to the rooms on the lower story. The plaintiff also alleged that the defendant had raised the level of the land between his building and the plaintiff's stable, thereby causing surface drainage to percolate through the walls of the plaintiff's stable. The plaintiff prayed for (a) demolition of so much of the defendant's upper story as impeded access of light and air to the plaintiff's cook-house; (b) closure of the defendant's upper story doors and verandah; (c) reduction of height of open land between defendant's house and plaintiff's stable to its natural level, and Rs. 2,500 compensation for damage caused to plaintiff through defendant's invasion of his privacy and right to light and air.

The defendant replied that his house caused no actionable obstruction to the plaintiff's rights; that the law recognized no such right of privacy as that claimed by the plaintiff; that the plaintiff's stables had always suffered to a like extent from the percolation of water; and that the plaintiff (if he had any remedy at all, which was denied) would be entitled to damages only.

The Court of first instance, the Subordinate Judge of Dehra Dun, found against the plaintiff on the question of obstruction to light and air, and in his favour on the other issues, *i. e.*, as to the stables and the question of the plaintiff's right of privacy, and gave the plaintiff a decree for the rectification by the defendant of the drainage in the neighbourhood of the plaintiff's stables, for the closing of doors and windows on the defendant's upper story which were nearest to the plaintiff's house, and the removal of the defendant's verandah and for Rs. 300 damages.

From this decree both parties appealed to the District Judge.

The defendant's appeal was dismissed, the Judge affirming the view of the Court of first instance that a right of privacy did subsist in favour of the plaintiff in respect of the rooms in question.

[71] The plaintiff's appeal was partially successful, inasmuch as the Court increased the amount awarded to him as compensation for the invasion of his right of privacy, and gave damages on account of the obstruction caused by the defendant's building to the passage of light and air to the plaintiff's lower rooms.

From each of these appellate decrees the defendant appealed to the High Court; and the plaintiff appealed from the decree in his appeal below, claiming demolition of the defendant's upper story and increased damages.

Messrs. <i>T. Conlan</i> and <i>Abdul Majid</i> , for the appellant	} in S. A. Nos. 83 and 84 .
Mr. <i>W. K. Porter</i> , for the respondent.	
Mr. <i>W. K. Porter</i> , for the appellant.	} in S. A. No. 110.
Mr. <i>Abdul Majid</i> , for the respondent.	

JUDGMENT.

EDGE, C. J., and KNOX, J.—In two of these appeals the defendant in the suit is the appellant; in the third the plaintiff is the appellant. The plaintiff was the owner of a house in Landour. The defendant was the

owner of an adjoining house. The defendant proceeded to rebuild his house. He built it much higher than it was before, and in such a way as to seriously diminish the light and air of the plaintiff's cook-house, and destroyed the privacy of certain rooms in the plaintiff's house. For these acts, and another which is now immaterial, the plaintiff brought his suit.

The plaint and the written statement are rather inartificially drawn, but it is obvious that the plaintiff was complaining of a loss of light and air and of an invasion of the privacy of his house. On the question of privacy the defendant merely pleaded that "the law recognises no such right of privacy as is claimed." That the law does recognise a right of privacy in these provinces when established by custom was decided by this Court in *Gokal Prasad v. Radho* (1). It is obvious from the judgments of the two Courts below what was the contention of the parties on this question of privacy. [72] The defendant apparently contended that the plaintiff, not being a Muhammadan or a Hindu, could have no right of privacy. The plaintiff, on the other hand, contended that the right of privacy was one of property, and that the religion of the owner of the property was immaterial. It does not appear to have been suggested (drawing our conclusion from the judgments) that a custom of privacy did not prevail in Landour. We can see no reason in this case why the plaintiff was not entitled to the same right of privacy which his neighbours, who are Hindus or Muhammadans, enjoyed. When the plaintiff on a former occasion, as appears by one of the judgments, attempted to invade the privacy of one of his neighbours, a Muhammadan, the Muhammadan objected, and the plaintiff desisted from his invasion of his privacy. We are of opinion that the particular religion of the plaintiff was immaterial, and that in that respect the judgment in the Court below was right.

In one of the defendant's appeals it was contended that the damages awarded were excessive. The District Judge found, as we understand his judgment, that there had been substantial interference with the light and air of the cook-house, and that the cook-house could not be used as theretofore. There does not appear to be any question of law involved in the amount of damages. We dismiss the defendant's two appeals with costs.

As to the plaintiff's appeal, it is as unsubstantial as were the appeals of the defendant. The Judge refused to give a mandatory injunction compelling the defendant to pull down the building. He considered that the plaintiff should have come earlier for an injunction. He also considered that the damages which he awarded were sufficient to compensate the plaintiff for the injuries he sustained through the acts of the defendant. We should certainly not think of interfering with that decree. We dismiss that appeal with costs.

Appeal dismissed.

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(1) 10 A. 358.

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16 A. 73=14 A.W.N. (1894) 1.

APPELLATE CIVIL.

[73] Before Mr. Justice Aikman.

DIN DIAL (*Plaintiff*) v. HAR NARAIN AND OTHERS (*Defendants*).^{*}
[13th November, 1893.]

16 A. 73=
14 A.W.N.
(1894) 1.

Act XV of 1877, Sch. ii, Arts. 91, 120, 127—*Limitation*—*Suit to set aside an instrument*
—*Suit for maintenance of possession in joint family property.*

The plaintiff sued for maintenance of possession in certain joint family property by cancelment, so far as his interest was concerned, of a certain deed of sale by which another co-parcener in the same property had purported to convey the whole to a stranger. *Held*, that the limitation applicable to such a suit was that prescribed by s. 120 of sch. ii of the Indian Limitation Act, 1877, and not that prescribed by art. 91, *Sobha Pandey v. Sahodra B. bi* (1) referred to : *Janki Kunwar. v. Ajit Singh* (2) distinguished.

[F., 22 A. 90 ; R., 7 A.L.J. 783 (786)=6 Ind. Cas. 841 ; 1 C.L.J. 73 (80); 84 P.R. 1902 =116 P.L.R. 1902.]

THE facts of this case sufficiently appear from the judgment of Aikman, J.

Babu *Becha Ram Bhattacharji*, for the appellant.

Pandit *Sundar Lal* and *Munshi Ram Prasad*, for the respondents.

JUDGMENT.

AIKMAN, J.—The only question raised by this appeal is one of limitation. The plaintiff, who is appellant here, came into Court alleging that a deceased relation of his own had executed in favour of the respondent, Har Narain, a deed of sale by which he professed to transfer the whole of certain joint family property, one-fourth of which the plaintiff asserts he owns and is in joint possession of.

The relief is not very clearly set forth in the plaint: but what the plaintiff asks is, that he may be maintained in his joint possession by cancellation of the deed of sale, so far as it is injurious to his rights. The date of the cause of action is put down in the plaint as the 24th of December 1887, on which date the plaintiff states the collusive proceeding of the vendor and the vendee came to his knowledge.

The suit was instituted on the 23rd of September 1890. Both the lower Courts have found that the sale came to the plaintiff's knowledge at least as far back as the 3rd of September 1887, and, [74] treating the case as one falling within art. 91 of sch. ii of the Indian Limitation Act, 1877, have dismissed the plaintiff's suit as barred by three years' limitation. The learned pleader for the appellant contends that art. 91 is not applicable to the case, which, he maintains, falls either within art. 127, which allows a twelve years' period of limitation, or art. 120, which allows a six years' limitation.

If either of these articles applies, the plaintiff's suit was within time. The question for decision is not by any means an easy one; but after listening to the able arguments of the counsel in the case, I have come to the conclusion that the suit is not one to which art. 91 would apply. What we have to consider is, what was the real prayer of the plaintiff?

* Second Appeal No. 82 of 1892, from a decree of Rai Pandit Indar Narain, Subordinate Judge of Mainpuri, dated the 30th September, 1891, confirming a decree of Munshi Madho Das, Munsif of Etawah, dated the 1st December, 1890.

(1) 5 A. 322.

(2) 15 C. 58.

It is not a suit merely for the cancellation of an instrument, the validity of which, save in so far as it affects his rights, plaintiff does not dispute. It appears to me that what the plaintiff really asks is a declaration that his right is not affected by the sale-deed which was executed by the deceased Ram Sahai. Such a declaration would of course involve a pronouncement by the Court that the sale-deed was ineffectual so far as it professed to transfer the plaintiff's share. But this is different from a prayer, pure and simple, to have an instrument set aside. The case seems to me to resemble that of *Sobha Pandey v. Sahodra Bibi* (1). In that case the plaintiff alleged that he was proprietor of certain land which one of the defendants had wrongfully mortgaged to the others, and he prayed that, the mortgage-deed being set aside, the land might be protected from illegal foreclosure by cancelment of the foreclosure proceedings which had been instituted by the mortgagee. This Court remarked:—"This is not a suit strictly for cancelment or setting aside an instrument to which the limitation in No. 91, sch. ii of the Limitation Act will apply, which are suits of the nature of those referred to in s. 39 of the Specific Relief Act, but it is rather a suit for a declaratory decree and is not barred by limitation." I would also refer to an extract from an unreported judgment of Turner, C.J. and Kernan, J., which is given at p. 28 of I. L. R., 14 Madras: "If a person not having [75] authority to execute a deed, or having such authority under certain circumstances which did not exist, executes a deed, it is not necessary for persons who are not bound by it to sue to set it aside, for it cannot be used against them. They may treat it as non-existent and sue for their right as if it did not exist." On this view the prayer for cancelment of the deed to be found in the plaint may be treated as merely incidental to the main relief asked. The learned counsel for the respondent relies on the ruling in *Janki Kunwar v. Ajit Singh* (2) as overriding the previous decision above referred to. But in that case one of the plaintiffs was himself executant of the document which it was sought to cancel, and the grounds on which their Lordships of the Privy Council held that that suit was within art. 91 are not to be found in the present case. In my opinion plaintiff's suit falls within art. 120 of the second schedule of the Limitation Act. I allow the appeal, and, setting aside the decrees of the lower Courts, remand the case to the Court of first instance under the provisions of s. 562 of the Code of Civil Procedure.

The costs of this appeal will be the costs in the cause.

Cause remanded.

16 A. 75=13 A.W.N. (1893) 219.

APPELLATE CIVIL.

Before Mr. Justice Burkitt.

RAM NARAIN RAI AND OTHERS (*Decree-holders*) v. BAKHTU KUAR
AND OTHERS (*Judgment-debtors*).^{*} [18th November, 1893.]

Execution of decree—Limitation—Act XV of 1877, sch. ii, art. 179, clause (4).

Held that an application made before the passing of Act No. VI of 1892 by a decree-holder to the Court executing the decree to strike off a pending application

^{*} Second Appeal No. 1306 of 1892, from an order of Pandit Banshi Dhar, Subordinate Judge of Ghazipur, dated the 30th August 1892, reversing the order of Babu Girdhari Lal, Munsif of Ballia, dated the 16th September 1891.

(1) 5 A. 322.

(2) 15 C. 58.

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 (1893) 219.

for execution with liberty to make a fresh application for execution of the same decree, was an application in accordance with law to take a step in aid of execution of the decree within the meaning of Act No. XV of 1877, sch. ii, art. 179, cl. (4).

[Diss , 23 C. 817.]

THE facts of this case sufficiently appear from the judgment of BURKITT, J.

[76] Babu *Viddya Charan Singh*, for the appellants.

Munshi *Govind Prasad*, for the respondents.

JUDGMENT.

BURKITT, J.—This is an appeal in execution proceedings from an order of the Subordinate Judge of Ghazipur, reversing an order of the Munsif of Ghazipur, and rejecting appellants' application to execute a decree, dated the 5th of March 1883. Passing over intermediate applications, I find that an application to execute this decree was made on the 19th of April 1888, and the next succeeding similar application was made on the 29th of April 1891. *Prima facie*, therefore, this latter application was 10 days beyond time. It is, however, contended for the appellants that an application made by them on the 27th of February 1889 has the effect of saving limitation. The Munsif accepted that view and held that the latter application was an application which asked the Court to take a step in aid of execution. With this view the lower appellate Court disagreed and rejected the execution-application of April 1891 as time-barred. Now, as to the application of the 7th of February 1889, it appears that proceedings in execution on the application of April 1888 were then pending, and that a date had been fixed in February 1889 for the sale of certain property. The decree-holder then, on the 7th of February 1889, applied to the Court to strike off the execution-proceedings temporarily (but maintaining the attachment of the property), and he added to his application a request for permission to make a fresh application at some future date. This application for permission to apply again was necessary under s. 373 of the Code of Civil Procedure, under the law as it stood before Act No. VI of 1892 came into force.

The question I have to determine, then, is whether this application for leave to apply at some future time to execute the decree is an application to the proper Court in accordance with law to take a step in aid of execution. The point is a novel one, and, so far as I can ascertain, it has not yet been covered by authority. But, as I entertain no doubt respecting it, I consider it unnecessary to refer it to a Bench of two Judges.

[77] Now, the application most undoubtedly was one in accordance with the law as understood in these provinces before Act No. VI of 1892 was passed, and it asked the proper Court to do that without which no future execution-application could be entertained. The decree-holder, while temporarily withdrawing the then pending proceedings, asked for leave to renew his application at a future date. Under the law as it then stood the decree-holder could not have made any subsequent execution-application if he had not, on withdrawing the pending proceeding, obtained permission from the Court to apply again. Under these circumstances, I am of opinion that, as the granting of that application was absolutely necessary to the taking of further proceedings in execution, it was, and must be held to have been, an application to the proper Court to take a step in aid of execution of the decree.

For these reasons I am of opinion that the decision under appeal is wrong. I therefore allow this appeal, and, setting aside the decision of the lower appellate Court, I restore that of the Munsif and direct that under s. 562 of the Code of Civil Procedure the record be remanded for further process of execution in due course. Costs here and hitherto to be paid by the respondents.

Cause remanded.

16 A. 77 = 13 A.W.N. (1893) 223.

APPELLATE CIVIL.

Before Mr. Justice Aikman.

CHAMELA KUAR AND OTHERS (*Judgment-debtors*) v. AMIR KHAN
(*Decree-holder*).^{*} [21st November, 1893.]

Civil Procedure Code, s. 511—Appeal—Necessity for copy of decree appealed against accompanying a memorandum of appeal.

A memorandum of appeal is not a good memorandum of appeal in law unless it is accompanied by a copy of the decree appealed against. *Gulab Devi v. Shankar Lal* (1) followed.

[R., 16 C.L.J. 116 (118) = 17 Ind. Cas. 99 (100); 9 C.P.L.R. 109; 9 Ind. Cas. 222 = 8 P.W.R. 1911; 11 Ind. Cas. 8.]

THE facts of this case sufficiently appear from the judgment of AIKMAN, J.

[78] Mr. *Abdul Raoof*, for the appellants.

Mr. *Amir-uddin* and *Munshi Gobind Prasad*, for the respondent.

JUDGMENT.

AIKMAN, J.—In this case the respondent, who had got a decree under the provisions of s. 88 of the Transfer of Property Act, finding the proceeds of the mortgaged property insufficient to pay the amount due under the mortgage, applied to the Court under s. 90 of that Act to pass a decree for the balance, and a decree was passed. The judgment-debtors appealed to the Judge and their appeal was dismissed. The judgment-debtors come here in second appeal.

Mr. *Gobind Prasad*, who appears for the respondent, raises what may be called a preliminary objection, on the ground that there was no valid appeal before the Judge, inasmuch as no copy of the decree accompanied the memorandum of appeal. It has been held by this Court in the case of *Gulab Devi v. Shankar Lal* (1) that the copy of the decree is a necessary accompaniment for a valid appeal. The same view was taken in an unreported case (First appeal from Order No. 33 of 1893) decided on the 10th of July last by KNOX and BURKITT, JJ.

I am constrained to allow this objection, and, without entering into the merits of the case, I, on this ground, dismiss the appeal with costs.

Appeal dismissed.

* Second Appeal No. 75 of 1893, from an order of F. W. Fox, Esq., District Judge of Ghazipur, dated the 26th October 1892, confirming an order of Rai Lalta Prasad, Additional Subordinate Judge of Ghazipur, dated the 31st of March 1892.

(1) 12 A.W.N. (1892) 47.

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16 A. 75 =
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16 A. 78=
13 A.W.N.
(1893) 223.

16 A. 78 = 13 A.W.N. (1893) 223.

APPELLATE CIVIL.

Before Mr. Justice Aikman.

BASA MAL AND OTHERS (*Decree-holders*) v. TAJAMMAL HUSAIN
(*Judgment-debtor*).^{*} [23rd November, 1893.]

Act No. IV of 1832, s. 84—Execution of decree—Act X of 1870, s. 9—Acquisition by Government of land subject to a mortgage—Neglect of mortgagees to claim compensation—Assessment of compensation in favor of mortgagor—Subsequent remedy of mortgagees.

B. M. and others, mortgagees, obtained a decree under s. 88 of the Transfer of Property Act, 1882, for the sale of the mortgaged property. Before execution of that [79] decree some of the mortgaged property was taken up by Government under the provisions of the Land Acquisition Act, 1870. The mortgagees never put in any claim with regard to the mortgaged property in response to the notification made under s. 9 of the last mentioned Act, but subsequently sought to attach in the hands of the Collector the compensation money about to be paid to the mortgagor. On these facts it was *held* that the mortgagees were not entitled to attach such money in execution of their decree under the Transfer of Property Act, 1882.

[*Diss.*, 6 C.L.J. 745 = 13 C.W.N. 350 (353); 1 Ind. Cas. 164 (165); *D.*, 17 P.R. 1907 = 2 P.L.R. 1908 = 67 P.L.R. 1907.]

THE facts of this case sufficiently appear from the judgment of AIKMAN, J.

Babu Jogindro Nath Chaudhri, for the appellants.

Munshi Madho Prasad, for the respondent.

JUDGMENT.

AIKMAN, J.—The appellants in this case obtained a decree for the sale of certain landed property in enforcement of a mortgage on it. Before the decree was executed a portion of the property was taken up by Government for a railway now in the course of construction, and compensation was awarded for it. The decree-holders applied to the lower Court to attach the amount of compensation in the hands of the Collector in execution of their decree for sale. Their application was refused, and they appeal to this Court.

In my opinion, the learned Subordinate Judge was right. When land is taken up by Government, public notice is given thereof, and notification is made that "claims to compensation for all interests in such land may be made to the Collector" (s. 9 of Act No. X of 1870). It was open to the decree-holders to put in a claim under this section. Having failed to do so, I do not think that they are entitled, by force of a decree prepared under s. 88 of the Transfer of Property Act, to attach the amount of compensation which has been awarded by the Collector to the mortgagor. They may proceed against the remainder of the property which has not been taken up, and, if the proceeds of the sale of that property prove insufficient to discharge the amount due under the decree, they may apply to the Court under s. 90 for a decree for the balance.

The appeal fails and is dismissed with costs.

Appeal dismissed.

* First Appeal No. 62 of 1893, from an order of Babu Mrittonjoy Mukerji, Subordinate Judge of Moradabad, dated the 18th February 1893.

16 A. 80 = 14 A.W.N. (1894) 9.

[80] REVISIONAL CRIMINAL.

Before Mr. Justice Aikman.

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16 A. 80 =

14 A.W.N.

(1894) 9.

IN THE MATTER OF THE PETITION OF MATHURA DAS.*
[29th November, 1893.]

Criminal Procedure Code, ss. 195, 439, 476—Order directing prosecution—Revision.

Under the general revisional powers conferred by s. 439 of the Code of Criminal Procedure, a High Court has power to consider the propriety of an order which purports to be passed under s. 476 of the Code. *Queen-Empress v. Rachappa* (1) dissented from.

Where a defendant in a suit in the Court of a Munsif applied to the District Judge for sanction under s. 195 of the Code of Criminal Procedure to prosecute a witness who had given evidence in the Munsif's Court in support of a deed, produced as evidence before that Court, which had been found by the Munsif to be a forgery, and the District Judge refused the application, but, purporting to act under s. 476 of the Code, himself ordered the prosecution of such witness: *Held* that the Judge's order was made without jurisdiction, the offence in respect of which the prosecution was directed having been neither committed before him nor brought to his notice in the course of a judicial proceeding.

[**Overruled**, 34 A. 602 (603) = 10 A.L.J. 174 = 13 Cr. L.J. 717 = 16 Ind. Cas. 525; **Diss.** 13 Cr. L.J. 1 = 13 Ind. Cas. 111; **F.** 9 Cr. L.J. 181 (182) = 1 Ind. Cas. 220; **R.**, 26 A. 249 = A.W.N. (1904) 15 (17), 35 A. 8 (9) = 10 A.L.J. 361 = 13 Cr. L.J. 829 (830) = 17 Ind. Cas. 573 (574); 15 A.W.N. 225; 6 A.L.J. 392 (399); 26 B. 785 (787); 21 M. 124 (126) = 2 Weir 593 (**F.B.**); 9 C.P.L.R. 27 (28); 7 Cr. L.J. 281 = 103 P.L.R. 1908; 7 P.W.R. 1908 Cr. = 5 P.R. 1908 (**F.B.**); 18 P.R. 1902 (Cr.) = 78 P.L.R. (1902); Rat. Unrep. Cr. R. 895 (899). **D.**, 97 P.L.R. 1903.]

THE facts of this case sufficiently appear from the judgment of AIKMAN, J.

Babu *Becha Ram*, for the applicant.

The Government Pleader (*Munshi Ram Prasad*), for the Crown.

JUDGMENT.

AIKMAN, J.—This is an application for the revision of an order passed by the learned District Judge of Moradabad directing the prosecution of the applicant for offences punishable under ss. 193 and 471 read with s. 109 of the Indian Penal Code. The order purports to have been passed under the provisions of s. 476 of the Code of Criminal Procedure. At the outset a question was raised whether this Court has any power of interfering with an order passed under that section. Reference was made to the cases of *Queen-Empress v. Narakka* (2) and *Queen-Empress v. Rachappa* and *Queen-Empress v. Irappa* (1). With reference to the first of these two cases I am of opinion that it is an authority for holding that the High Court can interfere on revision with an order passed under s. 476 of the Criminal Procedure Code. What was held there was that the High Court had no power to interfere on appeal [81] with a complaint duly made by a Sessions Court under s. 476, but, the learned Judges went on to say in their judgment:—"No sufficient grounds have been shown for interfering in revision with the exercise of the Judges' discretion." This indicates that the Judges were of opinion that if sufficient cause had been shown they might have interfered on revision. The Bombay case does certainly appear to bear out the contention raised

* Criminal Revision No. 675 of 1893.

(1) 13 B. 109.

(2) 13 M. 144.

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by the Government Pleader, as it was there held to have been the intention of the Legislature that when a Court finds it necessary to take proceedings in the nature of a complaint it should be as free to do so as any private individual who has occasion to put the Criminal Courts in motion against an accused person, and that no superior Court should have the power to nullify any proceeding by way of complaint duly taken by a Court according to law. It is, however, possible that the learned Judges who decided this case were dealing only with the power conferred on a superior Court by the ante-penultimate clause of s. 195 of the Criminal Procedure Code and were not referring to the revisional powers of a High Court. I quote the following passages from the judgment of Parsons, J:—"When once, however, such a complaint is made, s. 195 does not give to any other Court the power of revoking that complaint; still less can the section be construed as conferring upon a superior Court the power to interfere when a subordinate Court has sent a case for inquiry or trial to a Magistrate under the provisions of s. 476. The provisions of s. 195 relating to the revocation or grant of a sanction given or refused by a subordinate Court can, in my opinion, refer only to a sanction and cannot apply to a complaint." I quite agree with the view that s. 195 does not give a superior Court power to interfere with a complaint as distinguished from a sanction. But s. 439 of the Criminal Procedure Code confers upon the High Court any of the powers belonging to a Court of appeal in the case of any proceeding, the record of which has been called for by itself or which has been reported for orders or which otherwise comes to its knowledge. There is nothing in this section to exclude from the revisional powers of the High Court proceedings under s. 476. I am of opinion, therefore, that under the general revisional powers [82] conferred by s. 439 a High Court has power to consider the propriety of an order which purports to be passed under s. 476. This is the view taken by the Calcutta High Court in *Khepu Nath Sikdar v. Grish Chunder Mukerji* (1). I hold, then, that I have jurisdiction to deal with this application.

Coming now to the facts of the case, it appears that Chote Khan, who was plaintiff in a civil suit in the Court of the Munsif subordinate to the District Judge of Moradabad, produced a deed of mortgage which the Munsif considered to be a forgery. The Munsif took action under s. 476 of the Criminal Procedure Code and directed the prosecution of Chote Khan. The applicant here, Mathura Das, gave evidence in support of the alleged forged deed. Bansi Dhar, who was defendant in the civil suit, applied to the District Judge under s. 195 of the Criminal Procedure Code to sanction the prosecution, of Mathura Das under ss. 193 and 476 read with ss. 109 and 463 of the Indian Penal Code. The District Judge entertained that petition and called on Mathura Das to show cause why the sanction should not be given. The result of the proceeding was that the District Judge refused to give Bansi Dhar sanction to prosecute, but, as stated above, himself directed the institution of a prosecution. It was contended by the learned counsel who appeared for the applicant that the District Judge had no power to entertain this petition, as the alleged offences were not committed in any proceeding in his Court. I cannot go so far as to hold that it was illegal for the District Judge to entertain the petition, but I must express my opinion that where sanction is asked for the prosecution of an

offence alleged to have been committed before any Court it is in every way expedient that that application for sanction should in the first place be made to the Court in which or in relation to any proceeding in which the offence was committed. In a similar but unreported case which came before this Court in 1892 Mr. Justice Straight expresses doubts as to whether s. 476 was applicable to a case like the present. I share those doubts very strongly. It is evident [83] that the offences were not committed in the Court of the District Judge, so that he has no jurisdiction under s. 476, unless it can be held that they were brought under his notice in the course of a judicial proceeding. Even if an application under s. 195 can be held to be a judicial proceeding, I do not think it could be held without straining the language of the section that when an application is presented for sanction to prosecute for an offence, that offence is brought to the notice of the Court in the course of a judicial proceeding, there being no other judicial proceeding before the Court than the application for sanction. Taking this view of the case, I am of opinion that the District Judge had no power to take action under that section. It may be further pointed out that this order in regard to the abetment of the use of a forged document cannot possibly come within s. 476, as abetment is not an offence referred to in s. 195. Further, I would point out that the offences connected with forgery which are referred to in s. 195 are offences committed by parties to proceedings. The applicant, who was only a witness, does not fall within this description and consequently cl. (c) of s. 195 would not apply to him. For the above reasons I feel bound to set aside the order of the District Judge, dated the 4th of October 1893, making over the applicant to the Criminal Court, as one passed without jurisdiction. If the District Judge thinks fit, the petitioner Bansi Dhar may be directed to apply to the Court of first instance to take action in the case. I would take this opportunity of observing here that I entirely sympathize with the following remark of the learned District Judge in regard to sanction :—"I fear too often that such sanctions are used for the purposes of extortion and persecution and are held for months hanging over the head of an enemy." When offences against public justice are committed it would be well, I think, if Courts availed themselves more freely of the provisions of s. 476 instead of leaving the prosecution to private parties, who too often take advantage of the sanction given them for the purposes of extortion and for the gratification of private malice.

The order is set aside.

16 A. 84 (F.B.)=14 A.W.N. (1894) 7.

[84] FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell,
Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Burkitt and
Mr. Justice Aikman.*

QUEEN-EMPRESS v. DURGA.* [19th & 20th December, 1893.]

Practice—Witness—Public Prosecutor in a trial before a Court of Sessions or High Court not bound to call all witnesses whose names are returned in the calendar.

In a trial before a Court of Session or a High Court the Public Prosecutor conducting the case for the Crown is not bound to call as a witness for the Crown

* Criminal Appeal No. 951 of 1893.

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or to put into the witness-box for the purpose of cross-examination any of the witnesses appearing in the calendar as witnesses for the Crown whose evidence is in his opinion unnecessary.

IN this case three persons, Durga, Ram Prasad and Madho, were put on their trial before the Sessions Judge of Allahabad, charged with offences falling under ss. 147 and 304 of the Indian Penal Code. At the trial, the District Government Pleader conducting the case for the Crown declined to examine one of the witnesses for the prosecution, who had been examined before the committing Magistrate. The Sessions Judge recorded the following observation in his judgment:—"It is not in evidence when Mathura was examined. He was not sent up when the case first came before the Court. He was made a witness for the prosecution because of a statement he made to the Police; but this he retracted before the committing officer. The Government Pleader declined either to examine him or to tender him for cross-examination, on the legitimate ground that he had been corrupted. He was kept in attendance in order that he might, if needed, be examined for the defence; but the defence declined to examine him." The Judge then went on to consider the evidence, and ultimately convicted Durga of the offence under s. 302 of the Indian Penal Code and sentenced him to transportation for life. He also convicted Madho and Ram Prasad of offences under s. 147 of the Indian Penal Code, and sentenced them to nine months' rigorous imprisonment each.

Durga appealed from jail to the High Court. He was not respresented; but at the hearing of the appeal the Bench concerned [85] (Edge, C. J. and Burkitt, J.) referred to a Full Bench of the whole Court the following question:—"Whether the prosecution is bound at the trial to call all the witnesses entered in the calendar as witnesses for the prosecution; or if not, whether it is bound to put such witnesses at it does not call into the witness-box for cross-examination on behalf of the accused."

On the consideration of the question thus referred, the Public Prosecutor (*Strachey*) laid before the Court numerous authorities which will be found mentioned below.

The opinion of the Full Bench (EDGE, C. J., TYRRELL, KNOX, BLAIR, BURKITT and AIKMAN, JJ.) was delivered by EDGE, C. J. :—

OPINION.

The question which we have to consider is whether in a trial in a Court of Sessions or in the High Court on its Criminal Side, the Public Prosecutor is bound to call all the witnesses returned in the calendar as witnesses for the Crown, or to put such of those witnesses as he does not examine into the witness-box to be cross-examined by or on behalf of the accused in the trial.

The question arose in an appeal to this Court in a case tried by a Sessions Judge in which the Public Prosecutor, acting on his discretion, declined to put into the witness-box some witnesses returned in the calendar as witnesses for the Crown. The question was referred to the Full Bench, in order that the practice in these Provinces on the point might be settled definitely.

At the hearing, the Public Prosecutor drew our attention to the following authorities:—*Queen-Empress v. Tulla* (1), *Queen-Empress v. Stanton* (2), *Empress of India v. Kaliprosono Das* (3), *the Empress v. Grish*

(1) 7 A. 904.

(2) 14 A. 521.

(3) 14 C. 245.

Chunder Talukdar (1), *Queen-Empress v. Ram Sahai Lall* (2), *the Empress v. Dhunno Kazi* (3), *Reg. v. Fattechand Vastackand* (4), *Reg. v. Woodhead* (5) and *Reg. v. [86] Cassidy* (6). He also directed our attention to the texts in *Russell on Crimes* (5th ed., VIII, p. 562.)

We can find nothing in the Code of Criminal Procedure which imposes an obligation on a Public Prosecutor to call all the witnesses entered in the calendar as witnesses for the prosecution in a Sessions trial. The question of a private prosecutor does not arise with regard to a trial in a Court of Session, as by s. 270 of Act No. X of 1882, a Public Prosecutor is the person to represent the Crown in all such trials. We have come to the conclusion that it is entirely in the discretion of the Public Prosecutor conducting the case for the Crown to call or not to call any witness or witnesses at a Sessions trial appearing in the calendar as witnesses for the Crown. It appears obvious to us that it cannot be the duty of a Public Prosecutor acting on behalf of the Government and the country to call or put into the witness-box for cross-examination a witness whom he believes to be a false or an unnecessary witness. The rule in England is made perfectly plain from the decision of Alderson, B., in the case of *Reg. v. Woodhead* (5). That learned Judge gave one very good reason why those representing the Crown cannot be compelled to call a witness who is likely to speak falsely. Referring to such witnesses he said:—"For instance, if they were called by the prosecutor, it might be contended that he ought not to give evidence to show them unworthy of credit; however falsely the witness might have deposed." That ruling of Alderson, B., who was a very great Judge, is supported by a ruling of Parke, B., in *Reg. v. Cassidy* (6). Parke, B., there followed a ruling of Lord Campbell, C. J., after consultation with Cresswell, J. These Judges to whom we have referred were all eminent Judges of the English Bench.

It is the duty of a Public Prosecutor to conduct the case for the Crown fairly. His object should be, not to obtain an unrighteous conviction, but, as representing the Crown, to see that Justice is vindicated; and, in exercising his discretion as to the witnesses [87] whom he should or should not call, he should bear that in mind. In our opinion, a Public Prosecutor should not refuse to call or put into the witness-box for cross-examination a truthful witness returned in the calendar as a witness for the Crown, merely because the evidence of such witness might in some respects be favourable to the defence. If a Public Prosecutor is of opinion that a witness is a false witness or is likely to give false testimony if put into the witness-box, he is not bound, in our opinion, to call that witness or to tender him for cross-examination. In cases in which a prisoner is undefended in a Sessions trial, the presiding Judge should, in our opinion, look at the deposition of any witness appearing in the calendar as a witness for the Crown, and not called on behalf of the Crown or tendered for cross-examination, in order to ascertain whether he should not himself take action under s. 540 of the Code of Criminal Procedure, 1882. All witnesses returned in the calendar as witnesses for the Crown are, whether they are called or not by the Crown, bound to be in attendance until the conclusion of the trial, unless they are released from attendance by order of the Court; and before releasing them from attendance, the Court should satisfy itself that their evidence will not be required either by the prosecution or by the defence. We have used the term "Public Prosecutor" in

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(1) 5 C. 614.

(2) 10 C. 1070.

(3) 8 C. 121.

(4) 5 B.H.C.R. 85.

(5) 1 F. & F. 79.

(6) 2 Car. & Kir. 520.

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the sense in which it is defined s. 4 (m) of Act No. X of 1882. This is our answer to the reference.

The appeal being subsequently returned for disposal to the Bench concerned, the following order was passed:—

ORDER.

EDGE, C. J., and BURKITT, J.—

In this case, which was an appeal for a conviction under s. 302 of the Indian Penal Code and a sentence of transportation for life, we referred a question to the Full Bench. The answer of the Full Bench has relieved us of any difficulty in the case. On the evidence Durga was convicted, and, being convicted under s. 302, he could not have received a more favourable sentence than he did. The appeal is dismissed with costs.

16 A. 88 = 14 A.W.N. (1894) 23.

[88] EXTRAORDINARY ORIGINAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and a Jury.

QUEEN-EMPRESS v. MOSS AND OTHERS. *
[20th November to 12th December, 1893.]

Criminal breach of trust by banker—Payment of dividends dishonestly out of deposits—Directors—Manager and Accountant—Person entrusted with property or with dominion over property—Banker—Agent—Act XLV of 1860 (Penal Code), ss. 405, 409—Cheating—False and misleading balance-sheet—Inducement to renew deposits—Act XLV of 1860 (Penal Code), ss. 415, 418—S. 191—Act VI of 1882 (Indian Companies Act), s. 215—Practice—Joint or separate trials—Criminal Procedure Code, s. 239—Trial of European British subject—Mixed jury—Criminal Procedure Code, s. 451—“Europeans”—Adducing evidence for defence—Documents produced for cross-examination of Crown witness—Right of reply—Criminal Procedure Code, s. 292—Evidence—Criminating answer—Act I of 1872 (Evidence Act), s. 132—“Compelled”—Leposition in inquiry under Act VI of 1882, ss. 162, 163.

When a Bank takes a deposit from its customer, it takes it on the understanding that that deposit is not to be used to pay dividends to shareholders at a time when the Bank is insolvent and cannot legally pay dividends. In the case of a Bank registered under the Indian Companies' Act as a Company limited by shares, and governed by the regulations contained in Table A in the first schedule to the Act, it was *held*, that the Directors had dominion over the property and the management of the funds of the Bank; that they were bound not to pay dividends except out of the profits of the Bank; and that if they dishonestly, that is, knowingly and intentionally, paid dividends to the shareholders out of deposits when there were no profits, intending to cause gain to themselves or others to which they were not entitled, or to cause wrongful loss to other persons, they were guilty of criminal breach of trust as Bankers under s. 409 of the Penal Code. But that the Manager, and the Accountant or Assistant Manager were not, within the meaning of the section, persons who were entrusted with property or with dominion over property as bankers or agents, and therefore did not come directly under s. 409, though they might be guilty of abetment under s. 409, read with s. 109, by conspiring with the Directors to commit criminal breach of trust, if they assisted the Directors to obtain the sanction of the shareholders to the illegal payment of dividends, and did so for the dishonest purpose of causing wrongful gain or wrongful loss.

Whether the illegal payment of dividends under the circumstances stated could be regarded as causing wrongful loss to the Bank as a corporate body, *quære*.

Whether moneys deposited in the Bank by its customers and not in any way ear-marked could, after such deposit, be regarded as “property” of the depositors within the meaning of s. 409, *quære*.

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[89] Held also that if the Directors, Manager, and Accountant dishonestly, that is, to obtain wrongful gain for themselves or to cause wrongful loss to others, put before the shareholders balance-sheets which they knew to be materially false and misleading and likely to mislead the public as to the condition of the Bank, and concealed its true condition, and thereby induced depositors to allow their money to remain in deposit in the Bank, they were guilty of cheating in the aggravated form made punishable by s. 418 of the Penal Code; and if they acted together to put forward such a false balance-sheet, they were guilty of abetment by conspiracy to cheat.

Semble, the making of such a false balance-sheet is not an offence within s. 191 of the Penal Code, and, where it is made prior to the commencement of the winding up of the Company, is not an offence within s. 215 of the Indian Companies' Act (VI of 1882).

A balance-sheet of a company under the Indian Companies' Act must be a true balance-sheet, in the sense that it must represent the actual state of the Company's assets and liabilities. If it falsely states the condition of the company, it is a false balance-sheet, though it follows the accounts as shown in the books of the company, and correctly represents what is in the books. A balance-sheet which showed all the debts owing to the company, amounting to Rs. 28 lakhs, under the head of assets, without specifying, in accordance with the form of balance-sheet annexed to Table A, which of such debts were good and secured, which good and unsecured, and which considered bad and doubtful, and also showed a divisible balance of profits amounting to Rs. 19,000, the facts being that out of the Rs. 28 lakhs some Rs. 13 lakhs were bad and irrecoverable, and that the capital, reserve fund and other provision for bad debts had been lost, and that the company instead of making profits was, and long had been, insolvent, was found to be false and misleading.

Having regard to the nature of the charges above referred to, the Court, under s. 239, of the Code of Criminal Procedure, rejected an application by the defence that the accused should be tried separately.

The word "Europeans" in s. 451 of the Code of Criminal Procedure means persons born in Europe.

The word "compelled" in the proviso to s. 132 of the Evidence Act (1 of 1872) applies only where the Court has compelled a witness to answer a question, and not to a case where the witness has not asked to be excused from answering a question, but gives his answer without any claim to have himself excused.

A deposition on oath made by one of several accused, as a witness in a previous inquiry under ss. 162, 163 of the Indian Companies' Act (VI of 1882) was admitted in evidence against himself only, and not against the other accused.

The action of the defence, during the cross-examination of a witness for the Crown, in tendering a document to such witness and using the same as evidence for the defence was held to entitle the Crown to reply, under s. 292 of the Code of Criminal Procedure.

[F., 4 L.B.R. 5 (7)=6 Cr. L.J. 115; *Rel. on*, 14 Ind. Cas. 653 (654)=6 L.B.R. 46=5 Bur. L.T. 11=13 Cr. L.J. 269 (270); R. 13 Cr. L.J. 888 (893)=17 Ind. Cas. 824=5 Bur. L.T. 143=6 L.B.R. 62 (70); 3 O.C. 79 (82); D., 11 Cr. L.J. 624 (625)=8 Ind. Cas. 325 (326)=9 M.L.J. 20 (21).]

[90] THIS was a trial at the Criminal Sessions of the High Court before Edge, C.J., and a jury, of Frederick Moss, Manager, Charles Greenway, Accountant and Officiating Manager, and Charles Wilson and William Munton, Directors, of the Himalaya Bank, Limited, Mussoorie, upon charges of criminal breach of trust as a banker (s. 409 of the Indian Penal Code), cheating with the knowledge that wrongful loss may be thereby caused to a person whose interest the offender is bound to protect (s. 418), and abetment by conspiracy (s. 107) to commit those offences. The Himalaya Bank, Limited, was a Company limited by shares. It was on the 27th April, 1874, registered under the Indian Companies Act, X of 1866; no articles of association were ever registered; the Bank suspended payment on the 7th July, 1891; and was ordered to be wound up by the Court in August of the same year. The charges upon which the accused

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were tried had reference to the balance-sheets, and Directors' reports issued, and the 10 per cent. dividends declared and paid by the Bank for the half-years ending the 30th of June, 1890 and the 31st December, 1890, respectively. They were in substance that at the end of the half-year ending the 30th of June, 1890, the accused, acting in concert, put forward a balance-sheet and a Directors' report, which stated falsely to their knowledge, that during that half-year the Himalaya Bank had earned a divisible balance of profits amounting to Rs. 19,543-0-7, available for payment of a ten per cent. dividend, and thereby fraudulently and dishonestly induced the shareholders to confirm an illegal *ad interim* payment of that dividend which had been made, not out of profits, but out of deposits; and further induced certain persons to make and renew deposits in the Bank, which they would not have done if the balance-sheet and report had not deceived them into supposing that the Bank was in a solvent and prosperous condition. There were similar charges in respect of the balance-sheet, Directors' report, and dividend for the half-year ending the 31st of December, 1890. For the purposes of this report it will be sufficient to state shortly, by way of example, the substance of the charges made against the defendant Wilson:—

[91] (1) That he on the 1st day of August, 1890, being a Director of the Himalaya Bank, Limited, and, as such, being entrusted as a Banker with dominion over the funds of the Bank, dishonestly misappropriated and converted to his own use certain funds of the Himalaya Bank, Limited, *viz.*, Rs. 1,220, being the dividend paid in respect of certain shares held by him for the half-year ending the 30th of June, 1890, and thereby committed an offence punishable under s. 409 of the Indian Penal Code.

(2) That he committed a similar offence on the 2nd day of February, 1891, in respect of a sum of Rs. 485, being a further dividend on his shares.

(3) That he, on the 1st day of August, 1890, being a Director of the said Bank, and being entrusted as aforesaid, dishonestly disposed of part of the funds of the said Bank, *viz.*, Rs. 8,730, by paying it to the shareholders as a dividend for the half-year ending the 30th June, 1890.

(4) That he, on the 2nd day of February, 1891, being a Director of the said Bank and being entrusted as aforesaid, dishonestly disposed of part of the funds of the said Bank, *viz.*, Rs. 9,515, by paying it to the shareholders as a dividend for the half-year ending 31st of December, 1890.

(5) That he, on the 1st day of August and the 31st day of October, being a Director and being entrusted as aforesaid, engaged in a conspiracy with Messrs. Munton and Greenway to commit criminal breach of trust on the days above-mentioned in respect of the said sum of Rs. 8,730, and thereby committed an offence under ss. 109, 409 of the Indian Penal Code.

(6) That he, on the 2nd day of February, or 29th of April, 1891, being a Director and entrusted as aforesaid, engaged in a conspiracy with Messrs. Munton, Moss and Greenway to commit criminal breach of trust in respect of the said sum of Rs. 9,515, and thereby committed an offence under ss. 109, 409 of the Indian Penal Code.

[92] (7) That he, on the 31st day of October, at Mussoorie, by means of a false balance-sheet, fraudulently and dishonestly induced the persons present at a general meeting of shareholders to consent that the shareholders should retain the said dividend of 10 per cent. for the half-year ending the 30th of June, 1890, amounting to Rs. 9,950, and to confirm the said dividend, and thereby committed the offence of cheating, punishable under s. 418 of the Indian Penal Code.

(8) That he, on the said 31st day of October, entered into a conspiracy with the said Messrs. Moss, Greenway and Muntun for the purpose in the last charge mentioned, and committed an offence punishable under ss. 109, 418 of the Indian Penal Code.

(9) That he, on the 29th of April, 1891, entered into a conspiracy with the said Messrs. Moss, Muntun and Greenway to cheat the shareholders present on that day at a General Meeting, and committed an offence punishable under ss. 109, 418 of the Indian Penal Code.

(10 & 11) That he, on the 16th of July, 1890, and 24th of January, 1891, respectively, was privy to the making of false or fraudulent entries in the balance-sheets for the half-year ending the 30th of June, 1890 and 31st of December, 1890, respectively, and thereby committed offences punishable under s. 215 of the Indian Companies Act, VI of 1882.

The charges against the other accused were closely similar to the above.

The Public Prosecutor (Mr. *A. Strachey*), with whom Messrs. *C. C. Dillon* and *H. Vansittart*, for the Crown.

Messrs. *J. E. Howard* and *C. Ross-Alston*, for Wilson.

Mr. *A. H. S. Reid*, for Muntun.

Mr. *W. Wallach*, for Greenway.

Moss was not represented by counsel or pleader.

Alston, on behalf of Wilson, applied that, under s. 239 of the Code of Criminal Procedure, the Court should in its discretion [93] order that the accused should be tried separately, and not together.

EDGE, C. J., was of opinion that, under the circumstances, the charges involving a conspiracy between the accused should be tried together.

The accused having pleaded Not Guilty, their counsel applied, under s. 451 of the Code, that the trial should be by a mixed jury, of which not less than half should be Europeans.

EDGE, C. J., held that the word "European" in s. 451 meant a person born in Europe.

Strachey, in his opening, stated that he should produce evidence to prove that at the time when the dividends for the half-years ending the 30th of June, 1890, and the 31st of December, 1890, were declared and paid, the Himalaya Bank was insolvent to the knowledge of the accused. He contended that the payment of dividends, at a time when the accused knew that there were no profits out of which alone dividends were legally payable, amounted to criminal breach of trust within ss. 405, 409 of the Indian Penal Code. The payment was made out of moneys placed in the Bank by depositors to be used for legitimate banking purposes, and not for the purpose of distribution as dividends among the shareholders. Such a misappropriation of the funds of the Bank was a disposition "in violation of a direction of law prescribing the mode within which" the trust of the accused "was to be discharged," inasmuch as art. 73 of Table A of the first schedule to the Indian Companies Act, VI of 1882, prohibited the payment of dividends except out of profits, and under s. 38, the regulations contained in Table A must be deemed to be the regulations of the Bank, no Articles of Association having been registered. He also referred to the Specific Relief Act (I of 1877), s. 54, illustration (c). The only remaining question as to the application of ss. 405 and 409 was whether the payment of dividends, not out of profits, but out of depositors' moneys, had been made "dishonestly" within the meaning of the former section and of s. 24. The payment was [94] made intentionally, and with full knowledge of its

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CRIMINAL. EDGE, C. J., said that it was very doubtful whether such a payment could properly be regarded as causing wrongful loss to the Bank. Technically, no doubt, the Bank was distinct from its shareholders, but, in fact, it was composed of the very persons to whom the dividends were paid, and, so far as they were concerned, it seemed immaterial whether they received Rs. 100 as dividend or whether it remained in the Bank as capital. They, in fact, lost nothing by getting the 10 per cent. dividend. If the Bank was actually insolvent, then they got what they would not have got in the event of a winding up of the Bank. Whether besides wrongful gain to the shareholders, wrongful loss had been caused to the depositors, was another question. Further, with regard to s. 409, it was doubtful whether moneys deposited in the Bank were "property" within the meaning of the section, so far as the depositors were concerned. When a depositor paid money on deposit, that money was not ear-marked so as to entitle him to receive the specific rupees he paid in, and consequently, after the deposit, the money deposited was not his property. The moneys so deposited might, however, be within the meaning of the section the "property" of the Bank.

Strachey further contended that s. 418 read with s. 415 was applicable. The accused, by issuing balance-sheets and reports which they knew to be false, deceived the shareholders and induced them to confirm the *ad interim* dividend of 10 per cent. which had previously been paid by the Directors in the exercise of the powers which they possessed. This was inducing the shareholders, within the meaning of s. 415, "to consent that any person shall retain [95] any property." By confirming the *ad interim* dividend, the shareholders made permanent a payment which had up to that time been provisional: they consented that those who had received the dividends should retain them. Deposits had also been renewed and made on the faith of the balance-sheets and reports, and this came within the words "or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes, or is likely to cause, damage or harm to that person in body, mind, reputation, or property."

EDGE, C. J., said that, with regard to the inducement to the shareholders to confirm the *ad interim* dividend, the argument assumed that if the shareholders had been informed of the true state of the Bank's affairs they would have refused to confirm the dividend, and would have refunded what they had received. He was not prepared to presume that they would have done this. But he should tell the jury that if the accused by a false balance-sheet, false to their knowledge, deceived any depositor who was in a position to withdraw his deposit, and thereby induced him to allow it to remain in the Bank, or deceived any member of the general public and so induced him to deposit money in the Bank, they would be guilty of cheating as defined in s. 415.

Strachey next referred to s. 191 of the Penal Code. He suggested that the words "whoever...being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes, to be false, or does not believe to be true," would apply

to the making of a false balance-sheet. He submitted that a balance-sheet was a declaration of the property and liabilities of a Company registered under the Indian Companies Act, which s. 74 of that Act required to be made. Both that section and articles 81 and 94 of table A, implied that the balance-sheet must be a true declaration of the state of the Company's affairs.

EDGE, C. J., said that he did not think s. 191 was applicable to the case. He also thought that s. 215 of the Indian Companies Act, which provides for the punishment of "any director, officer, [96] or contributory of any Company wound up under this Act" who *inter alia* "makes or is privy to the making of any false or fraudulent entry in any register, book of account, or other document belonging to the Company, with intent to defraud or deceive any person," would not apply to false statements contained in a balance-sheet published before the commencement of the winding up of the Company. He should direct the jury to acquit upon the charges under s. 191 of the Penal Code and s. 215 of the Companies Act.

The balance-sheet of the Himalaya Bank for the half-year ending the 30th of June 1890, showed as the principal item on the Assets side, an entry "To Loans, Bills discounted, etc., Rs. 28,10,107-7-6." Another entry on the same side was "To Cash and Treasury drafts Rs. 48,552-8-7." On the Liabilities side there were entries "By Capital, Rs. 2,00,000," "Reserve Fund, Rs. 1,25,000." The difference between the two sides, in favour of the assets, was stated as "Divisible balance, Rs. 19,543-0-7." In an "Abstract of Profit and Loss" annexed to the balance-sheet, on the profits side, the principal entry was "By interest account, Rs. 1,25,948-14-6." In this abstract, again, the divisible balance of profits was stated to be Rs. 19,543-0-7.

Similarly, in the balance-sheet for the half-year ending the 31st of December, 1890, the principal item on the Assets side was "To Loans, Bills discounted, etc., Rs. 28,49,378-1-5." "Cash and drafts" were represented as amounting to Rs. 57,121-8-2. A "Divisible balance" of profits was shown as Rs. 12,953-3-8. In the "Abstract of Profit and Loss" this Divisible balance was again shown, and on the profits side it was represented that there was a balance of profit and loss carried on from the preceding half-year amounting to Rs. 4,543-0-7, and there was an entry "By interest account, Rs. 1,08,236-8-0."

In neither of the balance-sheets was the form of balance-sheet appended to Table A. of the Act and required by s. 74 to be followed as nearly as circumstances admit, complied with. All debts owing to the Bank were shown as assets, without stating which were secured or unsecured, good, doubtful or bad.

[97] The Directors' reports issued with the first balance-sheet was as follows:—"Your Directors have the pleasure to state that after examining the balance-sheet and profit and loss account for the half-year ending 30th of June, 1890, they have decided to pay the shareholders an *ad interim* dividend of Rs. 10 per cent. per annum or Rs. 5 per share as usual. The nett profits have amounted to Rs. 19½ and a fraction, including the balance carried forward from the half-year ending the 31st of December 1889." The Directors' report issued with the second balance-sheet was in similar terms.

The defendant Moss was the Manager of the Bank from its foundation to its close. He was absent on leave from April to the end of September 1890. During his absence, Greenway, who had been Accountant

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1893 since 1879, officiated as Manager, reverting to his post of Accountant
 DEC. 12. upon Moss' return from leave. All entries in the ledgers and other books
 — of account from which the balance-sheets were prepared, were made upon
 EXTRA- orders or vouchers signed by the Manager or the Accountant or both.
 ORDINARY The balance-sheets for 1890 were prepared in the office and submitted for
 ORIGINAL approval first to the Manager, and through him, to the Directors, who
 CRIMINAL. thereupon declared the *ad interim* dividend. The balance-sheet for June
 — was signed by Greenway as Officiating Manager, and the balance-sheet
 16 A. 88= for December was signed by Moss as Manager. The dividends for the
 14 A.W.N. first half-year were paid on a voucher signed by Greenway; and the divi-
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At a meeting of the Directors held on the 16th July, 1890, at which the defendants Wilson, Muntun and Greenway were present, the following resolution was passed:—"The half-yearly balance-sheet ending 30th of June, 1890, having been duly approved of, it is decided to declare the usual *ad interim* dividend of 10 per cent. per annum, and that the usual notice be inserted in the newspapers." In pursuance of this resolution, an advertisement was published in the *Pioneer* of the 24th of July, 1890, notifying that the *ad interim* dividend would be paid on application. The dividend, amounting to Rs. 10,000, was paid on the 1st of August, 1890, to all the [98] shareholders, including the defendants. On the 31st of October, 1890, was held the thirty-second half-yearly ordinary general meeting of shareholders, which was attended by all the defendants. At this meeting, the Directors' and Auditor's accounts and reports were read and adopted, and the *ad interim* dividend was confirmed. In like manner, at the end of the half-year ending the 31st of December, 1890, an *ad interim* dividend of 10 per cent. was declared by the Directors on the 24th January, 1891, advertized in the *Pioneer* by the defendant Moss, as Manager of the Bank, on the 1st of February, paid to the shareholders, including the defendants, on the 2nd of February, and confirmed on the 29th of April by a general meeting of shareholders, at which all the defendants were present.

Mr. F. St. Aubyn King, a public accountant of the firm of Messrs. Meugens, King and Simson, Calcutta, was called as an expert to prove that the balance-sheets were false. He stated that he had examined those balance-sheets and the abstracts of profit and loss. He had also examined some 30 accounts in the books of the Bank, with a view to ascertaining the correctness or otherwise of the balance-sheets. Upon those accounts alone, and without reference to others, he found that out of the item on the Assets side in the 30th of June balance-sheet, "to loans and bills discounted, &c., Rs. 28,10,107-7-6," Rs. 9,06,770-0-3 was bad and irrecoverable. Similarly, out of the corresponding item in the December balance-sheet, Rs. 28,49,378-1-5, Rs. 9,90,150-11-4 were bad and irrecoverable debts. This was after giving credit to the accounts for the securities which the Bank held, in whatever form, and where those securities consisted of life policies, they were taken at the surrender value of such policies. Again, in the abstract of profit and loss for the 30th of June, 1890, the item of Rs. 1,25,948-14-6 under the head of "Interest account" was composed of unrealisable interest to the extent of Rs. 54,217-13-10. Further, the item on the Assets side of the balance-sheet "By Cash and Treasury drafts, Rs. 48,552-8-7," was unduly inflated by including Usance bills, *i.e.*, bills not payable on demand, which it was contrary to banking usage to class under that head. "Cash and drafts" would properly [99] include cash, currency notes, cheques and drafts payable at Mussoorie

on demand. The entry "cash and drafts" in a balance-sheet was intended to indicate the immediately realisable resources of the Bank. The witness gave similar evidence to prove the falsity of the corresponding items in the December balance-sheet. He stated that in neither half-year had the Bank earned a divisible balance of profit, or any profit at all, but it was working at a loss, and was insolvent at the dates when the balance-sheets and reports were issued and confirmed. At those dates the capital, reserve fund, doubtful debt liquidation fund, and unrealized interest account had been lost, having been swamped by the accumulation of bad and irrecoverable debts. The dividends could only have been paid out of depositors' money. Besides giving general evidence to the effect above stated, the witness specifically traced in the books of the Bank particular accounts included as assets in the balance-sheets, and showed the grounds upon which he based his opinion that they were bad and irrecoverable. He stated that the only conditions upon which it would be legitimate to include a bad debt on the assets side in a balance-sheet were (i) the debt being specifically shown as bad according to the form of balance-sheet appended to Table A of the Indian Companies Act, (ii) the debt being covered by provision for bad debts in the reserve fund, doubtful debt liquidation account, or other similar account.

Mr. W. D. Henry, official liquidator of the Himalaya Bank, and agent of the Mussoorie branch of the Alliance Bank of Simla, Limited, was also examined as an expert, and gave evidence corroborating the last witness. He deposed that he had traced the accounts back as far as the 1st of January 1886, and that the Himalaya Bank was then insolvent. If the balance-sheets for June and December 1890 had been correct, the depositors would have got back all their money, and the shareholders nearly all. In point of fact, the depositors would get about three annas in the rupee and the shareholders nothing. The witness had prepared and put in balance-sheets such as should have been issued in June and December 1890. According to these balance-sheets, the Rs. 28 lakhs odd [100] shown in the Bank's balance-sheets were bad and irrecoverable to the extent of about Rs. 14 lakhs. The witness was present at an inquiry held by the District Judge of Saharanpur (in whose Court the winding-up was proceeding) in April 1892, into the circumstances connected with the failure of the Himalaya Bank, under ss. 162, 163 of the Indian Companies' Act. In that inquiry all the defendants were examined on oath.

Strachey proposed to put in as evidence the depositions made at that inquiry by the accused Wilson, Munton and Greenway.

Reid, for Munton, objected that the deposition of his client was inadmissible in evidence under s. 132 of the Evidence Act (I of 1872). The witnesses in that inquiry had not objected at the time to answering any of the questions put to them; but he submitted that they were nevertheless "compelled to give" their answers within the meaning of the proviso to the section, because they appeared in obedience to a summons, and not of their own motion, and they were not entitled to refuse to answer any question while they were upon oath.

Strachey, in reply, contended that the depositions were admissible under s. 132. He referred to the decision of the Full Bench of the Madras High Court in *The Queen v. Gopal Doss* (1), see also *Queen Empress v. Ganu Sonba* (2).

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EDGE, C.J. — In my opinion "compelled" in s. 132 of the Indian Evidence Act only applies where the Court has compelled a witness to answer a question, and not to a case in which the witness has not asked to be excused from answering a question but gives his answer without any claim to have himself excused. I think that in reading s. 132 and considering the word "compelled" in the proviso, we must not overlook the earlier part of the section, which says "a witness shall not be excused." I also come to the same conclusion from a perusal of s. 130 which provides that "no witness who is not a party to the suit shall be compelled to produce his title-deeds to any property." In a case to which that section [101] would apply, it would be entirely optional for the witness to produce his title-deeds, and to raise any objection whatever; and the section would apply if the witness objected to produce his title-deeds. I shall admit the evidence.

The depositions were then put in.

EDGE, C.J., told the jury that the deposition of each of the accused was evidence against himself only, and must not be taken into consideration against the other accused.

Evidence, consisting principally of correspondence and of resolutions recorded in the Directors' minute book, was given to prove that the accused issued the balance-sheets and reports with the knowledge that they were untrue, and declared and paid the dividends with knowledge that the Bank had earned no profits out of which such dividends could be paid. Three depositors gave evidence that they had renewed and made deposits in the Bank solely on the faith of the representations contained in the balance-sheets and reports.

During the cross-examination of one of the witnesses for the Crown, *Howard* asked his Lordship for a direction as to whether, if the defence put a certain document to the witness which had not been proved by the Crown, the Crown would have the right of reply under s. 292 of the Code of Criminal Procedure. [See *Queen-Empress v. Hayfield* (1).]

EDGE, C.J., said that under the circumstances suggested the Crown would have the right of reply.

Howard, in addressing the jury on behalf of Wilson, suggested that the balance-sheets were not false, inasmuch as they were proved to be correct transcripts of the accounts as shown in the books. A balance-sheet must give a correct view of the Bank's affairs, but it could only give such a view as was contained in the books.

EDGE, C.J., said that it was not sufficient that the balance-sheet should accurately show the state of the books: it must, to be a true balance-sheet, show the actual state of the Bank. If the books [102] were false, and the balance-sheet represented the books, then the balance-sheet was false. If the books misrepresented the state of the Bank, then the balance-sheet should show the true state of affairs. No man investing money in the Bank could safely depend on the balance-sheet, if it were held that a balance-sheet was a true balance-sheet if it correctly followed false books.

EDGE, C.J., summed up the case to the jury as follows:—

Gentlemen of the jury, I hope to charge you as shortly as possible. The case which you have to try is probably the most important case that has been tried on the Criminal side of this Court for many years, important to the public and vitally important to the men at the bar. It is of

the utmost importance that the Directors of public Companies and servants of public Companies should obey the law, and that the balance-sheets of public Companies should be true so far as they are capable of making them true—so far as they know. It is absolutely necessary that the investing public should have some security and be able to depend upon the published accounts of Companies. It is equally of the greatest importance to these men that you should not allow yourselves to find them guilty through being prejudiced as to the mismanagement of the Bank before 1890, or any mismanagement during 1890, that is, so long as that mismanagement is not comprised in the charges before you.

Well now, gentlemen, these men are charged with criminal breach of trust, and they are charged with conspiring to commit criminal breach of trust. The charges are framed under ss. 405 and 409 of the Indian Penal Code. I shall explain them at greater length later on. And they are also charged with cheating in respect of depositors who had money in the Bank, and who, it is alleged, were induced by the false balance-sheets to allow their deposits, that otherwise they would have attempted to draw out, to remain in the Bank. They are also charged with conspiracy to cheat. Before going into these particular charges, I think I ought to draw your attention to some of the sections relating to undertakings of this kind to be found in the Companies Act. The Himalaya Bank, of which Wilson was a Director from 1885 to April 1891, was incorporated [103] under Act No. X of 1866. That was an Act passed to regulate Joint Stock Companies, to compel them to be registered in certain cases, and to regulate how such companies should carry on their business. It was an Act to enable a Company like this to carry on business with certain protection to the shareholders, so that, if they chose to register their company as limited by shares, the shareholders, in the event of the company being wound up, would not be liable except for the amount that remained unpaid on their shares. If people as shareholders were not entitled to carry on business under the protection of that Act, they would, in the event of the company becoming insolvent, be liable to the whole amount of their assets to make good the liability of the concern in which they were partners. It is perfectly obvious that when the Legislature enables a body of persons to deal with the public and join in trade with the public and gives them the exceptional protection that the members of the corporation shall not be liable beyond the unpaid amount of their shares, strict regulations should be enforced to compel the Company to disclose the actual state of its affairs, so that persons should know before they dealt with it exactly how the company stood. Well, gentlemen, Act No. X of 1866 was repealed by Act No. VI of 1882. I merely mention it. The two Acts are precisely the same so far as regards any question that concerns you. Under the Act, persons desirous of forming a company, limiting by shares the liability of members, are obliged to register a Memorandum of Association. That Memorandum of Association states the object of the company and how it is to carry on business. This particular company was limited by shares. The Act further, with regard to banking companies limited by shares, enables them to register articles of association of their own, or, the Act says, if they do not they shall be bound by Table A of the Act. It is absolutely necessary for the protection of the public that there should be some such law as this, because you or I or any one who wished to deposit or had money to invest in shares should like to know, not only that the company was limited, but we should like to know how the business was bound to be carried

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on. This particular company seems to have drawn up certain Articles of Association. These articles of association were not registered, and in law and in good common sense, the regulations in the Act became the regulations binding on the company. In one sense, in considering what the accused must have known, it is not very material whether the regulations were those in Table A or not, inasmuch as Articles of Association had been drawn up although they were never registered, and one of the most material points in this case was not overlooked in the private Articles of Association because they coincided with Table A and prohibited them from paying dividends except out of profits. The prohibition in the Act is an absolute one. It is essential for you to bear that in mind. Any person dealing with the company, or having money to deposit, would assume, if he saw that balance-sheet or the report of the Directors, that the company had earned money which enabled them to pay a dividend of 10 per cent. for the half-year. The business of the company is, under the Act of 1866, as of 1882, under the sole and exclusive management of the Directors. The regulations in the Table are absolutely explicit on that point. The article in question is No. 55. I only add this because one of the counsel, in a very able speech, sought to make you understand that Directors had merely the *right* but not a duty to manage. The law says they *shall* manage. Not only article 55 but subsequent articles of the Act say that the business of the company shall be managed by Directors. (His Lordship read article 55 and also articles 72 and 73 of Table A.) Then we come to article 78. I will now read the whole of the article "*Accounts*." The Directors shall cause true accounts to be kept, that is, the books of the company shall be true as far as the company can make them true. Under articles 77 and 80 they have to prepare at least once in every year a statement of profit and loss. Article 72 says, "Once at least in every year the Directors shall lay before the company in general meeting a statement of the income and expenditure"—[reading the whole of the article.] That is the article that describes how the statement of profit and loss is to be made up. Then we come to article 81, which deals with the balance-sheet. "A balance-sheet shall be made out in every year and laid before the company in general meeting, and such [105] balance-sheet shall contain a summary of the property and liabilities of the company arranged under the heads appearing in the form annexed to this table, or as near thereto as circumstances admit." There are other provisions requiring that once a year the accounts and balance-sheet of the company shall be audited, and there is a provision in the Act itself which requires that the balance-sheet that has been submitted and approved by the shareholders shall be sent to the Registrar of Joint Stock Companies. This balance-sheet is the balance-sheet referred to in the schedule of the Act which shows good debts and bad and doubtful debts separately. Well, now, that is how this company was constituted. It was registered as a limited company; the Memorandum of Association was registered, but the Articles of Association were not registered; but so far as is really material to your consideration it is immaterial whether they registered their Articles of Association or not, because the Directors were clearly bound not to pay one single anna as a dividend unless paid out of the profits of the business of the corporation. The Himalaya Bank, having been started as a company limited by shares in 1874, carried on business in the usual way, received money on floating deposit, or current account as you would call it—as you put a thousand rupees into the Allahabad Bank and receive a cheque book. They also received money on fixed

deposit. In a fixed deposit account of this kind you pay your money—most of you have paid money on fixed deposit account before now—that money is repayable only on a date fixed by you and the bank, or so many months after notice of withdrawal as agreed by you and the bank. The bank deals—is entitled to deal—in the way of its business with the money received on deposit, otherwise it could not pay the interest to depositors. It is permitted to allow loans and overdrafts to its customers and invest in landed property, and house property to deal with the money in its *trade* in discounting bills and promissory notes. As to this particular bank, it is perfectly obvious that it has allowed its capital to be drawn away in bad debts and is now in the unfortunate position in which it is—a matter which you have not to consider against these men, because they are not charged with it. Wilson and Muntion may have neglected, and did in fact neglect, [106] their duty by not attending to the ordinary duties of Directors, but you are to disregard that absolutely. The case which they have to answer began, as far as they are concerned, on the 18th or 19th April 1890. This Bank may possibly, through the mismanagement of Moss or the Directors, past and present, be in an absolutely hopeless condition. Do not let that influence your minds. The question is, were these men guilty of the frauds with which they are charged? As I have told you, under Table A of the Act, they are obliged to publish, at least once in every year, a statement of profit and loss, and they are obliged to lay before the shareholders once a year a statement or balance-sheet. The balance-sheet—you are to take this from me, and I think it is hardly necessary for me to say it, because it is only common sense, the balance-sheet, to represent the assets and liabilities of the company, must be a true balance-sheet. It must show the actual condition of the company. It was suggested by one of the counsel who addressed you that the balance-sheet would be a true balance-sheet if it followed the accounts in the books of the Bank, although it showed falsely what was the condition of the company. It is not so in law, nor is it so in common sense. The balance-sheet to be of any use must show the true state of the accounts of the Bank, so that you are entitled to assume that the figures on that balance-sheet are true figures and nothing has been concealed that ought to be told for information. You are then in a position to say if you are safe to trust that Bank or not, and whether if you deal with it you would be likely to lose your money. The balance-sheet which is required under the Companies' Act does give you the very information that is required. The balance-sheet in the former Act is in the same form as that in the present Act, and if you look at it for a moment you will see the material bearing of this column here. (His Lordship showed the balance-sheet in the Companies' Act to the jury.) That is the form in which the company is bound to send the balance-sheet to the Registrar of Joint Stock Companies, after it has been submitted to the shareholders in general meeting. Now if you look at that balance-sheet, you will see on one side it shows the capital, it shows [107] the number of shares and the amount paid per share, the debts and liabilities of the company, the reserves, the profit and loss, and the contingent liabilities of the company; on the other side, the property and assets of the company, the debts owing to the company. This is a very material question, because there were Rs. 28 lakhs shown as loans and bills discounted according to the Bank's balance-sheet. The debts owing to the company must according to the balance-sheet in the Act be divided into and shown in three classes. You have to show good debts for which the company holds security, good debts for which the company holds no

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Now, gentlemen, I come to the particular charges against these men. I shall tell you what these charges are. (His Lordship read s. 409, criminal breach of trust by banker, and s. 405, criminal breach of trust.) I shall tell you as matter of fact that the defendant Directors had dominion over the property, that they had the management of the funds of the Bank. I shall tell you that as Directors they were bound not to pay one anna of dividend out of anything except the profits of the company; and, if you come to the conclusion that they did dishonestly pay dividends for the half-years ending on the 30th of June and the 31st of December, out of the depositors' money when there were no profits, that each of these Directors committed criminal breach of trust. Now, gentlemen, it is not necessary to go into the question, but if it were necessary I should tell you that when a Bank to which the Indian Companies' Act applies takes [108] a deposit from its customer, it takes it on the understanding that that deposit is not to be used to pay dividends to shareholders at a time when the Bank is insolvent and cannot lawfully pay dividends. The defendants are charged under s. 409. The material words in s. 409 are as follows:—"Whoever, being in any manner entrusted with property or with any dominion over property in his capacity of a public servant or in the way of his business as a banker or agent, commits criminal breach of trust in respect of that property" shall incur certain penalties. I have had to consider this case very carefully. I have come to the conclusion that Moss and Greenway cannot be considered to be persons who were entrusted with property or with dominion over property as bankers or agents. So, as to the charges in which they are directly charged—this is apart from conspiracy—with criminal breach of trust, I shall direct you to find them not guilty on those charges. I shall also tell you that if you find that Muntou and Wilson did dishonestly, that is knowingly and intentionally, pay over these dividends when they had no profits, intending to cause gain to themselves or others, to which they were not entitled, or to cause loss to other persons, you must find them guilty under s. 409. But although, in my opinion, Moss and Greenway as Manager and Accountant or Assistant Manager, do not come directly under s. 409, they are charged with conspiring with the other men to commit criminal breach of trust under s. 109 read with s. 409 of the Code. That is the abetment section. The section is as follows—(His Lordship read s. 109 of the Penal Code.) If you should come to the conclusion that Moss and Greenway abetted, that is, assisted Muntou and Wilson to obtain the sanction of the shareholders to the paying of the dividends, if you come to the conclusion that they did this for the dishonest purpose of causing wrongful gain or wrongful loss, then you ought to find them guilty under s. 109 of conspiracy. Then there are the other charges. These charges are charges of cheating and abetting—arising under s. 418 and s. 109 of the Code. Section 418 says—(His Lordship

read the section.) And then we go back to the definition of cheating in s. 415. (His Lordship read this section also.) The way these men are said by the prosecution to have conspired to [109] cheat, whether true or not, was that to their knowledge these balance-sheets were false; that they were materially false; that they acting in concert, concealed the true state of affairs from the depositors and shareholders, and by that concealment the shareholders who were depositors, and depositors not shareholders, were induced to allow their money which was in the Bank on deposit to remain on deposit. It stands to reason and commonsense that if you, or I, or any one else, had Rs. 3,000 or Rs. 4,000 deposited in the Bank, and we were in a position to draw it out, we should draw it out if we knew from the balance-sheet that the Bank was insolvent; on the other hand, if the balance-sheet represented the Bank to be more or less flourishing, we should probably allow our money to remain in the Bank. If these men, intending to defraud the shareholders or depositors, knowingly put forward these balance-sheets, knowing that they were false balance-sheets, then it is your province to find them guilty under s. 418. If you come to the conclusion that they abetted each other by their acts, that is, if you find that they were acting together to put forward a false balance-sheet, you must find them guilty under the charge of conspiracy. I will tell you at the close with regard to some of the charges in respect of the balance-sheet of the 31st of December, you will find Greenway not guilty because there is no evidence to convict him.

The first question we have to consider—or you have to consider, for you are the judges of fact—is this, were these balance-sheets false? We come next to the question whether these men knew at the time the balance-sheets were put before the shareholders that they were false. Was the balance-sheet of the 30th of June 1890, was the balance-sheet of the 31st of December 1890, false and misleading? If you believe the evidence of Mr. King, who is a gentleman of experience, and if you believe the evidence of Mr. Henry, who is a gentleman of great experience and who is the liquidator of the Bank, you must come to the conclusion that each of these balance-sheets was absolutely false and absolutely misleading. Take up the balance-sheet of the 30th of June 1890. In dealing with this balance-sheet I do not intend to take you into details. That is [110] more a question for a banker. We will look at this in a broad way of common sense, as a member of the public would look at it if he were to go to it for information. You will notice there is a divisible balance shown of Rs. 19,543-0-7. Well now, that balance-sheet represents that the Bank was in a flourishing condition; that it was not insolvent; that they had a sum of Rs. 19,543 which could be divided out of profits amongst the shareholders. That is the broad representation that the balance-sheet makes. Let us see what the actual facts were. On the 30th of June 1890, the capital of the Bank was gone. This is the evidence of Mr. King and the evidence of Mr. Henry—and, in fact, according to Mr. Henry, it had been gone so far back as January 1886. Mr. King was the first scientific witness—scientific in the sense that he is a man who thoroughly understands accounts—and the minute of questions prepared by the Directors was put into his hands and he was asked to investigate the accounts. The result of his investigation was that out of these accounts in the minute of questions, which only form a portion of the Rs. 28 lakhs of assets on the left hand side of the balance-sheet, Rs. 9 lakhs were bad debts. If you believe his evidence, and his evidence was

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not shaken in cross-examination or by anything that has so far been seen, assuming for one moment that there were no other bad debts in the Bank on that day, assuming that there were only the Rs. 9 lakhs bad debts in the Bank on the 30th of June, let us see what the condition of the Bank was. What the Bank had was the unrealised interest account of Rs. 71,000 odd, the doubtful debt liquidation account of Rs. 24,000 odd, and a reserve fund of Rs. 1,25,000. The Bank could not have put the whole of that reserve fund against the nine lakhs of rupees, because it was brought out in evidence that the reserve fund was represented by Government paper in the hands of the Delhi and London Bank in their office in Calcutta as security for an overdraft of the Himalaya Bank; and, gentlemen, where they represented a reserve fund of Rs. 1,25,000 the Delhi and London Bank held it for an overdraft, so that the available reserve fund instead of being Rs. 1,25,000 would have been Rs. 29,674. It does not require any elaborate calculation to see that between [111] five and six lakhs had been swallowed up—capital, reserve fund, unrealised interest account and doubtful debt liquidation account. They represented that instead of being in that miserable position, they were in a flourishing position, having a divisible balance of Rs. 19,543. That is the result of Mr. King's evidence. Let us turn now to Mr. Henry's evidence. He prepared the balance-sheet as he was told to prepare it, as of the 30th of June 1890. He has told us that the balance-sheet so prepared has been falsified by his subsequent experience, because he has found that he was not able to collect as much of the assets as he would have hoped on the 30th of June 1890 to have been able to collect but on the face of it, as made on 30th of June, of that Rs. 28 lakhs, there were Rs. 13 lakhs of bad and irrecoverable debts. Look what ought to have appeared for the information of the public. They would have had shown so much as good debts, so much as good debts unsecured, and Rs. 13 lakhs as absolutely bad and irrecoverable, instead of showing Rs. 28 lakhs as assets. That would, according to Mr. Henry's statement, have been a true balance-sheet, because that was the true state of affairs, as far as could be judged on the 30th of June 1890.

We come to the balance-sheet of the 3rd of December 1891. It shows the same state of affairs. It represented that the available balance was Rs. 12,953-3-8, which the Bank might divide amongst the shareholders. On the 31st of December the capital was all gone, the reserve fund was still pledged to the Delhi and London Bank, and instead of a balance reserved in Government paper, it was pledged for Rs. 1,50,000. Well, then, the result is they get an unrealised interest account amounting to Rs. 1,07,468, a doubtful debt liquidation account amounting to Rs. 19,529. But the accounts, which Mr. King tells us were Rs. 9,87,000 in June 1891, in the minute of questions, were still about the same figure—9 lakhs on 31st of December, absolutely bad and irrecoverable, and, according to Mr. Henry's more practical test, Rs. 14 lakhs. So that on 31st of December 1891, instead of the company having a divisible balance of Rs. 12,953, there was included in the Rs. 28 lakhs some Rs. 14,42,000 of absolutely bad and irrecoverable debts. You [112] will say whether that was an honest balance-sheet, whether it was a true balance-sheet or not. As to whether this was a true balance-sheet, or not, you will remember that Mr. Howard told you a balance-sheet was true if it correctly represented what was in the books. I told you that, as so stated, that was not the law. But let us apply Mr. Howard's method. There was a book called the Z. Loan Ledger. The evidence in regard to this

book was that any account that was not considered good was entered in it. When an account was entered in the Z. Loan Ledger no further interest was charged. The Z. Loan Ledger was a sort of mortuary index in which they placed the accounts which the Manager considered absolutely bad and irrecoverable. I suppose they did not like to call it the Bad Debt Ledger, so they called it the Z. Loan Ledger. If Mr. Howard's view that a balance-sheet is only false if it is not according to the books is correct, these balance-sheets were false in that view, as according to the evidence of Sells, if you believe it, in the Rs. 28 lakhs shown in the balance-sheet of the 30th of June 1890, Rs. 1,13,000 belonged to the Z. Loan Ledger. This had been put into the Z. Loan Ledger as bad, by the Manager of the Bank. If they had made the balance-sheet in the form laid down in the statute, they would have shown at least that Rs. 1,13,000 on the face of the balance-sheet as bad and doubtful debts. Let us turn to the balance-sheet of December. According to Sells' evidence in it Rs. 1,15,000 was taken from the Z. Loan Ledger. Captain Leahy is not a witness of any great skill, but he, as an ordinary man of common sense, when asked how he makes out his accounts, said he did not take bad debts into his balance-sheet as assets. The public were never informed that a portion of the Rs. 28 lakhs consisted of bad and doubtful debts. Now, gentlemen, were these balance-sheets misleading? It only requires the question to be asked to be answered. If you wanted, on the 30th of June or the 31st of December 1890, to buy shares of the Bank or to deposit money, would you have the slightest idea that this Bank was absolutely insolvent, that if you invested in shares you would not get a farthing back, and if you deposited money you would get in the [113] course of the liquidation three annas in the rupee? Were they misleading when the Bank was absolutely insolvent, when nearly half of what were represented as assets were bad debts?

Hogan, the conductor in the Ordnance Department, trusted to the balance-sheet of the 30th of June 1890. He did not trust to the other, because he did not get it before renewing his deposit. He had some few thousand rupees in the Bank. He trusted to the balance-sheet and the reports of the Directors and the auditor. Lightning apparently was deceived by both balance-sheets. He says he got both, and looked at them and would not have left his money in deposit if he had known the Bank was insolvent. You will see for yourself: no one looking at either of those balance-sheets would suspect that the Bank was insolvent. Campbell again says he was deceived by the balance-sheet of the 30th of June 1890. You may, I think, be quite certain that these men looked and saw the amount of divisible profits and came to the conclusion "The Bank is going on well. I shall be quite safe to leave my deposit there."

The next question is, if you come to the conclusion that their balance-sheets were false and misleading, did these men know, when the balance-sheets were put out, the approximate amount of the bad debts; did they know that instead of there being a divisible balance on the 30th of June and the 31st of December, there was in fact no money to divide at all, unless they put their hands into the pockets of the depositors? In the first place, I draw your attention to Moss. Moss, you know, had been Manager since 1874. Up to the time when he went to Australia in 1890, the public apparently had perfect confidence in this Bank. They considered that it was in a flourishing condition. There was not a single word against the Bank. Shortly after Moss went to Australia there were rumours, according to the evidence of Sells, that the Bank was not in the condition it was supposed to be in. A question was put by Moss in

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cross-examination as to who let out the secrets of the Bank. I do not know what secrets. The Bank was in an insolvent condition. That secret was kept strictly, [114] and so long as Moss was in control of the Bank books no person outside Moss himself, and possibly Greenway, appears to have known that the Bank was insolvent. Moss came back from Australia; but before he comes back the Directors, having had it suggested to them by Greenway, looked into the accounts themselves. They drew up a minute of questions and they put that minute of questions into Moss' hands and required him to answer it. And Moss took nine months before he gave his answer. And what was his written answer when it was produced? At any rate, we have what Munton and Leahy thought about it. You heard their observations. There was hardly a single answer except two or three referred back for a further answer, which they did not declare to be unsatisfactory, most unsatisfactory, entirely unsatisfactory. He took nine months to prepare the answer which two Directors considered entirely unsatisfactory. It is hardly possible to conceive that Moss did not know what the state of the Bank was. It is impossible that Moss, who had been granting these loans, did not know the state of the Bank. (His Lordship took up the accounts of Jager, and described their condition.) He must have known the state of the Bank. It is impossible, in my opinion, to conceive the contrary. He did know of the Z. Loan Ledger, because it was Moss himself who started it, and in it were accounts included in the Rs. 28 lakhs represented as assets in the balance-sheets of the 30th of June and the 31st of December. Leahy has sworn that there were sums included in it which have been in the Z. Loan Ledger as far back as 1887. When you come to consider whether these balance-sheets were false, it will be for you to consider if Moss could have believed that on the 30th of June there was a divisible balance of Rs. 19,543 in June, and a divisible balance of Rs. 12,953 in December.

Greenway had been for several years an Accountant in the Bank. If you believe the evidence of Captain Leahy, who was called for the defence, it was Greenway who told the Directors they had better look into the loan accounts themselves. What object Greenway may have had in giving that advice one does not know; whether it was a good motive to put the Directors on their guard, [115] or whether he hoped to succeed Moss as manager one cannot tell. But it was Greenway who made the suggestion that the Directors should examine the affairs of the Bank. Greenway acted till Moss returned in September, and Greenway was consulted about these very accounts. When the Directors were going into the accounts Captain Leahy, in the first instance, said they did not derive material assistance from Greenway, but at a later period, when he was pressed as to his knowledge of the securities held by the Bank, he said his knowledge of the securities was knowledge derived from Greenway. This is what he said—(His Lordship read parts of Captain Leahy's evidence.) But he also told us that though Greenway was not always present, the Directors sent for him when they wanted information. The questions were entered in Greenway's own handwriting, so that he must have had them before him. Not only was he consulted, but he had the actual minute of questions, because it was in his own handwriting. It does not require the skill of an accountant to understand some of the questions that were asked. Take Jager's account. (His Lordship read the questions on this account, and also those on Herzog's account.) Greenway knew all this, and it was Greenway who put the Directors on the inquiry which resulted in the minute of questions. It was Greenway

who was consulted when they did not understand the accounts, and it was Greenway who explained the Z. Loan Ledger and the value of the securities. There is the question of *hundis*. Now these *hundis*, according to the evidence of Greenway, were *hundis* given by the Directors, because he thought that some deposits would have to be met in July, and these two Directors and Greenway gave each two drafts, making a total of Rs. 14,500. Well, gentlemen, what he did with those *hundis* did not affect at all Moss or Munton or Wilson, because there is no evidence to show that they knew what he did with them. What did Greenway do with them? He gave them to Narain Das. He came to Narain Das on 30th of June with these six *hundis* apparently in two bundles of three each, and said one bundle was to be sold, and he said:—"Do not sell the others until you get orders or until they [116] are wanted." Narain Das asked whether they were to be entered as cash or *hundis*, and Greenway told him to enter them as cash. We know that, as a matter of fact, some of them never were converted into cash, and yet they appeared by Greenway's orders on the 30th of June as cash, and bills in the hands of the Bank. It is ridiculous to call these *hundis* cash. The cash was swelled by the entry of the *hundis* to the extent of Rs. 14,500. It is a matter of common sense, supposing you were looking at the balance-sheet, whether you would not consider it material to see how much cash the Bank held at a certain time. If you found that on the 30th of June the Bank held in its hands a small amount of cash you would not think so well of the Bank. It was by Greenway's directions that these *hundis* were entered as cash in the balance-sheet when he knew that in fact three had been discounted and three had not. They were all represented in the balance-sheet as actual cash. It is a question for you to say whether the evidence in regard to these *hundis* leads you to the conclusion that the balance-sheet so prepared was a false balance-sheet or not. Well you know Greenway must have known about the Z. Loan Ledger. He must have known about the Ledger, because it was one of the books he had kept in the Bank for years as the Accountant. Captain Leahy tells us that it was Greenway who told the Directors what was the Z. Loan Ledger. Is it possible that Greenway could consider that this was an honest balance-sheet when, on the face of it, it contained as assets the accounts of the Z. Loan Ledger which were considered by the Manager to be absolutely bad debts? We must consider the probabilities of the case. It is impossible to get into the minds of men, but you must judge by what the men did what knowledge they had in coming to a conclusion whether Greenway, Moss and Wilson knew these accounts to be false. A good deal of stress was laid on Greenway wishing to draw out the deposit which was in his own and his wife's names. With regard to that all I can say is this: I am not satisfied he was not entitled to draw it out. He may or may not have been entitled to draw it out, but I am not satisfied [117] that he was not, and we cannot say what necessity he had. Whether knowing or not that the Bank was in a bad condition, he may have wanted his money. It is said by the prosecution that the reason was that he knew the Bank would fail and he would lose the money if it were left in the Bank.

Now we come to Wilson, and you have to come to a conclusion whether the balance-sheets of the 31st of December and the 30th of June 1890 were false balance-sheets or not with regard to Wilson and Munton. You will have to consider carefully whether these men, in making these minutes, could have been under any mistaken impression as to the position of the

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1893 Bank. Moss on the 18th of April 1890 left for Australia. The evidence
DEC. 12. is that Greenway advised the Directors to look into the loan accounts
 — for themselves, and on the 19th of April the three Directors met—Wilson,
EXTRA- Muntun and a man called Nash, who was then a Director. I shall draw
ORDINARY your attention to the first three paragraphs of the minute. (His Lordship
ORIGINAL read the paragraphs.) It is impossible for Wilson and Muntun to suggest
CRIMINAL. that they were under any misapprehension as to the form of the balance-
 — sheet to be issued, because so far back as April there appears in the minute :
16 A. 88= "With reference to the heading of bad and doubtful debts noted in the
14 A.W.N. form of balance-sheet annexed to the Companies' Act, resolved that the
(1894) 23. Directors look into the account." And—"The doubtful debt liquidation ac-
 count at present standing in the floating ledger has always been embodied in
 the balance-sheet under the heading 'Floating Deposits.' Resolved that the
 Directors examine the account." After this comes the eighth paragraph :—
 "With reference to dividend, which is made up of interest of accounts real-
 ised and on good accounts that are realisable, resolved that the Directors
 overhaul the accounts." So you see, on the 19th of April, these two Direc-
 tors, Wilson and Muntun, were alive to the fact of there being the form of
 balance-sheet in the Companies' Act and to the necessity of looking into the
 doubtful debt liquidation account and the bad and doubtful debts of the Bank.
 The next meeting was on 3rd of May, and at that meeting Wilson, Leahy and
 Muntun [118] were present. The only thing that is material is that Green-
 way having applied for a remuneration during the Manager's absence on
 leave, it is "resolved that, owing to the unsatisfactory manner in which loans
 and overdrafts have been granted during Mr. Moss' incumbency, the
 sum of Rs. 200 be deducted from Mr. Moss' pay, and that the amount
 be paid to Mr. Greenway, as the establishment expenses cannot be
 increased." Ask yourselves, what do they mean by that? Could any
 one reading that minute come to any conclusion other than that the
 accounts had got into an unsatisfactory condition owing to the reckless way
 Moss had invested the Bank's money? They had been investigating
 the affairs of the Bank. We know that the minutes show Jager's account
 as it stood about the 18th or 19th of April. It is for you to say, having
 regard to that minute, if you can come to the conclusion that they were in
 possession of information showing the unsatisfactory condition of the ac-
 counts. The next minute I shall draw your attention to is that of the 10th of
 July. (His Lordship read paragraph 8, which referred to debts barred owing
 to the statute of limitation having been exceeded.) Now this shows that
 by the 10th of July they had got considerable information; they had
 known several instances in which debts due to the Bank were barred by
 limitation, and debts allowed to run on in the books of the Bank. Then
 comes the minute of the 16th of July. In that minute the only important
 thing is the resolution that "Mr. Moss before resuming charge of his office
 be asked by the Directors personally to explain how all bad debts which
 have occurred are to be realised, and also about the premium on policies
 which the Bank has been paying." The next thing is the minute of
 questions. (His Lordship read passages from the minutes on several
 accounts in which securities were referred to). Does not that lead you
 to the conclusion that at the time they entered Dyer's account in that
 minute of questions they had been investigating Dyer's account and
 looking into the securities they held for it? There are some others, and
 under the heading of "Acceptances on account of Buckle and Co." there
 was the question "Why were these taken? Was it not to show a cash
 [119] balance in the half-yearly account?" If there was any evidence

to fix the Directors with knowledge in regard to the entry of the *hundis* as cash in the balance-sheet of July that was rather an important question, because it would make one imagine that acceptances were taken for purposes of being shown as cash in the cash balances. The next question is "Reserve Fund." The "Manager must explain why and how a large portion of the Reserve Fund has been squandered." Then there is the meeting of the 16th October, in the minute of which they say: "The Directors find it absolutely impossible, considering the present financial state of the Bank, to sanction the increase of Rs. 200 per mensem, the extra sum Mr. Greenway drew while officiating as Manager." I was under a misapprehension about this the other day. Greenway wanted to have this officiating allowance made permanent. But the force of this was that this came on the 16th of October, shortly before the meeting of the general body of share-holders. They say it is impossible to sanction the increase. They want Greenway to go on and do Assistant Manager's and Accountant's work, and, notwithstanding, refuse the Rs. 200 that he asks; and this is the Bank which professed to have a divisible balance of Rs. 19,543. On the 29th of October there is a minute which has a little bearing on the knowledge of the Directors. You know Captain Leahy professed in the witness-box at first that the other Directors knew as much as he, and he as much as they, did, and he professed never to have heard what the surrender value of a policy was. Then he admitted he knew shortly after the Bank failed, but he was present at the meeting of the 29th October 1890, in regard to Hazlett's letter requesting that the Directors will take a "mortgage bond pending settlement of his decree against Lachman Das, or realisation of surrender value of the policy." Have you any doubt in your minds that the Directors on the 29th of October knew the difference between the surrender value and the nominal value of a policy? The only other minute I shall draw attention to is that of 10th of December. (His Lordship read the minute, which related to the duties of the officials of the Bank.) I shall draw attention to any others if the accused wish. So far as the minutes are [120] concerned the conclusion which an ordinary man would draw is, it appears to me, the conclusion that these Directors had been investigating the accounts and had arrived at a considerable knowledge of the actual condition of the Bank before the 29th of October. Let us see what knowledge Wilson's letters show. (His Lordship read part of the letter written by Wilson to Moss immediately on the latter's return from Australia.) That was written on the 13th of November 1890, a few days after the General Meeting of the shareholders of the 31st of October, when they sanctioned the dividend. "You know, and I unfortunately now know, the causes and the unprofitable nature of the transactions that have so seriously affected the prosperity of the Bank." The next letter I would draw your attention to is the letter of the 7th of February. About that time he wrote a good many letters with reference to Moss. (This letter his Lordship read.) It is the letter to which the postscript belongs. There is another, a letter from Wilson to Leahy. This is with regard to the loan they were trying to get from the Mussoorie Bank. (His Lordship read passages from this letter also.) I must say this much as regards Wilson. Wilson's letters do show an honest wish to deal fairly between himself and the Bank and the general body of creditors. They show that he was taking objection to handing over a number of securities, and that although he was anxious that his wife's deposit should be paid, he did not press for it if it was not convenient to the Bank to re-pay it. It is possible you may

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come to the conclusion that he is guilty of these charges. It is for me to take this into consideration. I must say that he seems to me to have had a more honest mind than the other defendants had. It is for you to consider whether these letters do not show that Wilson knew about the condition of the Bank. You have evidence that Wilson gave when he was examined before the Judge of Saharanpur. (His Lordship read a number of extracts from Mr. Wilson's evidence.)

16 A. 88=
14 A.W.N.
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Let us turn now to Munton, and I will deal with the case against him very shortly. Everything I have said with regard to Wilson, except about the letters, will equally apply to Munton. Munton was associating himself with Wilson. He was attending as [121] much to the business as Wilson, and if you draw a conclusion from the minute of questions of the Directors that the Bank was insolvent to Wilson's knowledge, you should draw the same conclusion with regard to Munton. There is Exhibit 107 to which Mr. Strachey has drawn your attention. (This was the document containing "Matters to be discussed at the next General Meeting of shareholders to be held on the 25th of April 1890" with notes in red ink in Munton's handwriting.)

[His Lordship read several of these notes.] "Balance-sheet to be prepared in accordance with sample given in Companies' Act." Dividend made up from interest unrealised is paying dividend out of capital, and is a breach of trust on the part of Directors." That was Munton's note before the balance-sheet of June 1890 came into existence, and it shows the state of the mind of Munton before he had begun his investigation. Then there are one or two points in the evidence he gave before the District Judge of Saharanpur. (His Lordship read a number of passages from Munton's evidence.) Take his answers into consideration. They have been read to you, and you will come to a conclusion as to whether it is possible that Munton did not know when these balance-sheets were drawn up that they represented the Bank as a solvent Bank when he knew that the Bank was insolvent.

If you come to the conclusion that these men or any of them knew that these balance-sheets were false and misleading, the question is, what was their motive? We cannot get into their minds and make them tell us. But one thing is clear, from your own experience of life, that if these balance-sheets had disclosed what, according to Mr. King and Mr. Henry, was the real state of affairs on the 30th of June and the 31st of December 1890, the Bank would have closed its doors the next day. They represented the Bank as a going concern, able to pay its debts in full, and with profits to divide amongst the shareholders. They would induce the public, as a matter of common sense, to come in and desposit their money and not to withdraw their deposits from the Bank. We have the evidence of three men who were depositors and who, satis-[122]fied with the condition of the Bank as shown in the balance-sheets, did renew their deposits instead of withdrawing those deposits from the Bank. This is the case. You are not to allow yourselves to be influenced by the unfortunate condition the Directors, the Manager or the Assistant Manager have brought the shareholders or depositors into. You are not to allow yourselves to be influenced by the fact that the Directors neglected their duty. You are not to find these men guilty unless you are satisfied that they put forward balance-sheets that were false. Further than that, you ought not to find them guilty unless you think that they dishonestly, that is, to obtain wrongful gain for themselves, or to cause wrongful loss to others, put before the shareholders the balance-sheets, know-

ing them to be false and misleading, and likely to mislead the public as to the true position of the Bank. As to the particular charges against them, you are to acquit Greenway under s. 418 of all the charges relating to the 31st of December 1890. I direct you to acquit him on this charge, because there is no evidence. I direct you to acquit Moss of the charges under s. 409 of the Indian Penal Code, which charge him with criminal breach of trust. I ask you to say whether Wilson and Muntun did not commit breach of trust in respect of the dividends which they received on the 30th of June 1890 and the 31st of December 1890.

I ask you also to say whether they did not commit criminal breach of trust in respect of the general dividends paid to shareholders for those two half-years. I shall ask you to say whether Wilson and Muntun, Moss and Greenway did not conspire to commit criminal breach of trust in respect of the dividends for the 30th of June 1890. I ask you also whether these men did not conspire to cheat by the balance-sheet of the 30th of June 1890, for although Moss was not in the country when the balance-sheet was prepared, he was at the meeting of shareholders where the balance-sheet was put before the shareholders. I would ask you to say whether Wilson and Muntun did not commit criminal breach of trust in respect of the payment of dividends for the 31st of December 1890. Wilson, you remembered, had tendered his resignation before [123] the 29th of April 1891. The dividend was paid in February. I have to ask you whether Moss was not guilty of conspiracy to commit criminal breach of trust in respect of the dividend of the 31st of December 1890. And with regard to that I should certainly point out that Wilson in February 1891 was dissenting, and dissenting strongly, from the payment of the 10 per cent. dividend. He seems to have been taking an honest view of matters. You may come to the conclusion that Muntun was guilty and Wilson was not. It is entirely a matter for you.

I ask you whether Wilson and Muntun or Moss or any of them were guilty of cheating in respect of the representation as to the balance-sheet of the 31st of December.

Now with regard to that there is only the evidence of one man, Lightening. The other two men renewed their deposits on the balance-sheet of the 30th of June. On the other charges I shall direct you to acquit all.

The jury retired and returned in less than a quarter of an hour, and the foreman particularised the charges on which they found the prisoners guilty and on which they found them not guilty. They found them guilty on the bulk of the charges, acquitting them on those charges on which the Chief Justice had so recommended them.

JUDGMENT.

*Sentence was passed as follows:—*Moss, eighteen months' rigorous imprisonment under s. 418 read with s. 109 of the Penal Code, in reference to the balance-sheet for June, 1890, one day's rigorous imprisonment under s. 409 read with s. 109 in reference to the June dividend and eighteen months' rigorous imprisonment under s. 409 read with s. 109, in reference to the dividend of December 1890; total, rigorous imprisonment for three years and one day. Muntun, eighteen months' rigorous imprisonment under s. 409 and s. 409 read with s. 109, in reference to the dividend of June 1890, one day's rigorous imprisonment under ss. 418 and 418 read with 109, in reference to the balance-sheet of June 1890, eighteen months' rigorous imprisonment under ss. 418 and 418 read with s. 109,

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1893 [124] in reference to the balance-sheet of December 1890, and one day's
 DEC. 12. rigorous imprisonment under ss. 409 and 409 read with 109, in reference
 — to the dividend of December 1890; total, three years and two days.
 EXTRA- Wilson, twelve months' rigorous imprisonment under ss. 409 and 409 read
 ORDINARY with 109, in reference to the dividend for June 1890, one day's rigorous
 ORIGINAL imprisonment under ss. 418 and 418 read with s. 109, in reference to the
 CRIMINAL. balance-sheet for June 1890, twelve months' rigorous imprisonment under
 — ss. 418 and 418 read with 109, in reference to the balance-sheet for Decem-
 16 A. 88= ber 1890, and one day's rigorous imprisonment under s. 409 and s. 409
 14 A.W.N. read with s. 109, in reference to the dividend for December 1890; total, two
 (1894) 23. years and two days. Greenway, six-months' rigorous imprisonment under
 ss. 409 and 109 in reference to the dividend for June 1890, and six months'
 rigorous imprisonment under ss. 418 and 109, in reference to the balance-
 sheet for June 1890.

[For a case closely analogous on almost all points to the above, see *Reg. v. Esdaile* (1 F. and F. 213). See also *Reg. v. Burch* (4 F. and F. 407); *Burnes v. Pennell* (2 H.L.C. 497), per Lords Campbell and Brougham; Lindley on Companies, 5th ed., pp. 87, 433 and 488; and "a report of the trial before the High Court of Justiciary, Her Majesty's Advocate against the Directors and the Manager of the City of Glasgow Bank" by Charles Tenant Couper, Advocate (Simpkin, Marshal & Co.)—A. S.]

16 A. 124 = 14 A.W.N. (1894) 10.

REVISIONAL CRIMINAL.

Before Mr. Justice Knox and Mr. Justice Burkitt.

QUEEN-EMPRESS v. BISHESHAR.* [4th December, 1893.]

Act XLV of 1860, s. 211—False charge of offence punishable with death—Criminal proceedings not instituted—Jurisdiction of Magistrate to try the case.

To constitute the offence defined in the second paragraph of s. 211 of Act No. XLV of 1860, it is necessary that criminal proceedings should be instituted. Where the offence committed does not go further than the making of a false charge to the Police, the making of such charge does not amount to the institution of criminal proceedings, and the offence committed will fall within the first paragraph of s. 211, notwithstanding that the offence so falsely charged may be one of those referred to in the [125] second paragraph of that section; *Queen-Empress v. Pitam Rai* (1) and *Queen-Empress v. Parahu* (2) followed; *Karim Buksh v. The Queen-Empress* (3) dissented from.

[Diss., 20 M. 79 (80) = 1 Weir 189; 2 N.L.R. 119 (120) = 2 Cr.L.J. 240; F., 6 A.L.J. 989 (990) = 11 Cr.L.J. 54 = 4 Ind Cas. 812; R., 24 A. 368 (371); 22 B. 596 (600).]

THIS was a reference made by the Sessions Judge of Benares under s. 438 of the Code of Criminal Procedure.

The essential facts of the case and the reasons which led to the making of the reference will be found stated in the Judge's referring order, which is as follows:—

"Appellant has been convicted by the Joint Magistrate of making a false charge of murder to the Police under the 1st clause of s. 211 of the Indian Penal Code. In my opinion a case of this kind falls under the second clause of s. 211, of the Indian Penal Code, and is therefore exclusively triable by the Court of Sessions. The Joint Magistrate quotes

* No. 544 of 1893.

(1) 5 A. 215.

(2) 5 A. 598.

(3) 17 C. 574.

Queen-Empress v. Pitam Rai (1) in support of his procedure. Besides this there is the Allahabad case *Queen-Empress v. Parahu* (2). These rulings were followed in the Calcutta case *Queen-Empress v. Karim Buksh* (3).

"Since those decisions, however, there has been the Calcutta Full Bench ruling in *Karim Buksh v. The Queen-Empress* (4), which distinctly lays down that a case of this kind comes within the second clause of s. 211, Penal Code.

"The rule in civil cases is laid down by both the Allahabad and Calcutta High Courts that subordinate Courts should follow the rulings of their own High Courts, *Imam Ali v. Saadat Ali* (5) and *Korban Ally Mirdha v. Sharoda Proshad Aich* (6). I do not know whether this also applies to criminal cases or not, and therefore hesitate to disregard the rulings in *Queen-Empress v. Pitam Rai* and *Queen-Empress v. Parahu* and act under s. 423 of Act No. X of 1882.

As the ruling in *Karim Buksh v. The Queen-Empress* (4) seems to me to be the one which should govern such cases in future, I think it better to submit the record of the case to the Hon'ble High Court for orders under s. 438 of Act No. X of 1882.

[126] The Court (KNOX and BURKITT, JJ.) after hearing the Public Prosecutor (for whom *Dillon*) delivered the following opinion:—

OPINION.

We have heard the learned public prosecutor, who, after a careful study made of the rulings of this Court, found himself prepared to support those rulings and not to contend for the view expressed in *Karim Buksh v. The Queen-Empress* (4). We have read that case, and, with all respect to the learned Judges who decided it, find no reason to differ from, and prefer following the rulings previously delivered by this Court. Let the papers be returned with this order to the Sessions Court of Benares.

Order accordingly.

16 A. 126 = 14 A.W.N. (1894) 3.

APPELLATE CIVIL.

Before Mr. Justice Tyrrell and Mr. Justice Blair.

WAZIR KHAN AND OTHERS (*Defendants*) v. KALE KHAN AND ANOTHER (*Plaintiffs*).^{*} [6th December, 1893.]

Pre-emption—Decree conditional on payment of pre-emptive price within a fixed period—Appeal after expiry of such period.

Held that plaintiffs in a pre-emption suit, who had obtained a decree conditioned on payment by them of the pre-emptive price within a certain fixed period, could, after the expiration of such period, appeal against such decree on the ground that a condition of the contract out of which their right to pre-empt arose had not been embodied in the decree. *Kodai Singh v. Jaisri Singh* (7) referred to.

[*Diss.*, 18 A. 223 ; R., 49 P.R. 1906 = 104 P.L.R. 1906.]

^{*} Second Appeal No. 131 of 1892, from a decree of Maulvi Shah Ahmad-ullah, Subordinate Judge of Meerut, dated the 20th November 1891, modifying a decree of Muhammad Ruh-ullah, Munsif of Meerut, dated the 8th May 1890.

(1) 5 A. 215.

(2) 5 A. 598.

(3) 14 C. 633.

(4) 17 C. 574.

(5) 2 A.W.N. (1882) 106.

(6) 10 C. 82.

(7) 13 A. 376.

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THE facts of this case were as follows :—

The plaintiffs sued in the Court of the Munsif of Meerut for possession by right of pre-emption of a certain piece of land. There were five defendants, the vendor and four purchasers of the land in suit. The plaintiffs alleged that the defendant vendor, being a relation of their own, had, in contravention of the plaintiffs' right of pre-emption, sold the said land to the other defendants, who were strangers; and that, though demand had been made, the defendants all refused to allow the plaintiffs to pre-empt. The plaintiffs also alleged [127] that, in order to defeat their right, the defendants had put a fictitious value upon the property. The claim was based on the *wajib-ul-arz* and on the custom of the village.

The defendants, vendees, denied that the plaintiffs had any preferential claim to themselves in virtue of their relationship to the vendor. They asserted that the law governing both parties was the Muhammadan law, and that the plaintiffs could not rely on the *wajib-ul-arz*; and that, in fact, the contract had been made with the full knowledge and consent of the plaintiffs.

They also denied the plaintiff's allegation that a fictitious price had been entered in the sale-deed.

The Court of first instance found all the issues in favour of the plaintiffs and gave them a decree for pre-emption, conditioned on their paying within a specified time to the defendants, vendees, the sum alleged by them in their plaint to be the true pre-emptive price.

The plaintiffs did not pay the pre-emptive price as decreed to the defendants, vendees, within the time limited by the decree of the first Court; but after the expiration of such period they appealed to the Subordinate Judge, on the ground that, as the vendees had in fact never paid the purchase money to the vendor, but still held it in deposit for the benefit of one Tansukh, the vendor's mortgagee, and as it was one of the conditions of the sale that the purchase money should not, in fact, go to the vendor but to Tansukh, they, the plaintiffs, ought not to be compelled to pay the purchase money to the vendor.

The appeal was resisted on the ground that no appeal could be preferred after the time limited for the payment of the purchase money by the decree of the Court of first instance had expired. That objection however was overruled, and as to the appellants' plea in appeal, the Court held that they were entitled to take advantage of the above-mentioned condition in the sale-deed. The Court accordingly decreed the plaintiff-appellants' appeal and ordered that the purchase money should be held in deposit for Tansukh by the plaintiffs.

[128] From this decree the defendants, vendees, appealed to the High Court.

Mr. Fateh Chand, for the appellants.

Pandit Sundar Lall, for the respondents.

JUDGMENT.

TYRRELL and BLAIR, JJ.—The appellants here were defendants in a pre-emption suit. A Munsif had given the pre-emptors a decree conditioned on their paying before a fixed date a certain sum to the credit of the vendees, whose contract the pre-emptors had succeeded in acquiring. The pre-emptive plaintiffs were dissatisfied with this decree, because the conditions of the contract between the vendors and the vendees included the provision that the money was not to go into the pockets of the vendees, but was to pay off the vendor's mortgage creditors. The plaintiffs did not

deposit the sum awarded within the time fixed by the Munsif. A few days after the expiry of that time they appealed, as they were entitled to do, to the local Court of appeal, seeking for relief in respect to the order that they should deposit the money to the credit of the vendees. The Subordinate Judge held that they were entitled to this relief, and modified the decree of the Munsif by declaring that the deposit should be deemed to be for the benefit of Tansukh Rai, the mortgagee of the vendor. In second appeal it is contended that the plaintiffs' suit stood dismissed before they asked for modification of the decree, and that their non-payment within the time prescribed deprived them of the right of asking for the relief which they obtained. We have considered the Full Bench ruling of this Court in *Kodai Singh v. Jaisri Singh* (1), and we hold that the principle underlying the decision in that case is applicable to this second appeal. It is true that the grounds of appeal in *Kodai Singh v. Jaisri Singh* refer to the question of the amount of the sale consideration, whereas the subject of the appeal in the case before us relates to the qualifications of the mode of payment. We do not think that this difference is essential, and we think that the reason of decision in the Full Bench case applies here. We dismiss the appeal with costs.

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Appeal dismissed.

16 A. 129 = 14 A.W.N. (1894) 6.

[129] APPELLATE CIVIL.

Before Mr. Justice Aikman.

JAMNA PRASAD (*Judgment-debtor*) v. MATHURA PRASAD
(*Decree-holder*).^{*} [12th December, 1893.]

Civil Procedure Code, s. 258; ss. 2, 244—"Order"—"Decree"—*Appeal*.

An appeal will lie from an order under s. 258 of the Code of Civil Procedure, refusing an application to record an adjustment of a decree made out of Court. *Lingayya v. Narasimha* (2) and *Rangji v. Bhairji Harjivan* (3) cited.

[*Appr.*, 5 M.L.J. 140; R., 33 A. 327; 33 A. 337 = 8 A.L.J. 79 = 9 Ind. Cas. 127 (129); 18 M. 26.]

IN this case the judgment-debtor, appellant here, came into Court asking that an alleged adjustment of a decree which the decree-holder, respondent here, held against him should be certified by the Court. It appears that on the day fixed for the hearing of the application the decree-holder appeared by pleader. The judgment-debtor had applied for a summons for the personal attendance of the decree-holder, but the only order made was:—"Summons to issue if there is time to get it served," and the Court, without waiting for the personal appearance of the decree-holder, dismissed the judgment-debtor's application. The judgment-debtor appealed to the District Judge, who, holding that no appeal lay from the order of the Court of first instance, dismissed the appeal.

The judgment-debtor then appealed to the High Court.

Maulvi Ghulam Mujtaba, for the appellant.

Babu Viddya Charan Singh, for the respondent.

^{*} Second Appeal No. 551 of 1893, from an order of H. B. J. Bateman, District Judge of Gorakhpur, dated the 1st of February 1893, confirming an order of Rai Bageshri Dial, Munsif of Gorakhpur, dated the 27th April 1892.

(1) 13 A. 376.

(2) 14 M. 99.

(3) 11 B. 57.

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JUDGMENT.

AIKMAN, J.—The only question which I have to decide in the case is whether an appeal lies from an order under s. 258, refusing the application of the judgment-debtor to record an alleged adjustment of the decree out of Court.

The learned District Judge has held that no appeal lies. It is true that orders passed under s. 258 are not included amongst orders which are made appealable by s. 588 of the Code; but I have no hesitation in holding that an order such as that which was passed in this case is an order determining a question between parties to [130] a suit in which a decree was passed and relating to the satisfaction of the decree. It is therefore a "decree" within the definition of s. 2, inasmuch as it is an order determining a question mentioned in s. 244. The same view has been taken by the Madras High Court in *Lingayya v. Narasimha* (1) and by the Bombay High Court in the case of *Rangji v. Bhaiji Hajivan* (2). I allow the appeal, and remand the case for decision on the merits under the provisions of s. 562 of the Code. Costs here and hitherto will abide the result.

Cause remanded.

16 A. 130=14 A.W.N. (1894) 11.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Burkitt.

MAULA AND ANOTHER (*Defendants*) v. GULZAR SINGH (*Plaintiff*).^{*}
[9th December, 1893.][†]

Civil Procedure Code, s. 44—Misjoinder of causes of action—Objection not taken in the Court of first instance—Practice.

An objection under s. 44 of the Code of Civil Procedure as to misjoinder of causes of action should be taken in the Court of first instance.

Where such an objection had been raised for the first time in appeal, the High Court, in second appeal, declined to entertain it. *Dhondiba Krishnaji Patel v. Ramchandra Bhagvat* (3) followed.

THIS was a suit for specific performance of a contract to sell. The plaintiff claimed the execution by the defendants of a sale-deed in respect of certain shops, which he alleged the defendants had agreed to sell to him, and offered to pay Rs. 275 as the balance of the agreed price, Rs. 300, Rs. 25 having been already paid as earnest money. The plaintiff prayed also for delivery to him of possession of the shops.

The defendants contested, the suit on various grounds, but the Court of first instance found all the facts in favour of the plaintiff and decreed the claim.

The defendants appealed, and then for the first time raised the objection that the suit was bad for misjoinder of causes of action, [131] inasmuch as the claim for execution of the sale-deed ought not to have been joined with a claim for possession.

^{*} Second Appeal No. 274 of 1892, from a decree of Babu Abinash Chandra Banerji, Subordinate Judge of Agra, dated the 14th December 1891, confirming a decree of Maulvi Muhammad Ismail, dated the 23rd December 1890.

[†] In 14 A.W.N. (1894) 11 the date is given as 12th December 1893.

(1) 14 M. 99.

(2) 11 B. 57.

(3) 5 B. 554.

The Lower Appellate Court found against the appellants on the question of misjoinder, and, agreeing with the first Court on the other points in the case, dismissed the appeal.

The defendants then appealed to the High Court.

Mr. *E. A. Howard*, for the appellants.

Mr. *D. N. Banerji*, for the respondent.

JUDGMENT.

KNOX and BURKITT, JJ.—The reliefs prayed for in this suit were that the defendants, who were vendors, should be directed to execute a sale-deed in favour of the plaintiff, respondent before us, and that the respondent might be put in possession of the property sold. There is only one plea taken in appeal to-day to the effect that under the provisions of s. 44 of the Code of Civil Procedure, the causes of action joined together in this suit should not have been joined unless with leave of the Court. In the course of the argument the case of *Dhondiba Krishnaji Patel v. Ramchandra Bhagvat* (1) came to our notice. We entirely agree with what was laid down in that case, that an objection of this nature, being of a dilatory character and quite beside the merits, ought to have been taken in the Court of first instance, and not after the parties have been put to the expense and trouble of a hearing on the merits. The objection was not taken in this case in the Court of first instance, and we think that the appellants must be taken to have waived it then. At any rate, we are not prepared to entertain it now. The appeal fails and is dismissed with costs.

Appeal dismissed.

16 A. 132 (F.B.) = 14 A.W.N. (1894) 12.

[132] FULL BENCH.

Before Mr. Justice Tyrrell, Mr. Justice Blair and Mr. Justice Banerji.

STAMP REFERENCE FROM THE BOARD OF REVENUE, N.-W.P.
AND OUDH.* [22nd December, 1893.]

Act I of 1879, sch. ii, art. 15 (b)—Stamp—Payment of money without consideration—Receipt for Counsel's fees.

A receipt given by counsel for a sum above Rs. 20 paid to him as a fee for professional services is exempt from stamp duty.

[R., 25 A. 509 = 23 A.W.N. 104.]

THIS was a reference from the Board of Revenue, North-Western Provinces and Oudh, in respect of a receipt given by a barrister practising as an advocate of the High Court of Judicature for the North-Western Provinces for a fee, exceeding in amount Rs. 20, paid to him by a client for professional services. Although the legal practitioner who gave the receipt in question was a member of the English bar, the question referred by the Board of Revenue was "the general question as to whether this and similar receipts for over Rs. 20 in amount granted by a barrister, pleader or other advocate on account of professional services is liable to stamp duty."

* Miscellaneous No. 145 of 1893.

(1) 5 B. 554.

1893
DEC. 9.
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APPEL-
LATE
CIVIL.

16 A. 130 =
14 A.W.N.
(1894) 11.

1893
DEC. 22.
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FULL
BENCH.
—
16 A. 132
(F.B.) =
14 A.W.N.
(1894) 12.

In the present instance the receipt was impounded by the Deputy Registrar of the High Court and sent to the Collector of Allahabad for action. The Collector, with reference to Act No. I of 1879, sch. ii, art. 15 (b), and a case reported in I. L. R., 9 Madras, p. 140, held that the receipt in question was not liable to stamp duty and declined to take any action in the matter.

Subsequently, however, the above decision of the Collector having been brought to the notice of the Commissioner of Stamps, that officer moved the Board of Revenue to consider the question involved. The Board thereupon, having regard to previous decision of its own of the 3rd of July 1885, as to a similar receipt given by a barrister practising in the Ghazipur district, and to a decision of the Chief Court of the Punjab in Stamp Reference No. 10 of 1884, decided on the 19th of April 1885, came to the conclusion that the receipt in question ought to have been stamped, and accordingly referred to the High Court the question formulated above.

[133] The opinion of the Court (Tyrrell, Blair and Banerji, JJ.) was delivered by TYRRELL, J.

OPINION.

The Secretary of the Board of Revenue for the North-Western Provinces has addressed a letter to our Registrar asking a decision of this Court on the general question whether an advocate of this Court when giving a receipt to a person who has paid him a fee for professional services, the amount exceeding Rs. 20, is bound under the Stamp Act to affix a stamp to the paper of receipt. The same question was referred to and considered by a Full Bench of the Madras High Court, whose decision is reported in I. L. R., 9 Mad., 140. Their Lordships held that "a barrister's fee for services in litigation is a gratuity or honorarium. The relation of counsel and client in litigation creates an incapacity to contract for such services. Such services are not capable of forming such a valuable consideration as will support an action on the client's promise to pay, and conversely, if the client does pay, the payment must be held to be one without consideration."

In our opinion that is a sound interpretation of the law of the Indian Stamp Act on this point, and the decision receives the highest confirmation from the ruling of Knight, Bruce and Turner, L.JJ., in *In re Beaven* (1). Let this our answer be communicated to the Secretary of the Board of Revenue.

(1) 23 L. J. Eq. 536.

16 A. 133 = 14 A. W. N. (1894) 13.

APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.*HAFIZ SULEMAN (*Defendant*) v. SHEIKH ABDULLAH
(*Plaintiff*).^{*} [3rd January, 1894.]*Execution of decree—Attachment—Assignment of decree—Second attachment by assignee—Presumption as to cessation of prior attachment.*

If at the date of the assignment of a decree the judgment-debtor's property is already under attachment in execution of such decree, it is not necessary for the assignee of the decree to apply for a fresh attachment.

When either the decree-holder or his assignee applies to have attachment under the decree of property which has been previously attached under the decree, it lies upon the decree-holder or the assignee of the decree, as the case may be, if the question [134] is raised, to show that the second application was unnecessary by reason of the first attachment being still subsisting. Failing such evidence, a Court may presume that the prior attachment had ceased before the application for a second attachment was made. *Puddomonee Dossee v. Muthoora Nath Chowdhry* (1) referred to.

[R., 23 A. 114 = 20 A.W.N. 214; 18 Ind. Cas. 691 (693); 13 M.L.T. 145 (149).]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Amir-ud-din*, for the appellant.

Pandit *Sunder Lal*, for the respondent.

JUDGMENT.

EDGE, C.J., and BANERJI, J.—This appeal arises in a suit under s. 283 of the Code of Civil Procedure. The plaintiff in the suit is the respondent. He objected to the execution, as against the property which he claimed, of a decree of which the appellant here was the assignee. The original decree-holder had obtained attachment of the property under the decree, which was one for money, on the 8th of September 1887. The plaintiff's title was a private sale made by the judgment-debtor to him on the 8th of December 1887. The appellant, defendant in the suit, having purchased the interest of the original decree-holder, applied on the 14th of March 1888, for execution of the decree and attachment under the decree of this property in question, and on the 24th of March 1888, the property was attached on the present appellant's application. The defendant's objection to the execution of the decree against the property was disallowed; hence this suit.

The defendant, appellant, did not specifically plead that at the time of the sale to the plaintiff the property was under a subsisting attachment under which his claims were enforceable. He did not plead that the sale to the plaintiff was void by reason of s. 276 of the Code of Civil Procedure. He contented himself with pleading that the sale-deed to the plaintiff was executed "fraudulently after the decree and attachment of the original decree-holders with a view to defraud the defendants of their decree-money, and that no payment of consideration had been made." Apparently the defendant in his written statement was pleading

^{*} Second Appeal No. 368 of 1892, from a decree of Babu Nilmadhab Rai, Subordinate Judge of Benares, dated the 19th February 1892, confirming a decree of Pandit Raj Nath, Munsif of Benares, dated the 11th June 1889.

(1) 12 B.L.R. 411.

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16 A. 133 =

14 A.W.N.

(1894) 13.

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(1894) 13.

a case under s. 53 of Act No. IV of 1882, and not pleading a case falling under s. 276 of the Code of Civil Procedure. If the defendant had intended to rely [135] on s. 276 of the Code of Civil Procedure as avoiding the plaintiff's title, he should not only have pleaded a case covered by that section, but he should have proved at least that the attachment of the 8th of September 1887 was subsisting at the date of the sale to the plaintiff. In other words, he should have shown that the sale to the plaintiff was during the continuance of an attachment under which his claims were enforceable against the property. Now there is no specific evidence on this record to show whether or not on the 8th of December 1887 the attachment of the 8th of September 1887 was continuing. It has been found by the Lower Appellate Court that the attachment of the 8th of September 1887 did not remain in force. In the case of *Puddomonee Dossee v. Muthoora Nath Chowdhry* in the Privy Council (1), their Lordships (at p. 422) say: "It seems to their Lordships that generally where the party prosecuting the decree is compelled to take out another execution his title should be presumed to date from the second attachment. Their Lordships do not mean to lay down broadly that in all cases in which an execution is struck off the file such consequences must follow." Although the assignee of a decree is compelled to apply under s. 232 of the Code of Civil Procedure for its execution, if he wishes to execute it, still, in our opinion, if at the date of the assignment the judgment-debtor's property is already under attachment, it is not necessary for the assignee of the decree to apply for a fresh attachment, and when either the decree-holder or his assignee applies to have attachment under the decree of property which had been previously attached under the decree, it lies upon the decree-holder or the assignee of the decree, as the case may be, if the question is raised, to show that the second application was unnecessary by reason of the first attachment being still subsisting, and that the first attachment had not been taken off. Failing such evidence, we think that it was a reasonable presumption of the Court below that the attachment of the 8th of September 1887, had been removed by the order of the 25th of October 1887, striking off the application for execution.

We dismiss this appeal with costs.

Appeal dismissed.

16 A. 136 (F.B.) = 14 A.W.N. (1894) 39.

[136] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell, Mr. Justice Knox, Mr. Justice Blair and Mr. Justice Banerji.

QUEEN-EMPRESS v. GANGA RAM.* [29th January, 1894.]

24 and 25 Vic., Cap. 104, ss. 7 and 16—*Interpretation of statutes*—"On the happening of a vacancy"—*Nature of power conferred by s. 7 of 24 and 25 Vic., Cap. 104 discussed—Evidence—Presumption of law arising from the exercise de facto of the functions of a Judge of a High Court.*

The words—"Upon the happening of a vacancy in the office of any other Judge"—in s. 7 of the Statute 24 and 25 Vic., Cap. 104, mean upon the happening of a vacancy in the office of a Judge appointed to his office by Her Majesty. They are not applicable to the case of a vacancy caused by a person appointed to

* Criminal Appeal No. 984 of 1893.

(1) 12 B.L.R. 411.

act as a Judge under the provisions of the second part of the above-mentioned section ceasing to perform the duties of such office.

The words above quoted further mean that the power conferred by s. 7 must be exercised within a reasonable time, that is to say, a practicable time, after the happening of a vacancy. It cannot be held that the power conferred by the above-mentioned section can be held in suspense for several years and then be legally exercised.

Where a person had in fact for a period of more than a year been exercising all the functions of a Judge of the High Court in virtue of an appointment purporting to be made by the Lieutenant-Governor of the North-Western Provinces and Chief Commissioner of Oudh under sanction of Her Majesty's Secretary of State for India; it was *held* that though, so far as the validity of the appointment depended upon the provisions of ss. 7 and 16 of the Statute 24 and 25 Vic., Cap. 104, the appointment was apparently *ultra vires*, it must nevertheless be presumed, in the absence of fuller information, that the appointment was legally made in the exercise of some power unknown to the Court vested in the Secretary of State for India.

[R., 13 Cr. L. J. 609 (646) = 15 C. L. J. 517 (574) = 16 C. W. N. 1105 (1129) = 16 Ind Cas. 257.]

THIS was a reference to the Full Bench of the Court, other than the Judge concerned, of the question whether the appointment of Mr. Justice Burkitt to officiate as a Puisne Judge of the Court, made according to notifications published in the *Government Gazette* for the North-Western Provinces, dated the 26th of October, 1892, the 5th of January, 1893 and the 15th of November, 1893, by the Lieutenant-Governor of the North-Western Provinces, with the sanction of Her Majesty's Secretary of State for India, was or was not a valid appointment.

[137] The question was raised by way of an objection to the constitution of a Division Bench, consisting of KNOX and BURKITT, JJ., before which a criminal appeal (*Queen-Empress v. Ganga Ram*, Appeal No. 984 of 1893) was put up for hearing. Counsel for the appellant (Mr. C. Ross Alston) contended that, the appointment of Mr. Justice Burkitt being invalid, the Bench was not properly constituted, regard being had to the fact that the appellant had been sentenced to transportation for life, and that therefore, under the Rules of Court, his appeal could not be heard by a single Judge. The facts of the case being fully stated in the judgment of the Court it is unnecessary to recapitulate them here.

Mr. C. Ross Alston, for Ganga Ram.

The Public Prosecutor (Mr. A. Strachey) for Government.

Alston in opening his case read the order of the 26th of October, 1892, with an "erratum" dated the 5th of January, 1893, and that of the 15th November, 1893, in virtue of which Mr. Justice Burkitt took a seat and continued to sit as a Judge of the High Court. (These orders will be found cited at length in the judgment of the Court, Q.-V.). He argued that the appointment so made could not be considered as an appointment made directly by the Crown, because the exercise of the Crown's power of appointment must be by letters patent. In support of this contention he referred to the following authorities:—Comyn's Digest, Vol. IV, p. 579; 27 H. VIII, Cap. 24; 1 Geo. III, Cap. 23; Croke's Reports, Part IV, Introduction; 13 Geo. II, Cap. 63; the Charters of the Supreme Courts in India (quoting from Morley's Digest, Vol. II, pp. 549, 594 and 624) and 24 and 25 Vic., Cap. 104.

The appointment therefore, not having been made by the Crown, must have been made under the powers conferred upon the Governor-General in Council or Governor in Council or Lieutenant-Governor by Statute 24 and 25 Vic., Cap. 104. Counsel then read s. 7 of the above-mentioned statute, and argued that the power conferred thereby was a

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power intended by the Legislature to be exercised as a temporary expedient merely, and that its exercise could not be suspended for an indefinite period. If the power conferred by s. 7 was to be exercised at all, it must be exercised as soon as might be practicable after the happening of the vacancy which occasioned the exercise of such power. In the present instance, whatever view might be taken of the previous history of the Court, the power in question had been held in abeyance for at least two, and possibly for twenty years, and its exercise in the present instance was therefore *ultra vires*.

Strachey, for the Government, argued that, admitting that the words used in s. 7 of the 24 and 25 Vic., Cap. 104, "upon the happening of a vacancy" meant immediately and not many years after the occurrence of the vacancy; that these words must have the same meaning in the second clause of s. 7 relating to Puisne Judges as in the first clause relating to the Chief Justice, and that by reason of s. 14 a vacancy in the office of the Chief Justice must be filled up at once, there still remained the question as to what happened or what was to be done upon the happening of a vacancy, and in that respect, he submitted, there was an important difference. In the case of the Chief Justice "upon the happening of a vacancy" the Government "shall appoint." In the case of a Puisne Judge, "it shall be lawful" for the Government to appoint. What arose immediately upon the happening of a vacancy in the office of Chief Justice was an obligation to appoint; what arose immediately upon the happening of a vacancy in the office of Puisne Judge is only an authority to appoint. In the latter case the idea of immediateness implied by the word "upon" had reference not to the actual appointment, but only to the vesting in the Government of the power of appointment. The word merely indicated that then and not till then it became lawful for the Government to appoint. According to this construction the words "upon the happening of a vacancy" must be read in connection with the nearer words "it shall be lawful," and not the remoter words "to appoint a person," &c. Counsel quoted from Wilberforce's "Statute Law," p. 117—"All the sentences of an Act are to be read grammatically in the order which has been adopted by its framers," and argued [139] that in the present instance it would not be permissible to invert that order so as to make the sentence in s. 7 read—"It shall be lawful to appoint a person on the happening of a vacancy. As the sentence stood, it was the lawfulness, the legal authority, which arose upon the happening of the vacancy; as it would stand if inverted, it would be not the authority, but the exercise of it, that was immediate. From these premises he argued that, though immediately upon the happening of the vacancy caused by the retirement of Ross, J., in 1871, it became lawful for the Government under s. 7 to appoint an acting Puisne Judge, that power need not have been exercised immediately, and, the Crown not having put an end to it by filling up the vacancy under s. 2, it remained in force until 1892, when it was duly exercised by the appointment of Mr. Justice Burkitt.

With reference to the intention of Parliament in enacting s. 7, he argued that the Government had a discretion to abstain from appointing an acting Judge altogether if in its opinion the remaining Judges were sufficient to carry on the work of the Court. It was also clear from the concluding words of the section that considerations of the exigencies of the Court's business might justify the Government at any time in cancelling an acting appointment which it had made. From this he argued

that if the object of the section was to enable the Government to make temporary provision for keeping the Court up to its necessary strength, Parliament must reasonably be supposed to have intended the Government to decide according to circumstances and without any hard and fast limit of time as to when such temporary provision was expedient. The words in s. 7 upon which the question turned were intended not to compel the Government to decide between action and inaction once for all at a particular moment, but to define the event upon which its discretion to act or not to act came into existence. In this connection counsel cited the observations made by MAHMOOD, J., in *Lal Singh v. Ghansham Singh* (1).—"The phrase 'it shall be lawful' cannot be held to mean that it was imperative upon the [140] Government to fill up any vacancy in the office of a Puisne Judge of this High Court. Nor is there any limitation of time within which the Government is required to fill up a vacancy, if it chooses to exercise the power conferred upon it by s. 7 of the statute. It seems to me therefore clear that neither the Crown nor the Government is bound to fill up a vacancy in the office of a Pusine Judge within any specified period, and, so far as the statute is concerned, the Government may leave any number of vacancies in the office of a Pusine Judge unfilled for any period, be it a day, a week, a month, a year or more."

In conclusion, counsel referred to s. 114 of the Indian Evidence Act, and contended that under the circumstances of the present case, the Court might presume that Mr. Justice Burkitt's appointment was valid, even though no direct authority for such appointment could be shown.

Alston in reply, mainly with reference to the construction of s. 7 of the 24 and 25 Vic., Cap. 104, contending that both clauses of that section were to be construed in the same way, and that in both cases the appointment must be made as soon as practicable after the happening of a vacancy.

The judgment of the Court (EDGE, C. J., TYRRELL, KNOX, BLAIR and BANERJI, JJ.) was delivered by EDGE C. J.

JUDGMENT.

One Ganga Ram was convicted of the offence punishable under s. 400 of the Indian Penal Code, and for that offence was sentenced to transportation for life. From that conviction and sentence he appealed to this Court. By the rules of this Court made under s. 13 of the 24 and 25 Vic., Cap. 104, such an appeal can only be heard by a Bench consisting of at least two Judges. Ganga Ram's appeal came on in usual course to be heard by a Bench of two Judges. That Bench happened to be constituted of Mr. Justice Knox and Mr. Justice Burkitt. When the appeal was called on for hearing, Mr. *Alston*, who appeared for Ganga Ram in support of the appeal, raised an objection to the jurisdiction of the Bench to hear the appeal, contending that Mr. Justice Burkitt had not been legally appointed to act as a Judge of this Court. As Mr. *Alston's* contention raised a question of the utmost gravity, the question as [141] to whether or not Mr. Justice Burkitt had been legally appointed to act as a Judge of this Court was properly and of necessity referred to a Full Bench for decision. The reference to the Full Bench was heard by all the Judges of the Court excepting Mr. Justice Burkitt. On the hearing of the reference, the Crown was represented by Mr. *Strachey*, Public Prosecutor, and Ganga Ram by Mr. *Alston*. We took time to consider our judgment.

(1) 9 A. 625 at p. 641.

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Before referring to the arguments on one side or the other and expressing the conclusions at which we have arrived, it is necessary to state certain facts.

This High Court of Judicature for the North-Western Provinces of India was erected and established by Her Majesty's Letters Patent issued on the 17th day of March in the Twenty-ninth year of Her Reign.

Those Letters Patent were issued by the authority in that behalf conferred by the statute 24 and 25 Vic., Cap. 104, and have not been modified by any subsequent Letters Patent, or, so far as the question before us is concerned, by any legislative enactment. Section 2 of the Letters Patent is as follows:—

"2. And we do hereby appoint and ordain that the said High Court of Judicature for the North-Western Provinces shall, until further or other provision shall be made by Us or Our Heirs and Successors in that behalf, in accordance with the said recited Act, consist of a Chief Justice and five Judges, the first Chief Justice being Walter Morgan Esquire and the five Judges, being Alexander Ross Esquire, William Edwards Esquire, William Roberts Esquire, Francis Boyle Pearson Esquire, and Charles Arthur Turner Esquire, being respectively qualified as in the said Act is declared."

Mr. Justice Edwards retired in March 1867, Mr. Justice Roberts died in January 1870. Mr. Justice Ross retired in April 1871. Mr. R. Spankie was appointed to act as a Judge of the Court on the retirement of Mr. Justice Edwards in 1867 and subsequently received [142] his Patent appointing him to the office of a Judge of the Court. Mr. Justice Pearson proceeded on leave in December 1869, and was absent on leave until July 1871. Mr. G.D. Turnbull was appointed to act as a Judge of the Court in May 1870, and continued to act as a Judge of the Court until July 1871, when Mr. Justice Pearson returned from leave. Mr. Justice Turner proceeded on leave on the 11th of April 1873, and returned from leave on the 25th of October 1873. Mr. W. Jardine was appointed to act as a Judge of the Court on the 12th of April 1873, and continued to act as a Judge of the Court until his death on the 16th of August 1872. On the 28th of August 1873, Mr. G. D. Turnbull was again appointed to act as a Judge of the Court and continued to act until Mr. Justice Turner returned from leave on the 25th of October 1873. On the 3rd of April 1874, Mr. Justice Spankie proceeded on leave, and was absent on leave until the 8th of December 1874, when he returned to the Court. Mr. R. C. Oldfield was on the 4th of April 1874 appointed to act as a Judge of the Court, and continued to act as such until he received his Patent in 1881 appointing him to the office of Judge of the Court. Mr. M. Brodhurst was on the 27th of April 1874 appointed to act as a Judge of the Court, and continued to act as such until the 7th of December 1874. It may be presumed from the above facts and dates that Mr. Brodhurst was appointed to act during the absence on leave of Mr. Justice Spankie. Whether Mr. Oldfield's acting appointment was intended to be consequent on the vacancy in the office of a Judge of the Court occasioned by the death of Mr. Justice Roberts in January 1870, or consequent on the vacancy in the office of a Judge of the Court occasioned by the retirement of Mr. Justice Ross in April 1871, does not appear. The next appointment by Patent to the office of a Judge of the Court after that of Mr. Justice Spankie was that of Mr. Justice Straight in 1879, upon the appointment of Mr. Justice Turner to be Chief Justice of the High Court at Madras. Mr. Justice Pearson retired on the 30th of March 1881. Mr. Justice Spankie retired on the 31st of May 1881, and

subsequently in 1881 Mr. R. C. Oldfield and Mr. M. Brodhurst received their Patents appointing them respectively to the office of a Judge of the Court. Mr. W. Tyrrell received [143] his Patent appointing him to the office of a Judge of the Court in 1882. Mr. Justice Oldfield retired in March 1887; and in March or April 1887 Mr. Syed Mahmood was appointed by Patent to the office of a Judge of the Court. Mr. Justice Brodhurst died in October 1890. Mr. G. E. Knox was appointed by Patent to the office of a Judge of the Court in December 1890. It was assumed that Mr. Knox was appointed to the office of a Judge to fill the vacancy in the office occasioned by the death of Mr. Justice Brodhurst. In April 1892 Mr. Justice Straight retired, and on his retirement Mr. H. F. Blair took his seat as a Judge of the Court, having been appointed by Patent in 1892 as a barrister to that office in anticipation of the retirement of Mr. Justice Straight. Mr. Justice Turner and Mr. Justice Straight were Judges who had been appointed on the qualification as barristers.. In December 1893 Mr. Justice Mahmood retired. On the retirement of Mr. Justice Mahmood Mr. P. C. Banerji was appointed to act as a Judge of the Court in anticipation of the receipt of his Patent appointing him to the office of a Judge of the Court.

In the *Government Gazette, North-Western Provinces and Oudh*, of the 29th of October 1892 appeared the following notification :—

Appointment Department.

Appointments.

The 26th October 1892.

No. $\frac{4912}{11-784 C.}$

"In virtue of the authority vested in him by the Act of Parliament 24 and 25 Vic., Cap. 104, clauses 7 and 16, His Honor the Lieutenant-Governor and Chief Commissioner is pleased to appoint Mr William Robert Burkitt, C. S., Barrister-at-law, Judicial Commissioner, Oudh, to be the 5th Puisne Judge in the High Court of Judicature, North-Western Provinces; the appointment of a fifth Puisne Judge having been sanctioned temporarily for one year by Her Majesty's Secretary of State for India, with effect from the date on which the said Court re-opens after the annual vacation."

[144] In the *Government Gazette, North-Western Provinces and Oudh* of the 7th of January 1893 appeared the following notification :—

Erratum.

The 5th January 1893.

No. $\frac{40}{11-784 C.}$

"In Notification No. 4912, dated 26th October 1892, appointing Mr. W. R. Burkitt to be the fifth Pusine Judge in the High Court of Judicature, North-Western Provinces, for the words 'to be' read 'to officiate as.'"

In the *Government Gazette, North-Western Provinces and Oudh* of the 18th November 1893 appeared the following notification :—

Appointment Department.

The 15th November 1893.

No. $\frac{3497}{11-784 C.}$

"In virtue of the authority vested in him by the Act of Parliament 24 and 25 Vic., Cap. 104, clauses 7 and 16, His Honor the Lieutenant-

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Governor and Chief Commissioner is pleased to appoint Mr. William Robert Burkitt, I. C. S., Barrister-at-Law, to continue to officiate as a Puisne Judge in the High Court of Judicature, North-Western Provinces, until further orders."

The notifications which we have set out are the only sources of information which the Public Prosecutor on behalf of the Crown has placed before the Court or which the Court has in its possession as to the manner in which and the authority under which Mr. Justice Burkitt was appointed. From the 1st April 1892, when Mr. Justice Blair as a Barrister Judge succeeded Mr. Justice Straight, and until the 15th of November 1892, when Mr. Burkitt took his seat as a Judge acting under the notification of the 26th of October 1892, the Court consisted of a Chief Justice and Mr. Justice Tyrrell, Mr. Justice Mahmood, Mr. Justice Knox and Mr. Justice Blair, [145] all of whom had been appointed by Patent. On the 25th of November 1892 Mr. Justice Mahmood went on leave and Mr. R. S. Aikman was appointed to act during the absence of Mr. Justice Mahmood, and acted as a Judge of the Court until the appointment of Mr. Justice Banerji in December 1893. Treating for present purposes Mr. Justice Burkitt as a legally appointed acting Judge of the Court, the Court consists to-day of the Chief Justice and Mr. Justice Tyrrell, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji and, as an acting Judge Mr. Justice Burkitt.

Mr. *Alston* on behalf of Ganga Ram contended that by reason of s. 11 of the 24 and 25 Vic., Cap. 104, of the 13 Geo. III., Cap. 63, of s. 3 of the Charter dated the 26th of March 1774, establishing the Supreme Court of Judicature at Fort William in Bengal, of s. 6 of the Charter dated the 26th December 1800, establishing the Supreme Court of Judicature at Madras, and of s. 7, of the Charter dated the 8th of December 1823, establishing the Supreme Court of Judicature at Bombay, no person could be legally appointed to the office of a Judge of a High Court established in pursuance of the 24 and 25 Vic., Cap. 104, except by Her Majesty's Letters Patent. Mr. *Alston* further contended that the power to appoint a person to act as a Judge of this High Court was that conferred by ss. 7 and 16 of the 24 and 25 Vic., Cap. 104, and that Mr. Justice Burkitt had not been appointed to act "upon the happening of a vacancy in the office of a Judge of this Court or during the absence of any such Judge or on the appointment of any such Judge to act as Chief Justice" within the true intent and meaning of s. 7 of the 24 and 25 Vic., Cap. 104, and consequently that Mr. Justice Burkitt, not having been duly appointed under ss. 7 and 16 of the 24 and 25 Vic., Cap. 104, to act as a Judge of the Court, and not having been appointed by Her Majesty's Letters Patent to the office of a Judge of the Court, his appointment was *ultra vires* and illegal.

On the other side, Mr. *Strachey* for the Crown contended that Mr. Justice Burkitt had been legally appointed "upon the happening of a vacancy in the office of a Judge of the Court within [146] the meaning of s. 7 of the 24 and 25 Vic., Cap. 104, and if that section read with s. 16 of the same statute did not authorize Mr. Burkitt's appointment we should presume from the notification in the *Government Gazette, North-Western Provinces and Oudh*, and from the fact that Mr. Justice Burkitt had acted as a Judge of the Court since November 1892, that he had been lawfully appointed. Mr. *Strachey* relied on the fact that it is not specifically enacted in the 24 and 25 Vic., Cap. 104, that appointments other than those under s. 7 of persons to be or to act as Judges of a High Court shall be by Her Majesty's Letters Patent, and upon the fact that Mr. Justice Oldfield

had for many years prior to the grant of his Patent acted as a Judge of this Court. Mr. *Strachey* overlooked the inference to be drawn from the concluding words of s. 5 of the Act. Mr. *Strachey* correctly, as it appears to us, admitted that the words in s. 7 of the 24 and 25 Vic., Cap. 104, "upon the happening of a vacancy" when used in relation to a vacancy in the office of a Judge other than a Chief Justice, must be construed as having the same meaning as they have when used in the same section in relation to a vacancy in the office of a Chief Justice, and that the inference to be drawn from s. 14 of the 24 and 25 Vic., Cap. 104, is that, "upon the happening of a vacancy in the office of Chief Justice," a Chief Justice must, as soon as reasonably may be, be appointed by Her Majesty, or that one of the Judges of the same Court must, as soon as reasonably may be, be appointed under s. 7 to act as Chief Justice. But he contended that, although an obligation to appoint a Chief Justice or to appoint one of the Judges of the Court to act as Chief Justice arose at once "upon the happening of a vacancy in the office of Chief Justice"—no similar obligation arose "on the happening of a vacancy in the office of any other Judge of any such High Court," and that all that arose upon the happening of such latter vacancy was a power to the Governor-General in Council, the Governor in Council or the Lieutenant-Governor in these Provinces to appoint a qualified person to act as a Judge of the Court, and that such power could be exercised at any time, even after the [147] lapse of fifty years from "the happening of the vacancy;" and further, that such power could be exercised repeatedly and in favour of the same or different persons so long as the vacant office was not filled up by an appointment to it by Her Majesty. In order to ascertain whether or not Mr. *Strachey's* argument based on s. 7 of the 24 and 25 Vic., Cap. 104, is correct, it is necessary to examine that section with care.

Section 7 of the 24 and 25 Vic., Cap. 104, is as follows:—

7. "Upon the happening of a vacancy in the office of Chief Justice, and during any absence of a Chief Justice, the Governor-General in Council or Governor in Council, as the case may be, shall appoint one of the Judges of the same High Court to perform the duties of Chief Justice of the said Court until some person has been appointed by Her Majesty to the office of Chief Justice of the same Court and has entered on the discharge of the duties of such office, or until the Chief Justice has returned from such absence; and upon the happening of a vacancy in the office of any other Judge of any such High Court, and during any absence of any such Judge, or on the appointment of any such Judge to act as Chief Justice, it shall be lawful for the Governor-General in Council or Governor in Council, as the case may be, to appoint a person with such qualifications as are required in persons to be appointed to the High Court to act as a Judge of the said High Court, and the person so appointed shall be authorized to sit and to perform the duties of a Judge of the said Court until some person has been appointed by Her Majesty to the office of Judge of the same Court and has entered on the discharge of the duties of such office, or until the absent Judge has returned from such absence, or until the Governor-General in Council or Governor in Council as aforesaid shall see cause to cancel the appointment of such acting Judge."

In construing s. 7 of the 24 and 25 Vic., Chap. 104, it is advisable to bear in mind what a great lawyer has said about the construction of statutes. Lord Blackburn in *The River Wear* [148] *Commissioners*

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v. *William Adamson and others* (1) in reference to the principles of construction of statutes, said:—

“My Lords, it is of great importance that those principles should be ascertained, and I shall therefore state as precisely as I can what I understand from the decided cases to be the principles on which the Courts of Law act in construing instruments in writing, and a statute is an instrument in writing. In all cases the object is to see what is the intention expressed by the words used. But from the imperfection of language it is impossible to know what that intention is without inquiring further and seeing what the circumstances were with reference to which the words were used and what was the object appearing from those circumstances which the person using them had in view, for the meaning of words varies according to the circumstances with respect to which they were used.”

In order to ascertain what the intention of the Imperial Parliament in enacting s. 7 of the 24 and 25 Vic., Cap. 104, was, we must remember that at the time when that statute was passed there was no telegraphic communication between England and India, and that communication by mail, allowing for a despatch and reply and the time required for the issue of a Patent, would probably have occupied a period of three months or more. It is most probable that it seemed reasonable to Parliament, having regard to the interests of the public, that a High Court, which required to be at its full strength in order to enable it to cope with its work, should, on the occurrence of a vacancy in the office of one of its Judges, be provided with temporary assistance as soon as possible. The conditions of climate under which Judges work in the plains in India, particularly during the hot weather, are essentially different from those under which Judges work in England, and Judges in India cannot carry their work during the hot weather to the temperate climate of the hills. Family and other circumstances at times necessitate leave of absence to Europe. These conditions were not overlooked by Parliament, and we find provision made in the section under [149] consideration for efficiently maintaining the working strength of the High Courts under such circumstances. It must have been the object of Parliament that High Courts, the expenses of maintaining which are to a great extent, if not entirely, borne by litigants, should be maintained at a strength adequate to deal with the judicial and administrative work coming before them. It must also be kept in mind that Her Majesty could always appoint a Judge to a vacancy in a High Court, and that when the pressure of work in a High Court did not require on the happening of a vacancy in the office of a Judge of the Court that the vacancy should be immediately filled up, there would be ample time to communicate with the Secretary of State for India in order that Her Majesty might appoint a Judge to the vacancy when the work of the Court might require that the Court should be at its full working strength. It is also to be kept in mind that it is in the interests of the public that litigation should be speedily disposed of, and that if possible arrears should not be allowed to accumulate in Courts of Justice. In too many cases justice delayed is justice denied and both are treated alike in the Magna Charta:—
“*Nulli vendemus, nulli negabimus, nulli differemus rectum aut justitiam.*”

When we bear these facts and considerations in mind, the object which the Imperial Parliament had in view in enacting s. 7 of the 24 and 25 Vic., Cap. 104, is plain, and in our opinion such object was plainly

expressed in the section. Such object in our opinion was to enable the Governor-General in Council, the Governor in Council, and, by application of s. 16, the Lieutenant-Governor, in the case of these Provinces, upon the happening of a vacancy in the office of a Judge, to make temporary provision for keeping the Court up to its necessary working strength by the appointment of a qualified person to act as a Judge until one or other of the events specified at the end of s. 7 should happen. It was also in our opinion the intention of the Legislature in providing for the making of acting appointments in the High Courts that the person appointed to act as a Judge should do the work which the Judge who had died, or had retired or was absent on leave or was acting [150] as Chief Justice, would otherwise, and if he had been present, have done, and thus to avoid the work of the Court getting into arrear. No doubt the Governor-General in Council or Governor in Council or the Lieutenant-Governor of these Provinces is not bound to exercise the power conferred by s. 7 of the 24 and 25 Vic., Cap. 104, as was held in *Lal Singh and others v. Ghansham Singh* (1). Equally without doubt that power should be legally exercised when the necessity for exercising it arises. But that is not the question here.

The object and intention of the Imperial Parliament could not, in our opinion, have been to place in the hands of the Governor-General in Council or Governor in Council or the Lieutenant-Governor of these Provinces a power which would, subject to Her Majesty's being moved through the Secretary of State for India to appoint, enable the Executive in India by making acting appointments on the happening of vacancies, and by making successive appointments on the happening of the same vacancy, in time to constitute a High Court of one barrister Judge acting as Chief Justice and of acting Judges, that is, of persons who could at the will of the Executive be removed from their acting appointments in the High Court, and who could in the case of acting Civilian Judges be gazetted out of the Court to perform the duties and enjoy the emoluments of Assistant Magistrates. It is impossible to believe that a High Court established under the 24 and 25 Vic., Cap. 104, ever would be so constituted, but, if Mr. Strachey's construction of s. 7 is correct, a High Court might be so constituted by the Executive in India. Any such intention on the part of the Imperial Parliament when passing the 24 and 25 Vic., Cap. 104, as has been contended by Mr. Strachey was the intention of Parliament, would be contrary to the policy pursued by Parliament since the Act of Settlement became law, a policy which has secured to the subjects in England protection against unlawful or unauthorized acts of the Executive. This is what Hallam (*The Constitutional History of England*, Vol. 3, page 192, 7th edition) says in this connection as to the state of things prior to the Act of Settlement:—

[151] "It had been the practice of the Stuarts, especially in the last years of their dynasty, to dismiss Judges, without seeking any other pretence, who showed any disposition to thwart Government in political prosecutions. The general behaviour of the Bench had covered it with infamy. Though the real security for an honest Court of Justice must be found in their responsibility to Parliament and to public opinion, it was evident that their tenure in office must, in the first place, cease to be precarious, and their integrity rescued from the severe trial of forfeiting the emoluments upon which they subsisted." * * *

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It is impossible to believe that any person who would be appointed to act as a Judge in a High Court in India would subordinate his conscience to the requirements of the Executive, or that the Executive in India ever would attempt to influence the Judges: but it is equally impossible to believe that Parliament should ever have intended that the risk of such a subordination of his conscience on the part of a Judge or of any attempt on the part of the Executive to influence the Judges should be rendered a possibility. We do not believe, having regard to existing law, that Parliament has taken, or even intended to take, any step in that direction. That the risk of the Executive in India desiring to limit the judicial power of the Courts in India in matters touching the Executive is not merely hypothetical, may be inferred from a proposal made many years ago that the Courts in India should by legislative enactment be prohibited from questioning the legality of acts of the Governor-General in Council. That the risk of the Executive in India seeking to get the High Courts in India more under its control is not merely hypothetical, may be inferred from the introduction of a Bill into Parliament, by one section of which, if it had been passed, an order in Council might have been made for the purpose of regulating the High Courts without Parliament being consulted. Under another section of that Bill a local authority could have been invested with the discretionary power especially reserved to the Chief Justice of the Court by s. 14 of the 24 and 25 Vic., Cap. 104, in other words, [152] the Governor-General of India in Council might under that section have conferred upon a local authority a power which might be exercised by the local authority so as to select and nominate from amongst the Judges of a High Court such Judge or Judges as it deemed preferable for the hearing and determining of particular cases in which the local authority might be interested. While we point out that this would be a possible effect, we do not suggest or think that such was the object of the framers of the section. The intention of Parliament in framing the Acts under which the Supreme Courts in India were constituted and in passing the 24 and 25 Vic., Cap. 104, must have been to establish judicial tribunals which would command the respect of the people of this country, and which would not be liable to any possibility or suggestion of influence on the part of the Executive.

But in our opinion it is not necessary to seek for the object and intention of the Parliament in enacting s. 7 by the consideration of matters outside the section itself, as it appears to us the wording of the section is plain and unambiguous. The important words are "upon the happening of a vacancy in the office of any other Judge." The most cursory consideration of the section shows clearly that the Judge there referred to must be a Judge appointed to his office by Her Majesty and not a person appointed under the section to act as a Judge. The Chief Justice of a High Court is a Judge of the court. The Judge who may be appointed to perform the duties of the Chief Justice in one of the events specified at the beginning of the section must be "one of the Judges of the same High Court." Until we reach the words "to appoint a person with such qualifications as are required in persons to be appointed to the High Court to act as a Judge of the said Court, &c.," we find no allusion to any Judge other than a Judge holding the office of a Judge of the High Court. Further, that point is made certain by s. 4 of the 24 and 25 Vic., Cap. 104, in which it is enacted that "all the Judges of the High Courts established under this Act shall hold their offices during Her Majesty's pleasure, provided that it shall be lawful for any Judge of a High Court to resign such office

of [153] Judge to the Governor-General in Council or Governor in Council of the Presidency in which such High Court is established." A person appointed under s. 7 to act as a Judge does not hold the office of a Judge nor does he hold the office of a Judge during Her Majesty's pleasure. He is appointed "to act as a Judge of the said High Court and the person so appointed shall be authorized to sit and perform the duties of a Judge of the said Court until some person has been appointed by Her Majesty to the office of Judge of the same Court and has entered upon the discharge of the duties of such office, or until the absent Judge has returned from such absence, or until the Governor-General in Council or Governor in Council as aforesaid shall see cause to cancel the appointment of such acting Judge." These last quoted words are in our opinion conclusive that our reading of the antecedent words "upon the happening of a vacancy" is the only legitimate reading of those words as they occur in the section.

Mr. *Strachey* admitted that if the wording of that part of the section was "it shall be lawful for the Governor-General in Council or Governor in Council, as the case may be, to appoint on the happening of a vacancy in the office of any other Judge, &c.," he could not contend that the appointment could be legally made under the section unless it were made as soon as practicable after the vacancy occurred. We are unable to see any difference in meaning, intention or effect between such a wording and the actual words of the section. If the words "it shall be lawful" confer both a power and a discretion, it would seem certain that such power and such discretion were intended, as it is not otherwise expressed, to be exercised upon the specified occasion and contingency and not to be reserved indefinitely or used repeatedly or intermittently. The word "upon" is a word the meaning of which has been considered by the Courts in England. It appears from *The Queen v. Humphrey* (1) and from *The Queen v. Arkwright* (2) that "the words 'on' and 'upon' may either mean before the act done to which it relates, or simultaneously with the act done, or after the act [154] done, according as reason and good sense require, with reference to the context and subject-matter of the enactment." (*Per* Lord Denman, C.J., in *The Queen v. Arkwright*.) In *Folkard v. The Metropolitan Railway Co* (3), the question depended upon the meaning of the words "upon the trial of any issue" in s. 10 of the Mayor's Court Procedure Act (20 and 21 Vic., Cap. 157), by which section it is provided that if the Judge "upon the trial of any issue" shall grant leave to move in any of the Superior Courts to enter a verdict or non-suit or for a new trial, the party to whom such leave is granted may move accordingly in such court within the time within which motions of the like kind may be made in such court. There the case was tried on a Thursday, and on the following Monday the Judge granted leave to move, and it was held by BOVILL, C.J., and KEATING and GROVE, JJ., BRETT, J., dissenting, that the leave could not be considered as given "upon the trial of the issue" in accordance with the Act. In that case the word "upon" was construed as meaning within a reasonable time after the trial. The majority of the court considered that two days after the trial (whilst BRETT, J., considered that four days after the trial) would be such a reasonable time.

In re Leigh, Leigh, v. Leigh (4) related to an order made by Kay, J., that Mr. Leigh, who, whilst he was a minor, had married, should execute a settlement. The marriage took place in October, 1885, the order was

(1) 10 A. and E. 335=7 L. J. Q. B. 202.

(2) 12 Q. B. 960=18 L. J. Q. B. 28.

(3) 8 C. P. 470.

(4) 58 L. J. Ch. 306.

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made in June 1886, and the settlement was executed in December 1886. Cotton, L. J., in delivering his judgment, said, in reference to the Infants' Settlement Act:—"Because we decide the present appeal on another point, it must not be considered that we adopt or favour the suggestion that the settlement executed was a settlement 'upon the marriage' within the Act. The words of the Act are 'upon or in contemplation of marriage.' In *In re Sampson and Wall* the majority of the court differed from me in construing those words as meaning—"On the occasion of the marriage," and in holding that the Act applied to post-nuptial settlements. But I see nothing in these judgments which would [155] appear to favour the conclusion that the settlement in this case can be considered as a settlement made upon the occasion of marriage, when there was this considerable interval between the marriage and the order of the Court." The decisions upon the construction of the word "upon" are collected in Stroud's Judicial Dictionary at page 841.

There is no decision, so far as we are aware, which would favour the construction contended for by Mr. *Strachey* that an appointment which "upon the happening of a vacancy" may be made, can lawfully be made years after—in this case more than twenty years after the vacancy has happened, if the vacancy was that occasioned by the retirement of Mr. Justice Ross in 1871, or more than two years after the vacancy had happened, if the vacancy was that occasioned by the death of Mr. Justice Brodhurst in October 1890.

To give the section the construction for which Mr. *Strachey* has contended, it would be necessary to read the section as if it were worded "upon the happening and during the continuance of a vacancy in the office of any other Judge * * * it shall be lawful for the Governor-General in Council or Governor in Council, as the case may be, from time to time, and at any time, to appoint, &c.

There is nothing in the section to suggest that the appointment authorised by section 7 could be made at any time other than within a reasonable time after the happening of the vacancy in the office of the Judge, or that the power having once been exercised upon the happening of a vacancy in the office of a Judge it could again be exercised in relation to that particular vacancy.

In our opinion the plain and reasonable construction of that part of s. 7 of the 24 and 25 Vic., Cap. 104, on which the question before us turns, is that if the power conferred by the section is to be exercised, it can only be exercised "upon," that is, within a reasonable time, which would mean a practicable time, after the happening of the vacancy, and could not be held in suspense for several years and then be legally exercised. We are led to the same opinion from the considerations to which we have referred outside the words of the [156] Section. It is impossible to hold that the exercise of the power after the lapse of two or of twenty years from the happening of the vacancy was an exercise of the power within a reasonable or practicable time. We are consequently of opinion, if the appointment of Mr. Justice Burkitt depends for its validity upon ss. 7 and 16 of the 24 and 25 Vic., Cap. 104, that the appointment was *ultra vires* and illegal. Although the occasion of the question being raised is recent, doubts as to the legality of such an appointment have been long entertained by the profession here, long before Mr. Justice Burkitt was appointed. Having regard to the gravity of the question and to the responsible duties which a Judge of a High Court has to perform, we are compelled to see, if we can, whether in

some other manner Mr. Justice Burkitt may not have been legally appointed to act as a Judge of this Court. The gravity of the question is apparent from the fact that Mr. Justice Burkitt, whilst acting as a Judge of this Court, has been a party, as such Judge, to the confirming of capital sentences, since carried into execution in many cases. He has also been a party, as such Judge, to the making of decrees absolute for dissolution of marriage, involving possibly the legal status of persons as yet unborn.

If Mr. Justice Burkitt was not legally appointed, all his judgments, decrees and orders in Civil and in Criminal cases have been *ultra vires* and illegal, and in some cases the mischief would be now irreparable, as for instance in capital cases. In other cases it might be possible for Parliament to pass an Act making valid what Mr. Justice Burkitt has done whilst acting as a Judge of this Court. We do not know whether there exists outside of ss. 7 and 16 of the 24 and 25 Vic., Chap. 104, any power under which Mr. Justice Burkitt could have been appointed to act as a Judge of this Court. But there remains the fact of the notifications in the *Government Gazette, North-Western Provinces and Oudh*, to which we have referred, the fact that apparently the Secretary of State for India in Council sanctioned the appointment of a fifth Puisne Judge as a temporary appointment, and the fact that Mr. Justice Burkitt has in fact since November 1892 acted in all respects as a Judge of this [157] Court. That last fact is, according to a well-known principle of the law of evidence, presumptive proof, until the contrary be shown, of his due appointment to act as a Judge of this Court. Being in ignorance as to whether or not any power existed under which Mr. Justice Burkitt may have been lawfully appointed to act as a Judge of this Court, we hold that the presumption that he was duly appointed, which arises from the fact of his having acted as a Judge of the Court since November 1892, has not been rebutted. This may seem to be a lame and impotent conclusion for a Court of Justice to arrive at concerning the validity of the appointment of one of its acting Judges, but our lack of necessary information as to the appointment, coupled with the circumstances of the case, permits of our arriving at no other. On this expression of opinion Mr. Justice Knox and Mr. Justice Burkitt will probably proceed to hear and dispose of the appeal of Ganga Ram.

[For the interpretation of the word "on" as used in an English Statute, see also *Robertson v. Robertson* (L. R. 8 P. D. 94 at p. 96)—ED.]

16 A. 157 (P.C.) = 21 I.A. 6 = 6 Sar. P.C.J. 404.

PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Macnaghten and Morris, and Sir R. Couch.

[*On appeal from the High Court at Allahabad.*]

JASWANT SINGH (*Defendant*) v. SHEO NARAIN LAL (*Plaintiff*).

[16th and 17th November and 16th December 1893.]

Evidence as to whether hundis were genuine or not—Comparison of handwriting—Entries in account books regularly kept—Act No. I of 1872 (Evidence Act), s. 34—Tests of correctness.

The High Court had reversed the finding of the first Court on an issue which, in effect, was whether certain hundis were genuine or false. Under s. 34 of Act No. I of 1872 (The Indian Evidence Act) the plaintiff's account books were produced by the plaintiff as relevant evidence, and were relied on as corroborating direct

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testimony. The books were tested by reference to entries corresponding with other independent evidence.

The Judicial Committee, on the whole evidence, affirmed the decision of the High Court that the hundis were genuine. In the decree which gave interest to its date, they extended the period until payment.

APPEAL from a decree (21st February 1889) of the High Court, reversing a decree (30th April 1887) of the Subordinate Judge of Mainpuri and a cross-appeal by the respondent.

[158] The plaintiff, now respondent and cross-appellant, as head of the firm of Dilsukh Rai, Radha Kishen, in the town of Etawah, sued the defendant, now appellant, for Rs. 14,526, the principal and interest, with other charges, due on six hundis purporting to have been drawn by him on Gobind Das, Lachhman Das, in Bombay, dated the 1st of April 1886, and payable sixty-one days after date. Five of the hundis were for Rs. 2,500 each and one was for Rs. 11,000. The plaintiff's firm on the 28th of June 1886, as was alleged, sent the hundis to the drawees at Bombay. Acceptance was refused, and payment, and they were returned dishonoured on the 30th.

Demand on the drawer for payment of the hundis was made thereupon, but he refused to pay the money, and the plaintiff filed this suit on the 11th of December 1886.

The proceedings on both sides, with all the facts, are stated in their Lordships' judgment.

The issue was as to the genuineness of the hundis, and the first Court virtually found that they were forged. The plaintiff's suit was accordingly dismissed.

The High Court, on an appeal, finding on the facts that the case made by the defendant was a false one, and that the hundis were genuine, ended their judgment thus :—

"On the whole, we come to the conclusion that the plaintiff has conclusively proved his case; that the defendant failed to make out his case, and that the plaintiff is entitled to a decree for the full amount claimed with interest; that is, a decree for Rs. 13,600 as principal, Rs. 68-5 as charges, and for interest from the due date of the hundis, at the rate of 12 per cent. per annum till the date of our decree, and with costs here and below, and that decree we make."

Mr. *R. V. Doyne*, for the appellant, argued that the judgment of the High Court was contrary to the weight of the evidence.

Mr. *J. H. A. Branson* and Mr. *G. E. A. Ross*, for the respondent, contended that the judgment was right. The High Court, however, should have awarded interest down to the date of payment, [159] this being covered by the plaint; and this not having been done, the decree should be amended to that effect on the cross-appeal.

Mr. *R. V. Doyne* replied on the whole case.

As to the interest, the High Court had a discretion which, apparently, had been exercised.

Afterwards, on the 16th December 1893, their Lordships' judgment was delivered by LORD HOBHOUSE :—

JUDGMENT.

The plaintiff in this suit, who is respondent in the principal appeal, sued the defendant, who is appellant in that appeal, for principal and interest due on six hundis drawn by the defendant for the aggregate sum of Rs. 13,600 upon the firm of Gobind Das, Lachhman Das of Bombay.

The date of the hundis was the 1st of April 1886, and they were made payable 61 days afterwards.

The plaint was filed on the 11th of December 1886. It describes the plaintiff as proprietor of the firm Dilsukh Rai, Radha Kishen in the town of Etawah, and the defendant as a Brahman resident in the district of Etawah. The case made is to the effect that from the year 1881 to 1886 the defendant was in the habit of raising money from the plaintiff's firm by drawing hundis on Bombay or Calcutta, which were never presented to the drawee, but when due were met partly by payment and partly by renewal; that the hundis of April 1886 were drawn in this course of dealing; that not being duly met they were presented at Bombay, and were dishonoured by the Bomby firm, who denied all knowledge of their writer.

In his written statement the defendant met the plaintiff's case by a flat denial of the whole. He says that the hundis are forgeries; that the Bombay bankers are unknown to him and are in collusion with the plaintiff; that he never purchased or sold a hundi; that he does not even know the way in which a hundi is drawn; that he has no account-books, nor any banking shop, nor does he carry on any trade; that his only business is advancing loans and holding zamindari estates; that he never had any deal-[160]ings with the plaintiff even for a day; that the plaintiff's family and his are at enmity; and that the plaintiff's motive is to satisfy a grudge and to defame the defendant.

The evidence given in the case is of three kinds; first, that which bears directly upon the making and delivery of the hundis in suit; secondly, that which relates to handwriting; and thirdly, that which goes to show that the defendant did raise money on hundis, and that the course of dealing between the parties was such as the plaintiff alleges.

Each side dwelt very strongly on the improbabilities attending his opponent's case. On the plaintiff's side it is said to be incredible that he, who is a prominent banker in Etawah and the head of the Treasury there, should from greed or, as the defendant suggests, from spite, concoct a series of elaborate forgeries, and procure a number of other persons to aid him by forgery and perjury, at the risk of severe punishment and absolute commercial and social ruin. On the defendant's side it is said to be incredible that he, who is a person of large estates, great wealth, and high social rank in Etawah, should raise money for years by giving hundis, and those drawn on firms unknown to him or to the plaintiff's house; or that, if he did so he should have the effrontery to perjure himself by denying transactions which he must have supposed to be capable of easy proof. Their Lordships confess that there is not much, if any, exaggeration in these arguments; and that the antecedent difficulties of each case appear so great that no help can be got by trying to balance them nicely against one another.

Not much more help is afforded by the direct evidence of persons who speak to the making of the hundis and their transmission to the plaintiff's house. The Subordinate Judge who tried the case did not believe these witnesses. The High Court mentions their evidence without comment on its credibility. Their Lordships do not here comment in detail upon it. It was closely examined in the argument, and the plaintiff's counsel hardly contested the opinion then expressed by their Lordships that it is quite untrustworthy.

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[161] The evidence of handwriting is left in a very unsatisfactory state. Before the Subordinate Judge no comparison of undoubted handwriting with the disputed handwriting was made. What was done was this:—The Judge made an officer of the Court read out one of the hundis while the defendant sat in Court and wrote it from dictation; he then referred the documents to two pleaders for comparison; they reported that the papers were not in one and the same hand; the Judge agreed with them, and so decided against the genuineness of the hundis in suit. It is obvious that such a test as this would at best be hardly adequate; and that it might be actually misleading, because the defendant would have a motive for disguising his hand. The Judges of the High Court compared the hundis with some admitted signatures of the defendant, but the only conclusion they drew was that there were no such differences as would justify them in finding that the evidence which went to support the hundis was false.

Their Lordships now turn to the plaintiff's books and to the evidence connected with them which formed the main ground for the decision of the High Court in favor of the plaintiff. The Subordinate Judge dealt with this part of the case in a very summary way, saying that "an account-book is nothing, it is one's private affair, and he may prepare it as he likes." It is true that there may be accounts to which that description would apply. Other accounts may be so kept, and may so tally with external circumstances, as to carry conviction that they are true. And the Evidence Act, section 34, therefore enacts that entries in books of account regularly kept in the course of business shall be relevant evidence, though not sufficient of themselves to charge any person with liability. The accounts in question are of such a nature that Mr. *Doyme* stated very fairly that unless they are forged the hundis must be genuine.

The books are proved by the plaintiff's gomashtha, Gulzari, who says that they show the daily accounts entered by himself and his brother, and are all genuine and correct. Extracts are given in the Record. There is a cash-book, a bill-book and a ledger, all [162] referring to one another. Tracing some items through the extracts, their Lordships find the correspondence between the books to be exact, and there is no suggestion made that any discrepancy exists. It must be confessed that to forge elaborate accounts extending over six years, or even to insert new sheets in such accounts, would be a most dangerous undertaking, and to make the different books correspond exactly would be a task of almost insuperable difficulty.

But there is even a better test of genuineness than the correspondence of the books with themselves, and that is their correspondence with other evidence. To apply this test their Lordships have traced the history of some of the items as disclosed by the record.

They take item 13 in the list on the record, as extracted from the account-book. It is there entered that a currency note for Rs. 1,000, No. 30477, was given to the defendant on the 31st of May 1883, and that he paid for it partly by drawing two hundis for Rs. 800 and partly in cash; and that this note was given in Government revenue on the 1st June 1883, through Wazir Ali in the tahsil of Etawah. In the bill-book the same transaction is entered, with the addition that the hundis were drawn on the firm of Gobind Das, Lachhman Das. In the cash-book the same transaction is entered, showing that the defendant was debited with only the sum of Rs. 775-12 for his hundis. In the rokar-bahi (another

cashbook) it is shown that the plaintiff received in cash Rs. 224-4 on the sale of the currency note, leaving Rs. 775-12 to the debit of the defendant. The lekha-bahi or ledger under the head of "Account of Tewari Jaswant Singh," enters the payment of Rs. 775-12 to his debit, and the hundis on Bombay at the rate of Rs. 96-15-6 per cent. (equal to the gross amount of Rs. 775-12) to his credit. These books, except the list, as to which it does not appear from what book it was extracted, contain cross-references to one another.

Pausing there, it is fit to remark that not only is there no discrepancy between the several books, but each book appears to contain that amount of difference which is appropriate to its character. The bill-book gives an additional particular of importance as it [163] happens, with respect to the hundis, viz., that they were drawn on Gobind Das. The two cash-books show the exact amount of cash paid and received by the plaintiff and the defendant, respectively on the sale of the currency note. The ledger sums up the nett result of the transaction. It is difficult to believe that any forger would have the cleverness to think of such things, but in the course of regular book keeping they would come naturally enough.

The matter, however, does not rest there. The register of the Etawah Treasury shows that on the 1st June of 1883, a note, No. 30477 for Rs. 1,030, was paid in by Wazir Ali on account of revenue due from the defendant. Wazir Ali is the defendant's servant. He was not called. The defendant called himself immediately before the hearing of the case, but said nothing on this point. It is placed beyond doubt that the defendant had the currency note, and paid for it partly by hundis drawn on Gobind Das.

Their Lordships will now take item No. 24 in the same list. The transaction here set down is that a hundi drawn by the defendant through Man Singh, a broker, on the 14th of December 1884, for the sum of Rs. 2,500, was bought by the plaintiff and paid for by crediting one Durga Prasad with Rs. 1,800 and paying Rs. 625 through Puran Singh. The bill-book shows that the hundi was drawn on Gobind Das, and that the discount was 3 per cent. The rokar-bahi shows the payment of the Rs. 625 through Puran on the day following the date of the hundi. In the lekha-bahi there are apparently two entries, one debiting and crediting the full amount of Rs. 2,500, the other crediting the defendant with the amount of the hundi less the discount, and debiting him with the two payments to Puran Singh and Durga Prasad, equal to Rs. 2,425.

Durga Prasad was examined. He stated that the defendant held a house upon lease from him, and that in Sambat 1941 (a year which would include the 14th of December 1884), he had received from the plaintiff's house the sum of Rs. 1,800 on account of rent due from the defendant, and had duly given the defendant credit. He [164] received the balance Rs. 700 through Wazir Ali. He produced his account-books in confirmation of this statement. The defendant, who was examined on his own behalf five days after the examination of Durga Prasad, says nothing about it, and he does not call Wazir Ali or Puran Singh, both his servants.

Their Lordships take it as conclusively proved by independent testimony that the sum of Rs. 1,800 shown by the plaintiff's books to be paid to Durga Prasad, on the defendant's behalf was so paid; that the defendant has had the benefit of the payment; and that the consideration which he gave for it was a hundi drawn on Gobind Das.

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Their Lordships need not go through other items in the books, nor deal with the evidence showing that the defendant had bill transactions with other people. The cases they have examined are sufficient, in the entire absence of countervailing evidence to establish three propositions. They prove that the defendant's sweeping denials of his connections with bill transactions are not true, and thereby they materially shake his credit. They prove that he drew hundis on Gobind Das and sold them to the plaintiff, thereby displacing the defendant's flat denial of dealings with the plaintiff, and meeting the improbability that he should have drawn upon a house unknown to him, by proof of the fact that he did so. They lead to the belief that the plaintiff's books are authentic and honest, and his gomashtha's evidence true, so that the course of the dealing alleged by the plaintiff terminating in the six hundis now sued on is supported.

Their Lordships agree with the High Court that the plaintiff's case is a true one and the defendant's false; and they will humbly advise Her Majesty to dismiss the defendant's appeal.

The plaintiff has presented a cross-appeal, on the ground that the decree of the High Court does not give any interest subsequent to their decree. On this point there is no dispute between the counsels. Mr. *Doyne* admits that interest should be given, and Mr. *Branson* admits that the omission is a mere slip which might have been set right on application to the Court, and that he cannot [165] ask for more than 6 per cent. On this appeal, therefore, their Lordships will humbly advise Her Majesty to vary the decree by directing that the amount decreed should bear interest at 6 per cent. per annum until payment.

Each party should bear his own costs of the cross-appeal. The appellant must pay the costs of the principal appeal.

Appeal dismissed and the cross-appeal allowed.

Solicitors for the appellant :—Messrs. *Pyke and Parrott*.

Solicitors for the respondents :—Messrs. *Barrow and Rogers*.

16 A. 165 (F.B.)=14 A.W.N. (1894) 65.

FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell,
Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Burkitt,
and Mr. Justice Aikman.*

MURTI (*Defendant*) v. BHOLA RAM AND ANOTHER (*Plaintiffs*).^{*}
[3rd June, 1893.]

Civil Procedure Code, s. 43—"Cause of action"—Execution of decree—Civil Procedure Code, ss. 278, 280, 283—Intervenor claiming attached property by two separate titles—Single order raising attachment—Two suits by judgment creditors for declaration of their right to attach—Civil Procedure Code, s. 58—Order of filing of suits.

A plaintiff's cause of action consists of every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove such fact, but every fact which is necessary to be proved. *Read v. Brown* (1) referred to.

* First Appeal from orders Nos. 89 and 90 from an order of Maulvi Muhammad Ismail Khan, Additional Subordinate Judge of Ghazipur, dated the 26th May, 1892.

(1) L. R. 22 Q.B.D. 128.

The plaintiffs, holding a simple money decree against two persons, Balgobind Ram and Mahadeva Ram, attached in execution thereof (a) their judgment-debtors' mortgagee interest in a certain mortgage and (b) a house said to belong to their judgment-debtors. Against this attachment one Musammat Murti filed objections under s. 278 of the Code of Civil Procedure, in consequence of which the property was released from attachment. The plaintiffs thereupon brought two suits under s. 283 of the Code of Civil Procedure, one in respect of the mortgagee interest and the other in respect of the house.

Held by the Full Bench (AIKMAN, J., *dissentiente*) that the first essential of the plaintiffs' cause of action was the order made under s. 280 of the Code of Civil Procedure [166] and that until that order was made they had no cause of action. The cause of action was the order under s. 280, which had been obtained by Musammat Murti and the right and title of the plaintiffs to bring the subjects of attachment to sale in execution of their decree.

The title or titles which the defendant might prove formed no part of the plaintiffs' cause of action, nor would the defendant's allegation of different titles in herself to different portions of the property split up the plaintiffs' cause of action into different and distinct causes of action.

Similarly the fact that the plaintiffs' judgment-debtors held or were alleged to hold portions of the property under different titles, would not split up the plaintiffs' cause of action into different causes of action.

Section 43 of the Code of Civil Procedure has nothing to do with the evidence which may be necessary or may be produced to support or defend a cause of action, or with the desire of a plaintiff to bring more suits than one, or with the devolution of title where the cause of action relates to land for other kind of property.

In the above case consequently s. 43 of the Code barred the later of the plaintiffs' two suits.

Held also that where two suits are filed on the same day it must be presumed until the contrary is proved that they were presented and admitted in the order in which their numbers appear in the Register of civil suits prescribed by s. 58 of the Code Civil Procedure. *Kaleshur Prasad v. Jagan Nath* (1); *Appasami v. Ramasami* (2); and *Duncan Brothers & Co. v. Jeetmull Greedharee Lall* (3) referred to; *Zahur Husain v. Muhammad Hasan* (4); and *Muhammad Ibrahim Khan v. Habib-ul-lah Khan* (5), overruled.

Per AIKMAN, J.—Although it was the single order in the execution department which necessitated the plaintiffs bringing their suits, the plaintiffs' real causes of action were the separate transactions entered into by the judgment-debtors with the objector under s. 278 of the Code, and they were therefore entitled to bring separate suits.

[*Diss.*, 19 A.W.N. 132; R., 18 A. 131; 18 A. 405 (405); 18 A. 432; 25 B. 189 (200); 10 A.L.J. 469 (471)=17 Ind. Cas. 833; 6 C.W.N. 535 (588); 5 Ind. Cas. 325 (329); 8 Ind. Cas. 9 (11); 1 P.R. (1904)=41 P.L.R. 1904; 28 P.R. 1907=93 P.L.R. 1908=140 P.W.R. 1907; D., 25 A. 48 (52); 4 A.L.J. 574=4 A.W.N. (1907) 207.]

THE facts of these cases sufficiently appear from the judgment of EDGE, C. J.

Mr. *Abdul Raoof*, for the appellant.

Mr. *J. E. Howard* and *Munshi Gobind Prasad*, for the respondents.

JUDGMENT.

EDGE, C. J.—The plaintiffs, who are respondents here, on the 31st of August, 1891 instituted two suits in the Court of the Munsif [167] of Ballia. One of those suits was entered in the register as Suit No. 614 of 1891 and the other of those suits was entered in the register as Suit No. 615 of 1891. The register in which they were entered is the register of civil suits prescribed by s. 58 of the Code of Civil Procedure. In suit No.

(1) 1 A. 650.

(4) 8 A.W.N. (1888) 147.

(2) 9. M. 279.

(5) 6 A.W.N. (1886) 113.

(3) 19 C. 372.

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614 of 1891 the defendants were Musammat Murti, who is the appellant here, Balgobind Ram, Mahadeva Ram, Padarath and Ram Narain. In Suit No. 615 of 1891 the defendants were Musammat Murti, Balgobind Ram and Mahadeva Ram. Those suits were brought by the plaintiffs in consequence of an order in the execution of a decree of the plaintiffs passed under s. 280 of the Code of Civil Procedure upon an objection made by Musammat Murti under s. 278 of the Code to the execution of the plaintiffs' decree against a mortgage of certain land and against a certain house, alleged by the plaintiffs to have been at the time the property of Balgobind Ram and Mahadeva Ram, which the plaintiffs had attached as property of their judgment-debtors. The suits were brought to establish the right of the plaintiffs to bring the interests mentioned to sale in execution of their decree against Balgobind Ram and Mahadeva Ram. Suit No. 614 related to the mortgagee's interest sought to be sold in execution of the decree. Suit No. 615 related to the house sought to be sold in execution of the decree. In Suit No. 614 of 1891 the mortgagee's interest was valued at Rs. 757-15-3. In Suit No. 615 the house was valued at Rs. 499-15. The two suits were dismissed by the Munsif as being in contravention of s. 43 of the Code of Civil Procedure. On appeal the Subordinate Judge set aside the decree of the Munsif and remanded, under s. 562 of the Code of Civil Procedure, each suit for trial on the merits.

The facts have not been gone into. It has been stated here, but the statement must not be taken as a finding by us, that the land in question was on the 1st of June, 1880 mortgaged by Padarath and Ram Narain to Balgobind Ram and Mahadeva Ram; that on the 17th July 1885 the same mortgagors made in favor of the same mortgagees a conditional sale-deed of the land and that on the 29th of March, 1890 Balgobind Ram and Mahadeva Ram granted in respect of their interest in the land a sub-mortgage to Mussammat Murti, the appellant. It was also stated here, but it must not be taken as found by this Court, that on the 26th of January 1889 the house in question was sold by Balgobind Ram and Mahadeva Ram to Mussammat Murti. The plaintiffs' decree against Balgobind Ram and Mahadeva Ram was dated the 15th of November 1889. In execution of that decree the plaintiffs on one application for attachment attached the mortgage of the 1st of June, 1880, the mortgage by conditional sale of the 17th of July 1885, and the house. Mussammat Murti by one proceeding objected to the attachment and sale. The question which we have to consider is, were these suits or was one of them barred by s. 43 of the Code of Civil Procedure? There was one objection to the attachment. There was one order made on that objection. That order would be conclusive against the plaintiffs' right to bring the mortgagees' interest in the land or their alleged interest in the house to sale unless a suit allowed by s. 283 of the Code of Civil Procedure were brought by the plaintiffs within the prescribed period.

In order rightly to comprehend what was the cause of action of the plaintiffs and when that cause of action first arose, it is necessary to consider briefly what are the rights which the holder of an executable decree for money has against the unincumbered immoveable property of his judgment-debtor. I take such a case for my illustration as the most simple case which can arise. Such judgment-creditor has by reason of his decree for money no interest or estate in his judgment-debtor's immoveable property. He has no right of suit for a trespass committed on that property. He can, except in the case provided for by s. 283 of the Code of Civil Procedure, bring no suit for a declaration of title that

the property is the immoveable property of his judgment-debtor. His sole right is to have that property attached under the Code of Civil Procedure and brought to sale in execution of his decree. On attachment under the Code the property is brought into the custody of the law and any alienation by the judgment-debtor of the property attached [169] made whilst it is under attachment is void as against all claims enforceable under the attachment. If no claim or objection be made under s. 278 of the Code of Civil Procedure, and if there be no other impediment which can be disposed of under s. 244 of the Code, the judgment-creditor is entitled to have the property sold, and subject to the provisions of s. 269 of the Code, he is entitled to have the proceeds applied so far as may be necessary in satisfaction of his decree. Should, however, a claim or objection be made under s. 278 of the Code, such claim or objection must be disposed of in accordance with the procedure prescribed for that purpose by the Code of Civil Procedure and not otherwise. If on the investigation of such claim or objection under the Code of Civil Procedure an order is made under s. 280 of the Code adverse to the judgment-creditor's claim to have the property sold in execution of his decree, his sole remedy is, by reason of s. 283 of the Code, a suit to have his alleged right to bring the property to sale in execution of his decree established; and it is by that section alone that he has a right to bring a suit to have his right to bring the property to sale in execution of his decree declared. In no event other than the making of an adverse order under s. 280 or s. 282 of the Code has the judgment-creditor a right of suit in aid of his application to have his judgment-debtor's property brought to sale in execution of his decree.

In the suit authorized by s. 283 of the Code many questions of title might have to be determined. It might, for example, be necessary to determine in such suit whether a transfer under which the defendant claimed was voidable under s. 53 of the Transfer of Property Act (Act No. IV of 1882). But the judgment-creditor's suit would necessarily be dismissed on the ground that he had failed to prove a cause of action if the allegation of the fact that an order adverse to his alleged right to bring the property to sale had been made before suit under s. 280 or s. 283 of the Code of Civil Procedure was traversed by the defendant and he should fail to prove that such order was in fact made. Unless and until that order was made, the judgment-creditor had no cause of action [170] and no right to sue any one in respect of property which was not his or in his possession, and in which he had no reversionary or other interest. It is obvious from the above considerations that the first essential of the plaintiffs' cause of action was the order made under s. 280 of the Code of Civil Procedure and that until that order was made they had no cause of action. The cause of action, it appears to me, was the order under s. 280 which had been obtained by Musammam Murti and the right and title of the plaintiffs to bring the subjects of the attachment to sale in execution of their decree.

It was held by Lord Esher, M. R., in *Read v. Brown* (1) that a cause of action is "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved." Fry, L.J., agreed and said:—"Everything which if not proved gives the defendant an immediate right to judgment, must be part of the cause of action." In the

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same case Lopes, L.J., said:—"I agree with the definition given by the Master of Rolls of a cause of action, and that it includes any fact which it would be necessary to prove, if traversed, in order to enable a plaintiff to sustain his action."

The question of how Musammat Murti might support that order passed under s. 280 and of what different title she might prove in her defence to the suit, could not, in my opinion, affect the question of what the cause of action was, except in so far as her defence might put the plaintiffs to proof of their decree, their right to execute it against their judgment-debtors and the title of their judgment-debtors to the property sought to be sold in execution of that decree. A title in Musammat Murti which, when proved, showed that the plaintiff had no cause of action could not, nor could the evidence in support of it, form any part of the cause of action of the plaintiffs. It would be, for instance, quite competent to Musammat Murti to allege, prove in the suit [171] and succeed on a title on which she had not based her objection under s. 278 of the Code of Civil Procedure. She might with regard to different portions of the property allege in answer to the suit an equal number of different titles in herself: for example, she might allege as to one portion of the property that it had come to her by descent; as to another portion of the property that she had purchased it at an auction sale held under a decree against the then true owner; as to another portion of the property that it had vested in her under a deed of gift from the true owner. The title or titles which she might prove form no part of the plaintiffs' cause of action. Her allegation of different titles in herself to different portions of the property would not split up the cause of action of the plaintiffs into different and distinct causes of action. Their right of suit arose only by means of the order passed under s. 280 which formed part of that cause of action.

Similarly the fact that the plaintiffs' judgment-debtors held or were alleged to hold portions of the property under different titles did not split up into different causes of action the plaintiffs' cause of action. Their cause of action did not arise or become a cause of action until their right to bring the property to sale was obstructed by the order obtained under s. 280 by Musammat Murti.

Section 43 of the Code of Civil Procedure has, it appears to me, nothing to do with the evidence which may be necessary or may be produced to support or defeat an alleged cause of action. It has nothing to do with the desire of a plaintiff to bring more suits than one, or with the devolution of title in the case where the cause of action relates to land or other kind of property. For instance, if A, were the owner of 100 bighas of land and had acquired each of these bighas at a different time and under a different title, and B turned A out of possession of those 100 bighas by a single act of trespass, there would be one cause of action in respect of the whole 100 bighas, although A might desire by a separate suit in respect of each bigha to establish his title to each [172] bigha separately and although, if A did not bring his suit for possession until after the expiration of six months from the date of dispossession by B, it might be necessary for him to prove a different title in himself in respect of each one of those 100 bighas. I am of opinion there was only one cause of action here and that s. 43 of the Code of Civil Procedure applies.

On behalf of the appellant two authorities of this Court have been relied upon. One is that of *Kaleshar Prasad v. Jagan Nath* (1) and the

other was that of *Zahur Husain v. Muhammad Hasan* (1). In the first case the learned Judges appear to have thought that the two suits, which were brought on the same day, may have been necessary, and they held that the two suits were simultaneous and not successive and did not apply the rule contained in s. 7 of Act No. VIII of 1859. Those learned Judges may or may not have been right in holding that in that case two suits were necessary. In the other case, *viz.*, that of *Zahur Husain v. Muhammad Hasan*, to the judgment in which I was a party, there was undoubtedly but one cause of action. The plaintiff brought on the same day two suits against the same defendant. We declined to apply s. 43 of the Code of Civil Procedure. We based our decision on the fact that we were not satisfied as to which of the suits in that case was the first suit. On consideration, I have come to the conclusion that my judgment in that case was based on a wrong principle and that the reason given by me there for not applying s. 43 of the Code of Civil Procedure would open the door to deliberate and continual evasions of the provisions and spirit of s. 43 of the Code of Civil Procedure. For instance, to assume a case, A buys on the same occasion seven different articles from B in B's shop, each article being sold at a price appropriated to itself. If my judgment in *Zahur Husain v. Muhammad Hasan* were to be acted upon, B might evade s. 43 of the Code of Civil Procedure, by filing on the same day seven suits against A in respect of the price of seven articles sold. It would in such a case be no answer to s. 43 of the Code of Civil Procedure for B to say that A denied [173] the sale of each of the seven articles and B's right to sell them, and that he (B) wished to establish his case in respect of the sale of each article by a separate suit. We have to see what s. 43 enacts and not what the wishes of the plaintiff may be. When the case of *Zahur Husain v. Muhammad Hasan* was before me, I had not present to my mind the concluding paragraph of s. 58 of the Code of Civil Procedure. I am prepared to hold, and do hold now, that it must be presumed, until the contrary is proved, that the suits were presented and admitted in the order in which their numbers appear in the register. It was contended in argument in this case that s. 43 of the Code of Civil Procedure could not apply because Padarath and Ram Narain were parties as defendants in suit No. 614 of 1891 and were not parties in suit No. 615 of 1891, in which suit and the subject-matter of it they were in nowise concerned. It appears to me that that makes no difference. In the first instance, Balgobind Ram, Mahadeva Ram, Padarath and Ram Narain were not any of the objectors to the attachment. Secondly, even if they were necessary parties in a suit relating to the land or the house, that fact would not in my opinion alter the effect of s. 43. The cause of action would still continue to be the same, although it might by way of precaution be necessary to make them parties to the suit in order to bind them by the decree. One of the cases cited in argument was *Appasami v. Ramasami* (2), and although the judgment in that case was generally in accordance with the view which I have expressed, I cannot agree with the proposition at page 281 of the report, *viz.*, "and one test is whether the same evidence and the same arguments apply in the two cases." Another case to which we were referred in the argument was that of *Duncan Brothers & Co. v. Jeetmull Greedharee Lall* (3). There is nothing in that case inconsistent with the view I have expressed during the argument in this case.

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Mr. *Gobind Prasad* on behalf of the plaintiffs, respondents here, asked us to return the complaints to enable his clients to amend one [174] of the complaints by including in it the whole cause of action and to claim for relief in respect of the mortgage and in respect of house. That is a course which is not open to him. His suits were instituted in the Court of the Munsif whose jurisdiction is limited to Rs. 1,000 in value, and we could not allow an amendment which would have the effect of ousting the jurisdiction of the Court in which the suit was instituted. Mr. *Gobind Prasad* then asked us to allow him to withdraw the suits under s. 373 of the Code of Civil Procedure with the permission to sue again. Assuming, for the present purposes only, that we have in this appeal from an order power to allow the suits to be withdrawn under s. 373, I am of opinion that we should not give any such permission. As to suit No. 614 of 1891, there is nothing to show that that suit must fail by reason of any formal defect. That it bars suit No. 615 is quite another matter, and is in my opinion no sufficient ground for permitting the plaintiffs, who have deliberately chosen to bring two suits, to withdraw from them with permission to sue again. It would be useless to give permission to withdraw suit No. 615 of 1891 and to sue again: as, so long as suit No. 614 of 1891 existed, we could not give permission, having regard to s. 43, for the bringing of a fresh suit in respect of matters to which suit No. 615 of 1891 relates. Mr. *Gobind Prasad* also asked for permission to elect as to which suit should be proceeded with and which abandoned. We have no power to give him any right of election. In my opinion we can give no such right to elect. The two suits are on the files of the Court, and being on the files of the Court and being in respect of the same cause of action, the first suit has barred the second. The result is in my opinion that the order of the Subordinate Judge setting aside the decree of the Munsif and remanding under s. 562 of the Code of Civil Procedure, suit No. 614 of 1891 is a right order in law, and the appeal, which is from that order, I would dismiss with costs. Also in my opinion the order of the Subordinate Judge setting aside the decree of the Munsif in suit No. 615 of 1891 and ordering a remand in that suit under s. 562 of the Code of Civil Procedure is a bad order in law. I would allow the appeal from the order in suit No. 615 of 1891, and setting aside the order of the Subordinate [175] Judge in that case, I would restore and affirm the decree of the Munsif dismissing the suit No. 615 of 1891 with costs in all the Courts.

TYRRELL, J.—I concur, and will only add that Mr. *Gobind Prasad* for the respondents relied on a judgment of this Court to which I was a party in *Muhammad Ibrahim Khan v. Habib-ullah Khan and others* (1). The view taken in that judgment is in favor of the position that Mr. *Gobind Prasad* was supporting. That judgment is not reported in the authorized law reports and on close examination I am satisfied it is incorrect.

KNOX, J.—I entertain no doubt whatever as to what was the cause of action in the present case. It was the one and indivisible order passed on the 7th of August 1891, an order which comprehended both the properties which were made the subject-matter of suit No. 614 and suit No. 615. The circumstances under which those properties came into contact with, or, in other words, to be attached by, the respondents are immaterial. They were in no way causes of action forcing the respondents into the Court. The one entire claim has been by respondents split up so as to

(1) 6 A.W.N. (1886) 113.

form two claims, and it becomes necessary to see what effect will result by reason of the provisions of s. 43 of the Code. I concur with the learned Chief Justice that, as nothing has been shown to the contrary, the order in which those suits were admitted upon the register must be deemed to be the order in which they were presented by the respondents and the order in which the respondents sued. The after-suit will therefore be suit No. 615, and the portion of the entire claim which respondents omitted to sue for in suit No. 614 is that portion which s. 43 prevents their suing for ever after. The contention that Padarath and Ram Narain were parties to suit No. 614 and not parties to suit No. 615 is not a sound one. Section 28 of the Code gave respondents ample power to array them in one and the same suit. The law required that one suit should be laid, and, that being the case, they should have availed themselves of that [176] power. For these reasons I entirely concur in the orders proposed to be passed in both the appeals.

BLAIR, J.—I am strongly of opinion that the cause of action is one and indivisible. It is the order of the execution Court upon the objection of Musammat Murti whereby properties, the subject of this suit, were released from the attachment, and I am unable to see that the fact that such properties were held by the objector under different titles can in any way affect the question as to what is the cause of action. That being so, I am of opinion that the two suits ought not to have been brought. I therefore concur in both the orders proposed to be passed.

BURKITT, J.—In my opinion plaintiffs had one and only one cause of action, *viz.*, the order of the execution Court releasing all the property which was the subject of Musammat Murti's objection from attachment and declaring that property not to be liable to sale in execution of the plaintiffs-respondents' decree against Balgobind and Mahadeva. That order was a single order covering the whole of the property of whatever kind and by whatever title claimed by Musammat Murti. That being so, the plaintiffs-respondents had but one and the same cause of action as to both the land and the house. They therefore under s. 43 of the Code of Civil Procedure were bound to include in one suit the whole of the claim which they were entitled to make in respect of that single cause of action. As they have chosen to split up their cause of action between two suits they must now take the consequences. I fully concur in the judgment just delivered by the learned Chief Justice and in the orders passed by him as to suits Nos. 614 and 615.

AIKMAN, J.—On the facts of this case I should hesitate to hold that there is anything in s. 43 to prevent the plaintiffs-respondents bringing two separate suits. The plaintiffs wished to bring to sale in execution of their decree two different properties which, they alleged, belonged to the judgment-debtors. They found themselves resisted by the mother of the judgment-debtors. Her resistance was based on two grounds:—First, that she was the mortgagee of one of [177] the properties, and next, she was the vendee of the other. These two transactions of the mortgage and sale were different transactions executed in her favour by her sons on different dates. The plaintiffs' case was that each of these two different transactions were merely colorable. Had the suit referred to in s. 283 of the Code of Civil Procedure been described as a suit to set aside the order in the execution department and had one order been passed, I should have had no hesitation in holding that only one suit would lie. But the suit referred to in s. 283 is described as a suit to establish the right which the plaintiff claims to the property in

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(1894) 65.

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(1894) 65.

dispute. The right claimed by plaintiffs in this case was to bring two different properties to sale. His case was that his right was being defeated by two different colorable transactions, and I am of opinion that it was open to him to attack each of these transactions in a separate suit. Supposing Musammat Murti had failed in asserting her title, the judgment of Oldfield, J., in the case referred to by my brother Tyrrell, *Muhammad Ibrahim Khan v. Habib-ullah Khan and others* (1), would be an authority for holding that she could have brought separate suits, although she filed only one objection which had been overruled by one and the same order. If so, I do not see why the decree-holders should not be entitled to bring two separate suits. It is true that it was the order in the execution department which necessitated their bringing the suits, but on the case set up by them their real causes of action were the two different transactions entered into by the judgment-debtors with their mother. On this view of the case I would dismiss the appeals.

If I could hold that s. 43 applied and that plaintiffs could not bring two suits, I should concur in all the rest of the judgment of the learned Chief Justice and in the orders proposed by him.

Appeal No. 89 dismissed.
Appeal No. 90 decreed.

16 A. 178 = 14 A.W.N. (1894) 12.

[178] APPELLATE CIVIL.

Before Mr. Justice Aikman.

MAMMAN AND OTHERS (*Defendants*) v. KUAR SEN (*Plaintiff*).^{*}
[5th December, 1893.]

Act No. V of 1882 (Easements Act), ss. 4, 18—Easement—Custom—Right to place tazias on a certain plot of land during the Moharram.

A right to place *tazias* on a certain plot of land during the Moharram is a right of the nature of the customary easements referred to in s. 18 of Act No. V of 1882, and may be acquired as such by prescription. *Ashraf Ali v. Jagan Nath* (2) referred to.

THE facts of this case sufficiently appear from the judgment of Aikman, J.

Mr. *Amir-ud-din*, for the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondent.

JUDGMENT.

AIKMAN, J.—The plaintiff in this case sued for the possession of a plot of land and for the demolition of a *chabutra* built upon it by the defendants. The Court of first instance gave the plaintiff a decree, but, finding that the defendants had established a custom of placing their *tazias* and celebrating the Moharram on this ground, the Court by the terms of its decree reserved to the defendants the right to continue to do so. Both parties appealed. The learned District Judge decreed the plaintiff's appeal, and dismissed that of the defendants. The defendants come here in

* Second Appeal No. 388 of 1893, from a decree of T. R. Redfern, Esq., District Judge of Bareilly, dated the 24th December, 1892, modifying a decree of Maulvi Ahmad Ali, Munsif of Bareilly, dated the 8th June 1892.

(1) 6 A.W.N. (1886) 113.

(2) 4 A.W.N. (1884) 186.

second appeal. The only point urged before me is the propriety of that part of the lower appellate Court's order which finds that the appellants had not established any right to place their *tazias* and celebrate the Moharram on the disputed plot. The learned District Judge holds that having regard to the definition of an easement in s. 4 of Act No. V of 1882, the defendants have not established any right. The learned counsel for the appellants refers to the decision of this Court in *Ashraf Ali v. Jagan Nath* (1). There it was held that a similar right could not be regarded strictly as an easement, but that [179] it was a right by custom of the description asserted in the case of *Mounsey v. Ismay* (2) and in *Abbot v. Weekly* (3). The right in the former case was one claimed by the freemen of the city of Carlisle to enter on a certain close on Ascension Day in each year for the purpose of holding horse races. In the latter case the right claimed was by the inhabitants of a parish to dance on a certain close. Such rights may be considered as coming under the definitions of customary easements referred to in s. 18 of the Indian Easements Act, No. V of 1882. It is true that the appellants denied that the plaintiff was proprietor of the land, but I do not think that their failure to substantiate this should prevent them from establishing a customary right, which it appears to me they claim in paragraph 4 of their written statement. There was evidence in the case that the *mirasis*, to which caste the appellants belong, had for a period of twenty years or so placed *tazias* on the disputed plot and sung there. There was a suggestion that this was by leave of the zamindar, but there was no evidence in support of this. In my opinion, the facts found by the District Judge are sufficient to establish the custom set up by the appellants. The other grounds of appeal have not been supported. I allow the appeal so far as to set aside the decree of the lower appellate Court and restore that of the Court of first instance. As the appellants' appeal has been partially supported, each party will pay their own costs in this Court and in the lower appellate Court.

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DEC. 5.

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16 A. 178 =

14 A.W.N.

(1894) 12.

Appeal decreed.

16 A. 179 = 14 A.W.N. (1894) 17.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Burkitt.

RAM DIAL (*Defendant*) v. INDAR KUAR AND ANOTHER (*Plaintiffs*).
[13th December, 1893.]

Annuity—Maintenance—Enforcement of decree for maintenance—Limitation.

Where a decree in a suit for maintenance gave the plaintiffs a right to recover maintenance for the year previous to the suit and also declared their right to maintenance in future, but omitted to specify any precise date on which such maintenance should become payable:—*Held* that such decree was one which could be enforced [180] from time to time by suit. *Vishnu Shambhog v. Manjamma* (4) approved. *Ashutosh Bannerjee v. Lukhimoni Debya* (5) distinguished.

[R., 13 C.P.L.R. 156; 15 Ind. Cas. 389 (391) = 15 O.C. 99 (105); 17 M.L.J. 423.]

THE facts of this case sufficiently appear from the judgment of the Court.

* Second Appeal No. 68 of 1892, from a decree of Maulvi Muhammad Anwar Husain, Subordinate Judge of Farakhabad, dated 21st November 1891, confirming a decree of Pandit Raj Nath, Munsif of Farakhabad, dated the 30th June 1891.

(1) 4 A.W.N. (1884) 186.

(2) 34 L.J. Ex. 52

(3) 1 Lavinge 176.

(4) 9 B. 108.

(5) 19 C. 139.

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DEC. 13.
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CIVIL.
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16 A. 179=
14 A.W.N.
(1894) 17.

Mr. T. Conlan, Pandit Bishambar Nath and Munshi Gobind Prasad, for the appellant.

Mr. D. N. Banerji, for the respondents.

JUDGMENT.

KNOX and BURKITT, JJ.—The respondents to this second appeal were plaintiffs in the Court of first instance. They there sued to recover from the defendant, now appellant, three years' arrears of maintenance upon a right to receive such maintenance decreed in their favour by a decree of a Civil Court dated the 7th day of June 1875. Their claim was met by an answer, first, to the effect that, as the respondents had already received a decree from a competent Court giving them maintenance allowance, the only course open to them was to execute that decree; and secondly, that by lapse of time the decree above alluded to had become barred. Defendants' position was that the respondents' right to receive maintenance had now become extinct. The lower appellate Court gave a decree for the sum claimed by the respondents; and the appellant now contends before us again that the respondents were not competent to institute the present suit, and that their only remedy lay in executing the decree of 1875, which, their counsel now admits, and has taken pains to show, is not time-barred.

The decree of 1875 was not very happily worded, probably because it proceeded on an arbitration award. There is, however, in it no distinct mandatory order directing the present appellant, who was then defendant, to pay the maintenance allowance in the future upon any date set out in the decree. It gave the respondents, who were then plaintiffs, a decree entitling them to recover maintenance allowance for one year which had accrued due previous to the institution of the suit, and it declared their right to receive an allowance at the rate claimed by them in the future; but it contained no order directing that the allowance was to be [181] paid in any given month or upon any given day of a month. In this respect the decree is clearly to be distinguished from that which formed the subject-matter of the appeal before the Calcutta High Court in *Ashutosh Bannerjee v. Lukhimon Debya* (1), a case which the learned vakil for the appellant pressed upon our notice as a case directly in support of his argument. The decree before us in its language and terms seems on all fours with one which was under the consideration of the Bombay High Court in the case of *Vishnu Shambhog v. Manjamma* (2). That decree, like the one before us, contained an order in express terms to defendant to pay plaintiff a sum claimed by her for maintenance during the previous year. "But as to the future," the Court remarked, "it is in words merely declaratory of her right to receive maintenance at the above annual rate from the defendant, and therefore strictly, we think, requires that a suit should be brought to enforce it." That in our opinion is the precise position which the decree before us occupies. Had the decree contained a distinct order to the defendant to pay at a distinct date we might have followed the precedent laid down by the Full Bench of Calcutta; but, looking to the terms of the decree, and considering them to be the same virtually as those of the decree in *Vishnu Shambhog v. Manjamma* (2), we prefer to follow the latter-named precedent, with which we thoroughly agree. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 19 C. 139.

(2) 9 B. 108.

16 A. 181 = 14 A.W.N. (1894) 15.

APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.*DALEL (*Plaintiff*) v. BHAJJU AND ANOTHER (*Defendants*).^{*}

[8th January, 1894.]

Landholder and tenant—Right of tenants to use a plot of their zamindar's land as a threshing floor—Conditions of tenancy—Easement—Evidence.

On evidence that a tenant has for a great number of years used a particular piece of the zamindar's land along with other tenants as a threshing floor, it is competent to the Court to find, there being no evidence to the contrary, that the right [182] to use the plot of land for that purpose was part of the contract of tenancy. *Udit Singh v. Kashi Ram* (1) distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. J. Simeon, for the appellant.

Mr. A. H. S. Reid, for the respondents.

JUDGMENT.

EDGE, C. J., and BANERJI, J.—The suit in this case was one for ejectment. It was brought by one tenant of a zamindar against two other tenants. The piece of land in question on the findings of the lower appellate Court had been used by the tenants for a great number of years as a threshing floor, but shortly before this suit the land had been let by the zamindar to the plaintiff. The Judge came to the conclusion on the evidence that it was an ingredient in the contract under which the tenants cultivated, that a place should be granted for the purpose of threshing the grain. He found that the plaintiffs had no right of occupancy in the plot, but that they had a right along with other tenants of putting their cut crops on it. It appears to us that on evidence that a tenant has for a great many years used a particular piece of land along with other tenants as a threshing floor for threshing out crops, it is competent to the Judge to find, there being no evidence to the contrary, that the right to use the plot of land for that purpose was part of the contract of tenancy, and that is what we understand the learned Judge to have found here. The decision in *Udit Singh v. Kashi Ram* (1) does not in the slightest degree conflict with what we have here said. The Judge's finding is that the right was acquired by contract. The decree in *Udit Singh's* case was that a right of easement cannot be adversely acquired by a tenant against his landlord. At one part of his judgment the Judge is in error if his judgment in that place means that an easement with regard to this land could be acquired adversely by user by the tenant against the landlord. We dismiss this appeal with costs.

Appeal dismissed.

* Second Appeal No. 448 of 1892, from a decree of H. P. Mulock, Esq., District Judge of Moradabad, dated the 22nd February 1892, reversing a decree of Maulvi Saiyad Muhammad Tajammul Husain, Munsif of Amroha, dated the 8th May 1891.

(1) 14 A. 185.

1894

JAN. 8.

APPEL-
LATE
CIVIL.

16 A. 181 =

14 A.W.N.

(1894) 15.

1894

JAN. 10.

APPEL-
LATE
CIVIL.

16 A. 183 = 14 A.W.N. (1894) 18.

[183] APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.*SHEIKH HASSU (*Plaintiff*) v. RAM KUMAR SINGH AND OTHERS
(*Defendants*).^{*} [10th January, 1894.]

16 A. 183 =

14 A.W.N.

(1894) 18.

Civil Procedure Code, s. 13—Res judicata—“Court of jurisdiction competent to try such subsequent suit.”

The words “a Court of jurisdiction competent to try,” as used in s. 13 of the Code of Civil Procedure, mean a Court having jurisdiction not only as to the nature but also as to the amount of the suit. *Misir Raghobar Dial v. Sheo Baksh Singh* (1) referred to.

[D., 18 A. 59 (62).]

IN the suit out of which this appeal arose, the plaintiff claimed Rs. 1,500 principal and Rs. 409-9-9 interest as *nankar* allowance due under a deed said to have been executed by the original defendant, Rasul Bakhsh, in favour of the plaintiff's mother and her male issue, and charging the payment on certain specified immoveable property. The suit was filed on the 25th of September 1891 in the Court of the Subordinate Judge of Allahabad. Subsequently certain other persons who were in possession of the property, or portions of it, charged with the payment of the allowance were joined as defendants. The defendants raised various defences, but were unanimous in pleading that the suit was barred by s. 13 of the Code of Civil Procedure, inasmuch as on a former occasion the plaintiff had sued the defendant, Rasul Bakhsh, under the same title to recover Rs. 684-7-11 principal and interest on account of two years arrears of maintenance. That suit had been brought in the Court of a Munsif and was decided by that Court against the plaintiff, Sheikh Hassu, in 1887, and the decision was upheld by the Subordinate Judge and by the High Court in appeal.

The Subordinate Judge in the present case held that s. 13 of the Code of Civil Procedure did not apply, and on the merits gave the plaintiff a decree for Rs. 1,500, the principal amount claimed but did not allow interest, as it was not provided for in the agreement on which the suit was based.

[184] The defendants appealed to the District Judge, who, holding that the principle of *res judicata*, if not s. 13 of the Code of Civil Procedure, applied, decreed the appeal and dismissed the plaintiff's suit.

The plaintiff then appealed to the High Court.

Babu Jogindro Nath Chaudhri, for the appellant.

Mr. D. N. Banerji, Munshi Ram Prasad and Munshi Madho Prasad, for the respondents.

JUDGMENT.

EDGE, C.J., and BANERJI, J.—The question of right had been disposed of adversely to this plaintiff in a suit between him and the defendants, or the persons through whom they claimed, in the Court of a Munsif. That suit was within the jurisdiction of the Munsif. The present suit, although

^{*} Second Appeal No. 713 of 1892, from a decree of G. F. G. Forbes, Esq., Officiating District Judge of Allahabad, dated the 1st June 1892, reversing a decree of Babu Piari Lal, Subordinate Judge, Allahabad, dated the 30th March 1892.

(1) 9 I.A. 197 = 9 C. 439.

involving the same question of right, was by reason of its amount not within the jurisdiction of a Munsif. The question is whether s. 13 of the Code of Civil Procedure applies. Although their Lordships of the Privy Council in *Misir Raghobar Dial v. Sheo Baksh Singh* (1) were not deciding upon the construction of s. 13 of Act No. XIV of 1882, and were in fact deciding on the construction of s. 13 of Act No. X of 1877, in which the words "in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised," were not contained, still, their Lordships' judgment shows the construction which we ought to put upon s. 13 of Act No. XIV of 1882, and according to that judgment we must construe "a Court of jurisdiction competent to try," as meaning a Court having jurisdiction not only as to the nature but as to the amount of the suit. The learned District Judge was wrong as to the preliminary point. We set aside his decree and remand this case under s. 562 of the Code of Civil Procedure. Costs here and hitherto in the lower appellate Court will abide the result.

Cause remanded.

16 A. 185 = 14 A.W.N. (1894) 21.

[185] APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Burkitt.

BALMAKUND (*Defendant*) v. BHAGWAN DAS (*Plaintiff*).

[15th January, 1894.]

Hindu law—Gift—Delivery of deed of gift effectual to pass title.

The delivery to the donee of immoveable property of the deed of gift is sufficient to pass the title to such property to the donee without actual physical possession of such property being taken by the donee. *Man Bhari v. Naunidh* (2) followed.

[R., 27 B. 31 = 4 Bom. L.R. 754; 20 C. 149 (171); 21 P.L.R. 1901; D., 45 P.R. 1901 = 64 P.L.R. 1901; 44 P.R. 1902 = 36 P.L.R. 1902.]

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi Madan Mohan Malaviya and Munshi Viddya Charan Singh, for the appellant.

Pandit Moti Lal Nehru, for the respondent.

JUDGMENT.

KNOX and BURKITT, JJ.—In the suit out of which this second appeal arises the plaintiff was one Bhagwan Das. He is now respondent before us. Bhagwan Das prayed for possession to be delivered to him over a house in the city of Cawnpore, which he claimed by virtue of a registered deed in his favour executed by one Musammat Gyana, who, at the time she executed the deed, was admittedly owner and in possession. The appellant before us is one Balmakund, who claims to be entitled to the house on allegations (1) that he was adopted by one Nonid, husband of Musammat Gyana, and (2) that he is the reversioner after Gyana's death to Nonid's property, as being grandson of the own brother of Nonid. It

* Second Appeal No. 739 of 1892, from a decree of Pandit Raj Nath Sahib, Subordinate Judge of Cawnpur, dated the 23rd June 1892, reversing a decree of Babu Banke Behari Lal, Munsif of Cawnpur, dated the 25th March 1892.

(1) 9 I.A. 197 = 9 C. 439.

(2) 4 A. 40.

1894

JAN. 10.

APPEL-

LATE

CIVIL.

16 A. 183 =

14 A.W.N.

(1894) 18.

1894
JAN. 15.
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APPEL-
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CIVIL.

16 A. 185 =
14 A.W.N.
(1894) 21.

has been found as a fact that he was never adopted, and it has also been found that the house in dispute was never the property of Nonid, but was acquired by Gyana from her own funds eight or nine years after Nonid's death. The deed of gift was a registered deed and is produced by the respondent, the donee. The only point that the appellant raises before us is that as the donee, according to him, did not obtain possession under the deed of gift, and has not obtained it until now, the deed of gift is ineffectual to transmit title. The fact that the deed of gift comes out of the hands of the donee [186] and is in his possession is evidence that he accepted the gift. That being the case, the facts of the appeal before us are virtually the same as those which were before this Court in the case of *Man Bhari v. Naunidh* (1). The delivery to the donee of the deed of gift was sufficient to pass title to him. The plea raised before us fails. The appeal is dismissed with costs.

Appeal dismissed.

16 A. 186 = 14 A.W.N. (1894) 20.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

BISHAMBAR SAHAI (*Plaintiff*) v. SUKHDEVI (*Defendant*).^{*}
[15th January, 1894.]

Civil Procedure Code, s. 483—Attachment before judgment—Suit on hypothecation bond—Attachment of non-hypothecated immovable property—Sale of hypothecated property not necessary to satisfy Court that such property may prove insufficient.

Section 483 of the Code of Civil Procedure does not refer exclusively to moveable property.

Where in a suit on an hypothecation-bond the plaintiff sought to attach before judgment immovable property of the defendant other than that hypothecated: *Held* that it was not necessary, in order that the Court might be satisfied that the proceeds of the sale of the hypothecated property were likely to prove insufficient to meet the decree which the plaintiff might obtain in his suit, that such property should be actually brought to sale.

[*Rel. on*, 15 Ind. Cas. 604.]

THE facts of this case sufficiently appear from the judgment of the Court.

Messrs. *T. Conlan* and *W. S. Howell*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

JUDGMENT.

EDGE, C. J., and BANERJI, J.—This is an appeal by a plaintiff from a decree in appeal of a Subordinate Judge dismissing the plaintiff's suit. The plaintiff brought a suit on a hypothecation-bond, and before decree he applied under s. 483 of the Code of Civil Procedure for an order of attachment of certain immovable property not included in the hypothecation-bond, but which, it was alleged, belonged to the defendant in the suit. That application [187] was granted, but, on objection taken by the wife of the defendant in the suit on the mortgage-bond, an order under s. 280 of the

* Second Appeal No. 506 of 1892 from a decree of Rai Sanwal Singh, Additional Subordinate Judge of Saharanpur, dated the 11th February 1892, reversing a decree of Sheikh Maula Bakhsh, Munsif of Muzaffarnagar, dated the 22nd July 1891.

(1) 4 A. 40.

Code of Civil Procedure was made and thereupon the plaintiff brought this suit to have his right to have this property attached declared. It was found for the plaintiff in this suit in the first Court that the property included in the mortgage would, by reason of prior incumbrances, be entirely inadequate to satisfy the mortgage-debt. It was also found that the transfer by the mortgagor to the female defendant, his wife, was made with intent to defraud the plaintiff and that it had defrauded him, and that it was void under s. 53 of Act No. IV of 1882. On appeal the Subordinate Judge dismissed the plaintiff's suit as premature. It has been contended that s. 483 of the Code of Civil Procedure does not apply to property other than moveable property. We do not agree with that contention. If that contention were correct, a plaintiff suing for a money decree would apparently be unable to obtain any protection in the suit against the disposal before judgment by the defendant of immoveable property which might be the only source to which such plaintiff could look for the satisfaction of his decree when obtained. It was suggested that cl. (b) of s. 492 of the Code would enable such plaintiff to obtain protection even if s. 483 did not apply. It appears to us that if s. 483 does not apply to immoveable property, there is nothing which would make cl. (b) of s. 492 apply. In our opinion s. 483 and cl. (b) of s. 492 apply not only to moveable but also to immoveable property. The Subordinate Judge considered that as the hypothecated property had not at the commencement of the suit been sold in execution of a decree for the sale it had not been ascertained that the hypothecated property would be insufficient to satisfy the decree. He consequently considered the suit to be premature. Now s. 483 of the Code of Civil Procedure enables in certain events a plaintiff to obtain an order of attachment before judgment. The opening part of the section is as follows:—"If at any stage of any suit the plaintiff satisfies the Court by affidavit or otherwise that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,—(a) is [188] about to dispose, &c." According to the wording of this section it applies to any suit and clearly enables an application to be made under it before judgment and decree. It is true that in a suit for sale on a mortgage under Act No. IV of 1882, the proper decree under s. 88 is the decree therein provided for, *i.e.*, a decree in certain events for sale of the mortgaged property, and that in such a decree it would be irregular to direct a sale of non-hypothecated property, but a plaintiff in a suit for sale on a mortgage may not only be entitled to a decree under s. 88 of Act No. IV of 1882, but to a subsequent decree in the same suit under s. 90. In the present case the decree in the mortgage suit, although a decree for sale under s. 88, irregularly is a decree against non-hypothecated property in case the hypothecated property is not sufficient, and that decree being final could be executed notwithstanding its irregularity. However, even if the plaintiff here had got a decree drawn up strictly in accordance with s. 88 of Act No. IV of 1882, he might subsequently be entitled to a decree under s. 90 under which he could bring to sale the non-hypothecated property. Our judgment in this case does not depend upon the particular form of the decree which the plaintiff has actually got. It appears to us that s. 483 applies in this case. We should say that in our opinion a Court should act with extreme caution in proceeding under s. 483 of the Code of Civil Procedure to attach non-hypothecated property in a suit for sale under a mortgage, and should be thoroughly satisfied, amongst other things, before making an order under that section, that the hypothecated property would be insufficient to discharge the mortgage debt. In this case we

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fail to see how the plaintiff here could have protected his interests otherwise than by bringing this suit, although it was brought before the hypothecated property was sold under the decree for sale, as, if this suit had not been brought within one year from the date of the order under s. 280 of the Code of Civil Procedure, that order would have become conclusive against the plaintiff and the remedy which he may be driven to against the non-hypothecated property would have become barred. The lower appellate Court having dismissed the suit on the short ground that it was premature, we, holding [189] a different opinion, set aside the decree under appeal and remand the case under s. 562 of the Code of Civil Procedure. Costs in this Court and hitherto in the lower appellate Court will abide the result.

Cause remanded.

16 A. 189 = 14 A.W.N. (1894) 19.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Banerji.

GAJPAT RAI (*Defendant*) v. CHIMMAN RAI (*Plaintiff*).*

[15th January, 1894.]

Act XV of 1877, Sch. ii, Arts. 131, 132—Suit for payment of annuity—Limitation.

A plaintiff whose right to receive a yearly payment out of the income of certain immovable property had been settled by arbitration in the course of a suit in 1864, sued in 1890 to recover from the then holder of the property arrears of such allowance for two years preceding the suit. The plaintiff alleged, but failed to prove, that he and his predecessor in title had received payment of the allowance for the intervening years or any of them.

Held that the suit was not barred by limitation, *Chhagan Lal v. Bapubhai* (1) followed.

[R., 19 Ind. Cas. 661 (662) ; 7 O.C. 108 (112).]

IN this case the plaintiff, Chimman Rai, sued in a Court of Revenue as a *muafidar* to recover from his *co-muafidar* two years' arrears of his share of the profits of a revenue-free estate.

The Court of first instance decreed the plaintiff's claim, resting its decision on the fact that in 1889 the Assistant Settlement Officer had recorded in the village administration papers that the plaintiff was entitled as against the defendant to a payment of Rs. 140 a year out of the assigned revenue of the estate in question.

The defendant appealed to the District Judge, who, holding that the order of the Settlement Officer, on which the judgment of the Court of first instance was based, was *ultra vires* and extra-judicial and could not be taken into consideration, proceeded to find [190] the following facts:—
"The estate was of old time revenue-free, and was confiscated in the mutiny of 1857-58 for rebellion. It was thereafter in 1862-63 granted in reward for loyalty, $\frac{1}{3}$ rd to Jwala Rai and $\frac{2}{3}$ rd to Nihal Rai and Musammat Gumano, but, as the two latter were admittedly out of possession, a sum of Rs. 300 was fixed as payable to them in cash." * * * *
"In 1864 there was a civil suit between the parties, the result of which,

* Second Appeal, No. 729 of 1892, from a decree of A. M. Markham, Esq., District Judge of Meerut, dated the 14th April 1892, modifying a decree of Pandit Shib Sabai, Assistant Collector of Bulandshahr, dated the 30th September 1890.

(1) 5 B. 68.

settled by arbitration, was that the entire village was given as of right to Jwala Rai, &c., and Nihal Rai, &c., were excluded and a sum of Rs. 140 cash (*naqdi*) was declared payable to Nihal Rai and Rs. 60 to Musammat Gumano as maintenance. This decision became final. Nihal Rai's and Musammat Gumano's names disappeared entirely from the record of rights. The plaintiff in the present suit is the representative of Nihal Rai, and the defendant is the representative of Jwala Rai." The District Judge also found that the plaintiff had failed to prove any payment of the annuity to him or his predecessor in title at any time. On these facts the Judge held that the plaintiff's suit was not barred by limitation and dismissed the defendant's appeal with some immaterial modification of the decree below.

The defendant appealed to the High Court.

Mr. *D. N. Banerji*, for the appellant.

Mr. *Roshan Lal*, for the respondent.

JUDGMENT.

EDGE, C.J., and BANERJI, J. — The case of *Chhagan Lal v. Bapubhai* (1) is in point, although it was decided on a former Limitation Act. We are aware of no case to the contrary, and we follow it and dismiss this appeal with costs.

Appeal dismissed.

16 A. 191 (P.C.) = 21 I.A. 17 = 6 Sar. P.C.J. 414

[191] PRIVY COUNCIL.

PRESENT :

Lords Watson, Hobhouse and Shand, and Sir R. Couch.

[On appeal from the High Court at Allahabad.]

GAJRAJ PURI (*Plaintiff*) v. ACHAIBAR PURI (*Defendant*).

[22nd November and 16th December, 1893.]

Hindu law — Succession — Nihangs in Gorakhpur — Alleged mode of succession to property by survivorship among a brotherhood of Nihangs — Failure to prove that the deceased, who had possessed property, was a member.

The plaintiffs claimed that they as members of a fraternity of *Nihangs* were, on the decease of another member, entitled to the succession to the property possessed by him, according to rules of inheritance prevailing in their religious brotherhood. They thus claimed to exclude the defendant, an alleged son of the deceased. This son, who was a minor, was in possession through his mother and guardian. The Judicial Committee, without deciding as to the alleged mode of succession to property among *Nihangs* forming this brotherhood, affirmed the decision of the High Court that it had not been proved that the deceased was a member of the sect: and on this ground the dismissal of the suit was maintained.

APPEAL from a decree (9th March 1889), of the High Court reversing a decree (30th March 1887) of the Subordinate Judge of Gorakhpur.

The main question on this appeal was whether the evidence had proved that Zalim, who died in 1884, possessed of property, of which the defendant, as his son, had obtained possession, was, or was not a member of the brotherhood of *Nihangs* to which the plaintiffs belonged. The plaintiffs, now represented by the appellant, *Mohant Gajraj Puri*, sought to establish that the rules of succession to property, binding on their

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fraternity, entitled them, as surviving members, to succeed to property left by one of their number. But only the above question of fact was determined.

The appellant in the character of *Mahant* of this brotherhood of *Nihangs*, in Bansi, in the Gorakhpur District, represented his co-plaintiff, *Goshain* Lachi Puri, both being described in their plaint as disciples of *Mahant* Jaikishen Puri, deceased. The property claimed consisted of three mauzas in the district, part of ten villages which, by orders of the Deputy-Collector recorded, in October 1853, were (in pursuance of a *birt*, or maintenance grant, in considera-**[192]**tion of payment of Rs. 2,000, and of a *mali-kana* reserved by former proprietors) entered in the names of *Goshains* Gajraj Puri, Zalim Puri and Maheshur Puri. That Jaikishen, in the greater part, and Zalim, as to three villages, were purchasers was found in the Court below. Zalim was said to have married Musammat Mona in 1864, and to have had by her a family, of which the defendant Achaibar Puri was the survivor. Into the name of the latter, as the succeeding *malguzar* in possession, *dakhil kharij* of the three villages now in suit was made in 1884, on the death of Zalim.

The plaintiff suing Achaibar, through Mona, his mother and guardian, alleged that the three villages were in Zalim's management, but not his own property; that the brotherhood lived in celibacy; and that Achaibar was not Zalim's son, or entitled to inherit the villages from him. The rule of succession, which they alleged, was in effect that in their brotherhood property descended from *guru* to *chela*, and, in the absence of the latter, to a brother in religion; also, if there should be no brother, it descended to a cousin, and, in default of a cousin, to any member of the body connected by discipleship. In their Lordships' judgment is given a table showing what was said to be the recognized relationship in religion, or right of succession, among the *Nihang* brethren.

In 1862 and 1864 the *wajib-ul-arzes* of the villages now in suit contained the names of Gajraj, Zalim and Nainsukh Puri, recorded as *birt*-holders. Disputes arose, and a suit was brought by Gajraj and Lachi against Zalim, for disturbance of their rights in mauza *Bhadra*, one of the villages. The plaintiffs described themselves as *Goshains*, and sons of *Goshain* Jaikishen. But a compromise was effected, dated 31st May 1879, with the result that the suit was struck off the file. The compromise settled that Zalim should be in possession of the three villages "without the participation and interference of any one else." When Zalim died, on the 21st June 1884, Gajraj opposed the application of Musammat Mona to the revenue authority for *dakhil kharij* of the three villages into the name of Achaibar. But the application was granted; and the present suit was brought on the 22nd July 1886.

[193] *The issues were:*—Whether Zalim Puri was a *Nihang*, or a *grihast* (householder) *Goshain*; and, in either case, whether he was married; and who should be held entitled as his heir? Whether the disputed property was acquired by Zalim Puri or by Jaikishen? What was the effect of the compromise of the 31st May 1879 as against the plaintiffs?

The Subordinate Judge decreed the claim with *mesne* profits, fixing the latter at Rs. 460. He was of opinion that Zalim Puri had been proved to have been a *Nihang* fakir; and that he had been shown to have contracted a marriage contrary to the usage of his sect. He then held that, upon the general principles of the Hindu law applicable to ascetics, the plaintiffs were entitled to the property in suit. He referred, in the matter of the violation of the usage of the sect by Zalim in marrying, to

Mohant Ruman Das v. Mahant Ashbul Das (1), in which it was decided that an ascetic could not alter the succession to property by any act or conduct of his own in connection with the *status* whereby he originally acquired his life interest, and no more, in the trust. That disciples have preference over sons had been also decided by the Agra Sadr Dewani Court on the 21st August 1855 in *Narasingh Das v. Piare Lal*. Independently of this principle, he considered that the defendant could in no case be Zalim's heir; since upon the evidence of Mussammatt Mona herself it appeared that she was of a superior caste to her husband, and therefore the marriage was invalid. In connection with the question as to the validity of this marriage, he referred to Colebrook, Digest, Vol. II; Manu., Inst., Chap. III, v. 13 to 19; Chap. IX, v. 188; Mitakshara, Vol. I, v. 52; *Rahi v. Govinda Valad Teja* (2) and *Narayan Bharthi and Laving Bharthi* (3).

The High Court (EDGE. C. J., and TYRRELL, J.) decreed in favour of the defendant on his appeal and dismissed the suit. The Court was of opinion that the plaintiffs had made out no title to the property, and considered it unnecessary to decide whether Zalim was or was not lawfully married to the defendant's mother, as the failure of the plaintiffs to prove a title had disposed of the case.

[194] The following is that part of the judgment of the High Court which related to the Hindu law and custom on the subject.

"The case was argued on the law and facts very fully by Pandit Ajudhia Nath for the defendant-appellant and by Mr. Colvin and Pandit Sundar Lal for the plaintiffs-respondents. We asked Pandit Sundar Lal whether his case was that Jaikishen Puri, the plaintiff, and Zalim Puri were *Sanyasis*. He informed us that that was the case of the plaintiffs, and apparently this was the case which the plaintiffs alleged in their plaint. They alleged that the family was a family of *Mahants* in which there was, according to the custom of the family, no marriage or keeping of a woman by the members of the fraternity. Before considering the evidence or the law, it is well to bear in mind what a *Sanyasi* is and what a *Nihang* is. *Sanyasi* is defined in Shakespeare's Dictionary which is a dictionary of authority, as meaning a Brahman of the fourth order, a religious mendicant, and the word *Sanyas*, from which it is derived, is also defined to mean abandonment of all worldly affections, the fourth religious order. We are referred under this word to the definition of the word *asram*. Now *asram* is defined as follows:—(1) abode, residence; (2) a religious order, of which there are four kinds, referable to the different periods of life: first, that of the *brahmachari* or student; second, that of the *grihastha* or householder; third, that of the *vanaprastha* or anchorite; and fourthly, that of the *bhikshu* or beggar. Now *Sanyasi* means a religious mendicant, that is, a person of the fourth order under the head *asram*. There are also two other definitions, which we ought to bear in mind in this case. One is the definition of *Nihang*. *Nihang* means naked, free from care. The other is the definition of *grihast*, which means a householder, a man of the second class, or he who, after having finished his studies and been invested with the sacred thread, performs the duties of the master of a house and father of a family, and *grihastha-asram* means the condition of a householder or married man. It is well to bear these in mind when we come to see what the evidence is in the case."

The Court then considered the evidence and continued thus:—

[195] "The result of the evidence is that we find that the villages

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in question were not purchased exclusively by Jaikishen with his own money as alleged by the plaintiffs; but, on the contrary, that Zalim Puri did purchase a one-third share in each of these villages with his money, and that he enjoyed that share during his lifetime before the date of the compromise, and subsequently the villages in suit under the compromise. We also find as a fact, and there is ample evidence in support of it, that Zalim Puri married Musammat Mona, and that the defendant is his son. It is not necessary to consider in this case whether it was a valid marriage, unless and until the plaintiffs have satisfied us that they have made out a *prima facie* title against the defendant. Let us consider how the plaintiffs propose to prove their right to the succession. Their right to succeed must arise either under the Hindu law or by custom. The rule of Hindu law relating to ascetics and hermits, of the kind which the plaintiffs allege they are, is to be found in section 8, Chapter II of the *Mitakshara*. It is also referred to in Part VIII, Chapter III of the *Viramitro Daya*. In Part VIII, we find it stated:—With reference to the estate left by a hermit, &c., an exceptional rule, excluding the heirs, such as the son and the rest, also the wife and the like, is propounded by Jogisara thus:—‘The heirs of a hermit (*vanaprastha*, or one who has entered the third order of life), or an ascetic (*yati*), or one desirous of *moksha*, or liberation from transmigration, and of a student (*brahmachari*) are in their order the preceptor, the virtuous pupil, and the spiritual brother, resident in the same holy place.’

(The rest of the quotation contained in the judgment is here omitted.)

“There is also a passage in West and Buhler’s ‘Hindu Law,’ (edition of 1884 at page 552), which goes to show that this statement of the rule of Hindu law can only be applied to persons who are strictly ascetics or mendicants, or persons coming within the strict definition of the Hindu law. The rule on the question is, we think, correctly expressed in Mayne’s Hindu Law and Usage (edition of 1880, paras. 506 and 517). Now, in the first instance, [196] if we are to apply this statement of the rule of the *Mitakshara* in this case the plaintiffs, even if they were spiritual brothers of Zalim Puri, were not spiritual brothers of his, resident in the same place. They were admittedly persons who had lived in Naipal, whereas Zalim Puri was a person who lived in the district of Basti. Can it be said that these persons, the plaintiffs or Zalim Puri, were *Sanyasis*? A *Sanyasi* or religious mendicant, according to the Hindu law, is a person who is only entitled to acquire the bare necessities of life, and who in the month of Asvina in each year is to give away all his accumulations. What do we find that these persons are in this respect? We find that for over thirty years, at least, the plaintiffs were the owners of seven villages. They were, as they described themselves, zamindars, agriculturists, and even mahajans or money-lenders. We find that for over thirty years Zalim Puri was a shareholder in the villages, and for several years, at any rate since 1879, he was exclusively in possession, taking rents and profits of the three villages in suit. We find also that he was a person who was described by the plaintiffs themselves as a shareholder, resident in a house in mauza Belwa. We find that Zalim Puri brought in 1879, or previously, criminal proceedings against the plaintiffs for their interference with alleged proprietary rights of his, and we find in the year 1879 that the plaintiffs, who say they belonged to the order of mendicants, brought a suit against Zalim Puri in which they claimed damages for interference with their rights to the crops in some of those villages. It is only necessary to look back to 1879 to see that at

that time, at any rate, they were repudiating any connection in the religious brotherhood with Zalim Puri. They were at that time admitting that Zalim Puri was a married man who had got a child; and they were asserting that as a married man with a family he could not belong to the order of *Nihangs*. Now it appears by the petition of the 16th April 1879 that Zalim Puri had presented a petition in the Revenue Department for the expungement of the names of the plaintiffs from the revenue records of the village of Belwa, and in para. 5 of the plaintiff's counter-petition we have the following"—(That part of the judgment of the High Court [197] which follows is set forth in their Lordships' judgment below as an extract, and is accordingly here omitted.)

After pointing out that if the plaintiffs' case had been true they would have described Zalim in the proceedings of 1879 as they described him in 1886, the High Court continued thus:—"We are of opinion that the plaintiffs are not, nor was Zalim Puri in his lifetime, persons, or a person, who could come within the rule of the Hindu law relating to mendicants and succession to their property. They are, in fact, here seeking to recover property of considerable value, which if they were *Sanyasis* within the meaning of the Hindu law, they will be obliged to renounce within twelve months, and they are seeking to recover property in addition to seven villages which, for over thirty years, in violation of the strict rules relating to *Sanyasis*, they have been enjoying. The rule of the Hindu law, relating to the succession to the property of mendicants, cannot apply to a case of this kind. Further, even if these persons were religious mendicants, under the rule of the Hindu law, the property which such persons and other ascetics are entitled to enjoy consists only of food, raiment, books and other bare necessities of life."

"If the plaintiffs cannot succeed under the rule of the Hindu law to be found in Chapter II, Section VIII of the *Mitakshara*, there is no rule of the Hindu law as regards succession which would entitle them to succeed, because, obviously in their own case, there is no relationship by blood or by adoption between the parties. If they rely upon the Hindu law, they must show that they come within the principle of the Hindu law relating to ascetics and mendicants."

"As to the question of custom, the evidence of custom appears to us to relate to *Mahants* who have not been married or who do not keep women, and does not relate to persons loosely called *Mahants*, who are either married or who live in concubinage. Several witnesses on the question of custom tell us that if a *Mahant* married he would be excommunicated, which means expelled from the family order of *Mahants*. The plaintiffs themselves, in their [198] petition of the 16th April 1879, to which we have referred, put it beyond doubt, because they argued that the marriage of Zalim Puri was conclusive proof that he could not belong to the family of *Nihangs*. Other witnesses say that in other places *Mahants* might be found who were married. Other witnesses say that it is contrary to custom for *Mahants* to keep women. The conclusion to which we come is that if there was any such custom amongst *Mahants*, that custom will have no applicability to a case like the present, where Zalim Puri is proved to have been for years a married man, and where, according to the evidence of several witnesses for the plaintiffs, that fact would have excommunicated him from the order of *Nihangs*, and according to the plaintiffs' own statement of the 16th April 1879, that fact negatived the possibility of his belonging to the family of *Nihangs*. We may mention that several witnesses of the plaintiffs on the question of custom

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undeniably make assertions which are untrue. They alleged, for instance, that Zalim Puri had not married and did not live with a woman. It is curious that they should have said so when, in 1879, the plaintiffs were aware of the fact, and alleged in their own petition that Zalim Puri had married. These are matters which would make it very difficult for us to rely on the witnesses who were called to prove custom. The result is that we find that the plaintiffs have failed to prove either under the Hindu law or by custom that they were entitled to succeed to the property in suit. We also find that they have failed to prove any title whatever to the property in dispute. It is not necessary for us to express any opinion as to the legitimacy or illegitimacy of the defendant, inasmuch as, in our opinion, the plaintiffs have failed to prove their title. Under these circumstances we allow the appeal and dismiss the suit with costs."

Mr. J. D. Mayne and Mr. H. Cowell, for the appellant, argued that there was error in the judgment of the appellate Court. Both by Hindu law and by the custom the succession in the line of disciples prevailed where a religious brotherhood had been formed, and property had been held in the manner alleged in this case. It prevailed amongst that sect of *Nihangs* to which the plaintiffs [199] and Zalim belonged. That there had been a devolution of the villages purchased by Jaikishen in the very mode for which the appellant now contended had been overlooked by the High Court, which had also erred in taking the view that Zalim's mode of life, as a married man, would have excluded him from the operation of the law and custom regulating the succession among religious bodies. But it would have been more correct to hold that, by his own acts, Zalim had not divested himself of his character in connection with the religious community to which he belonged, and that he could not, by his own acts, deprive his brethren in religion of their interest in the property in his possession. Even if he had done acts which would have rendered him liable to excommunication, still the only mode of terminating his connection with his brethren in religion would have been by his undergoing excommunication following upon some act of his. Reference was made to the decision cited by the Subordinate Judge from 1 W. R. 160. There was much to show that *Nihangs* of the sect in question were not excluded by marriage from the rule of succession prevailing among them.

Mr. R. V. Doyne, for the respondents, was not called upon.

Their Lordships' judgment was, afterwards, on the 16th December 1893, delivered by:—

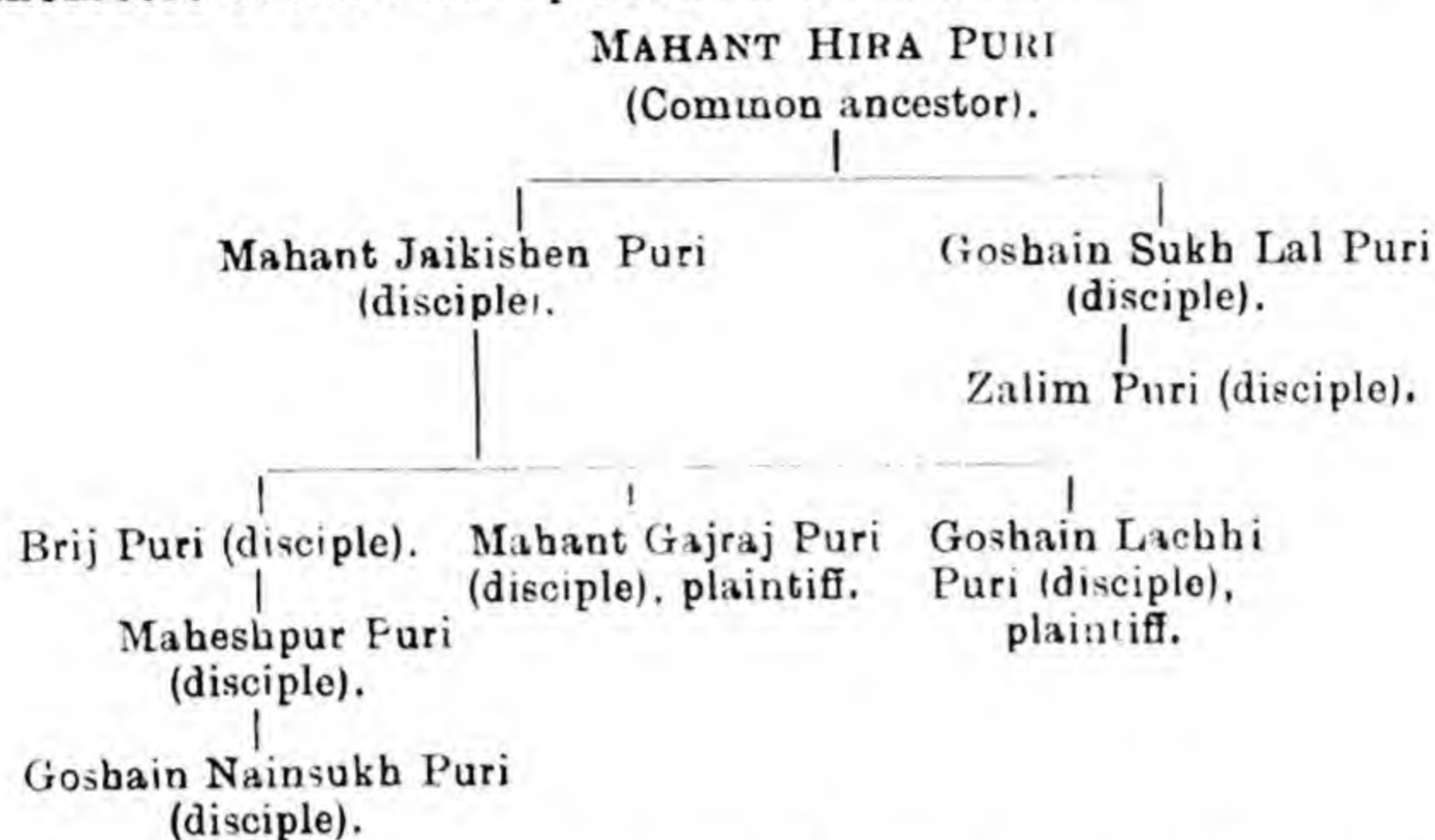
JUDGMENT.

LORD SHAND:—The suit was instituted in the Court of the Subordinate Judge of Gorakhpur in July 1886. The original plaintiffs, now represented by the appellant, claimed right to three villages in the Gorakhpur district, called Belwa, Anarhua and Bhartarsota, which had been in the possession of one Zalim Puri for some years prior to his death in 1884, and which after that event were registered in April 1885 by the Revenue authorities in the name of his son, the respondent Achaibar Puri, and have since been possessed by him or on his behalf by his mother as his guardian. The Subordinate Judge gave effect to the plaintiffs' claim, but on appeal his judgment was reversed by the High Court of Allahabad.

The question is one of succession. The plaintiffs were not related to Zalim Puri, but have rested their claim to the villages in question on the allegation that he was a fakir of the *Nihang* [200] sect, and that his

property consequently passed, not according to the ordinary rules of succession to his natural heirs, but, according to the rules of religious succession, to the plaintiffs claiming to be his fellow-disciples.

The following is the genealogical tree, which was embodied in the plaint for the purpose of showing the alleged relationship of the parties as members of the same spiritual brotherhood:—



The plaintiffs alleged that Sukh Lal Puri, *guru* (precept or) of Zalim Puri, and Mahant Jaikishen Puri, *guru* of the plaintiffs, were spiritual brothers, that is disciples of the same *guru*; that this *gaddi* (seat of a Mahant) belonged to the *Nihang* order, being ascetics who live in a state of celibacy; and that the rule of succession is that a *guru* is succeeded by his disciple, and in default of a disciple by his spiritual brother, and in his default by his spiritual cousin; and the plaintiffs claimed right to succeed to the property of Zalim Puri as his spiritual cousins, he having died without leaving any immediate disciple.

In regard to the property in dispute the plaintiffs alleged that it was purchased by Jaikishen Puri with seven other villages in the name of the plaintiffs and Zalim Puri and Maheshur Puri with his own funds; that he himself continued to be the owner during his life-time, and that on his death the plaintiffs and Maheshur Puri succeeded to the possession of it; that on the death of Maheshur Puri his disciple Nainsukh Puri succeeded to possession jointly with [201] the plaintiffs, and, as he had no disciple, the plaintiffs on his death became the owners, having right to possession of his estate. The plaint further stated that on the death of Zalim Puri competing petitions for the mutation of names in regard to the three villages in dispute had been presented by the plaintiffs and by the defendant, under the guardianship of his mother, the latter of these petitions having been given effect to by the revenue authorities; and the plaintiffs averred that Zalim Puri had not in fact been married, and that the defendant is not the son, nor his mother, Musammatt Mona, the wife of Zalim Puri. In regard to the right and possession of Zalim Puri of the villages in dispute during his life-time the plaintiffs stated that, after the death of Jaikishen Puri, they had agreed in the settlement by compromise of an application by Zalim Puri for mutation of names in respect of all the villages to Zalim Puri's possession of the three villages in question "during his life-time by way of management," and that Zalim Puri had acknowledged the plaintiffs' ownership in respect of the other seven villages.

The defence consisted of a denial of the alleged religious connection

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between the plaintiffs and Zalim Puri, and a denial that Zalim Puri was a member of the religious sect of *Nihangs*; and the defendant averred that from the outset, when the ten villages were originally acquired in 1853, Zalim Puri in his own right became one of the joint owners, and did not merely succeed to a right on the death of Jaikishen Puri; that further, in 1879, in the proceedings for mutation of names, his separate and independent right, not of possession only, but of independent property in the three villages in question had been recognised and settled and thereafter acted on; and that in these proceedings the plaintiffs, in direct opposition to the view they now plead as the basis of their claim, had asserted and maintained that Zalim Puri was not a member of the sect of *Nihangs*, who do not marry, but that he was married and had a wife and children; and that the original purchase of the ten villages was a purchase such as is made by people of different castes, but did not mean that the purchasers belonged to one and the same family.

[202] The Subordinate Judge expressly found that Zalim Puri was married to Achaibar's mother, and that the plaintiffs in 1862 and again in 1879 had admitted that the disputed property belonged to Zalim Puri as owner; and the judgment of the High Court on appeal contains the following important findings:—"The result of the evidence is that we find that the villages in question were not purchased exclusively by Jaikishen with his own money, as alleged by the plaintiffs, but, on the contrary, that Zalim Puri did purchase a one-third share in each of these villages with his money, and that he enjoyed that share during his lifetime before the date of the compromise, and subsequently the villages in suit under the compromise. We also find as a fact, and there is ample evidence in support of it, that Zalim Puri married Musammatt Mona, and that the defendant is his son." To which the learned Judges add, with reference to the plaintiffs' title to maintain the suit:—"It is not necessary to consider in this case whether it was a valid marriage, unless and until the plaintiffs have satisfied us that they have made out a *prima facie* title against the defendant"—an observation which is clearly well-founded.

The Subordinate Judge held that it was proved that Zalim Puri was a *Nihang*, and that, according to the principles of the Hindu law recognised in the case of ascetics of that order, the succession to his estate devolved on the plaintiffs as his spiritual cousins. On the question of fact he seems to have relied entirely on the oral evidence of the plaintiffs, so far as can be gathered from the terms of his judgment.

The only question which it is necessary should be determined is, whether it has been proved that Zalim Puri was a member of a religious body of *Nihangs* in which the rules of succession in favor of disciples prevailed.

The appellant's counsel was constrained to admit that the evidence adduced entirely failed to establish the averments in the plaint in two important particulars which have been already noticed. The plaintiffs not only failed to prove that the original acquisition of the whole villages was made by Jaikishen Puri as the head of a [203] religious body or family, and that Zalim Puri had acquired by succession from him as a disciple of the family, but it has been, on the contrary, held to be proved that Zalim Puri's share in these villages was purchased with his own money. Again, the plaintiffs not only failed to prove that as the result of the compromise in 1879 Zalim Puri acquired a right of possession only in the three villages in dispute, but it has been conclusively proved that he obtained an

independent and exclusive right which he possessed and exercised till the time of his death. The *sulehnama* by which the suit was compromised bears that "As a future arrangement it has been settled that I, Zalim Puri, shall be in possession of the entire mauzas Belwa, Bhartarsota and Anarhua, together with the *sair* and other rights appertaining thereto, without the participation and interference of any one else; and we, Gajraj Puri and Lachhi Puri, shall remain in possession of the entire mauzas Bhadroha, Bajrabhari, Khera, Bewdwa, Botal and Kodai, and, of an eight-anna share in mauza Sumera, together with the *sair* and rights appertaining thereto. So neither party has, nor will have, any connection or concern with the other;" and in the *wajib-ul-arz* of one of the mauzas, while held jointly by Gajraj Zalim and Nainsukh, and which was recorded by them in 1862, one of the conditions of the tenure was thus expressed:—

Para. 5. "Relating to the mode of alienation of the property—Every shareholder has a right to transfer his own share. But at the time of transfer it will be his duty to give notice and offer to sell or mortgage it at a proper consideration to his near sharer first, and in case of his refusal, to his other sharer of the village. If he does not agree or pay proper consideration for the same, he will then have power to transfer it to anyone he likes. No pre-emption plea will then be entertainable."

In these circumstances the appellant's counsel was able only to found upon two means of proving the averment that Zalim Puri was one of the sect of *Nihangs*: the first being two successive descents of shares of the mauzas in question which are said to have followed in favor of disciples and members of the sect of *Nihangs*, and not [204] of natural heirs, and the second consisting of the parole testimony adduced. The plaintiffs refer to the transfer statements taken from the revenue books for the years 1290 and 1291 Fasli (1883-84) relating to these mauzas, in which Gajraj and Lachhi were represented as disciples of Jaikishen, and Zalim was represented as a disciple of Sukh Lal, and from which it is inferred that Maheshur's share descended on his death to Nainsukh as his disciple, and that the share of Nainsukh on his death fell to Gajraj and Lachhi, the plaintiffs, also in their character as disciples. But assuming that the entries founded on do show that in these two instances the succession was as alleged, this circumstance alone falls a long way short of what would be required to prove that Zalim Puri belonged to the sect of *Nihangs*, or that as to his separate property the rule of succession by a disciple applied, controlling the ordinary law of succession. The entries seem to be inconsistent with the arrangement of the 31st May 1879, by which the entire mauzas Belwa, Bhartarsota and Anarhua were given to Zalim Puri. They were made, it may be assumed, on the requisition of Gajraj as *lambardar* of the villages. They are really in substance but one entry, for each of them is simply a repetition of the first, and so far is this carried that in the last of them in September 1884, Zalim Puri's name is entered for his share though he had died in June of that year.

In regard to the oral testimony there are no doubt a number of witnesses who say that Zalim Puri was a member of the spiritual body to which they depose the villages belonged. On the other hand, there are many witnesses for the defence to the contrary effect. The plaintiffs' witnesses, however, in many instances cannot be relied on, because, though professing to have had very full means of knowledge of Zalim Puri's life and circumstances, they give an untrue account of his connection with the joint property as a purchase made, so far as he was

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concerned, with his own means, and because they declare that Zalim Puri was not married and had not a son. Their Lordships are unable to place reliance on such evidence as proof of the facts the onus of establishing which lies on the [205] plaintiffs. On the other hand, it is worthy of notice that the plaintiff Gajraj did not himself appear as a witness, and that while all the plaintiffs' witnesses, say the *Nihangs* "do not marry," Zalim Puri certainly openly married and became a householder many years before his death, and for these years led a domestic life with his wife and family. The regularity of his marriage was no doubt open to question with any one having a title to challenge it, because of the difference of caste between the parties; but its importance and that of the family life he led are not thereby destroyed as facts bearing on the question of his having been a *Nihang*. Their Lordships are, however, disposed to agree with the learned Judges of the High Court that the position taken up by the plaintiffs in the proceedings of 1879, looked at in the light of the whole evidence now before the Board, is decisive against the appellant's present contention. In their petition of the 16th April of that year, presented as "shareholders and lambardars of mauza Belwa," filed with reference to a petition by Zalim Puri to have their names expunged and his name entered in respect of a certain share of that village, they alleged:—

"5. The genealogical table is entirely wrong, because the petitioners' (objectors') gaddi is occupied by *Nihangs*, who do not marry. When the petitioner has married and has got a wife and children, and he is a householder, he cannot belong to the family of the petitioners. The genealogical table alleged by the petitioner is wrong. People of different castes make purchases in a mauza, but that does not mean that they belong to one and the same family."

Their Lordships cannot better express the contrast between this statement and the position which the plaintiffs now after the lapse of many years seek to assume in their present plaint, than by referring to the following passage from the judgment of the High Court, in which reference is also made to the plaintiffs' pleading in a proceeding in March of the same year, 1879:—

"Now, every single allegation contained in para. 5 of the petition of 1879 is a direct contradiction of the plaintiffs' case here. They say here that Zalim Puri was a *Nihang*. They said then that [206] he was a married man. They say here that he never was married and must have been without a child. In para. 5 they said that he was a married man and had issue. They say here that he was a *Nihang*, which excludes the notion of his being a *grihastha*. They said there that he was married and was a householder, and thus could not belong to the family to which they belonged. They said in 1879 that he did not belong to the order of religious mendicants, and they account in their petition of 1879 for his being recorded in these villages, not on the ground that he was a disciple by descent from Jaikishen Puri, but by the suggestion that persons of other caste might be casually associated in purchases in the same village. On the 25th March 1879, these persons who now say that Zalim Puri was a member of their religious family of *Nihangs* and a *Sanyasi*, and who claim that he was by religious descent a spiritual brother of theirs, denied that he was the religious son of Jaikishen. They styled themselves in the previous suit as zamindars. What did they say about Zalim Puri in that suit? They did not describe him as the son of Jaikishen Puri. If their case here is true he was as much a son of Jaikishen Puri in religion as they were

through Sukh Lal Puri. This was the religious connection between them if their case is true. But they then described Zalim Puri as a person whose parentage was unknown in 1879. These persons now come and say that, because Zalim Puri was a disciple of Sukh Lal Puri, who was a disciple of Hira Puri, from whom they are descended in their religious pedigree, there are entitled to succeed to the property left by Zalim Puri. It is curious that in 1879, if their present case is true, they should have described Zalim Puri as a person whose parentage was unknown. If their case was true, they would have described him as they do now."

Their Lordships agree with the learned Judges of the High Court in holding that the plaintiffs have failed to prove that Zalim Puri was a member of the sect of *Nihangs*; and they will therefore humbly advise Her Majesty that the judgment of the High Court ought to be affirmed and the appeal dismissed. The appellant must pay the costs of appeal.

Appeal dismissed.

[207] Solicitors for the appellant:—Messrs. *Ranken Ford, Ford and Chester.*

Solicitors for the respondent:—Messrs. *Pyke and Parrott.*

16 A. 207 = 14 A. W. N. (1894) 57.

APPELLATE CRIMINAL.

Before Mr. Justice Knox and Mr. Justice Burkitt.

QUEEN-EMPRESS v. NASIR-UD-DIN AND OTHERS.* [9th January, 1894.]

Criminal Procedure Code, ss. 161, 162—Statements made to Police officer in the course of an investigation—Use of notes of such statements at trial before the Court of Session—Practice.

A police officer's notes of statements made to him in the course of an investigation and recorded by him under s. 161 of the Code of Criminal Procedure should, if used at all at the subsequent trial, be used only after proper proof of them and of the circumstances under which they were recorded, and under the direct sanction of the presiding Judge. Copies of such notes should not be given without question and as a matter of course to the accused or his counsel.

[R., 19 A. 390 (411) = 17 A. W. N. 174 (F. B.); 9 C. P. L. R. 33 (34) (Cr.); Con., 11 Cr. L. J. 117 (120) = 5 Ind. Cas. 357 (361) = 13 O. C. 7 (16).]

THIS was an appeal by one Nasir-ud-din and three other persons from convictions under ss. 302 and 302 read with s. 114 of the Indian Penal Code, and sentences of death passed by the Sessions Judge of Allahabad. The case was also before the High Court for confirmation of the sentences of death. The appeal came before Knox and Burkitt, JJ., who agreed in finding the charges against the appellants not proved. The judgments are based entirely on facts, and are in the main immaterial for the purposes of the present report. But in the course of his judgment Knox, J., had occasion to comment on the use in the Court below of the record made by the police officer investigating the case of the statements made to him by various persons examined in the course of such investigation under s. 161 of the Code of Criminal Procedure. These observations are given below, the rest of the judgment and that of Burkitt, J., being omitted.

* Criminal Appeal, No. 856 of 1893, against the order of F. E. Elliot, Esq., Sessions Judge of Allahabad, dated the 19th September 1893.

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21 I.A. 17 =

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(1894) 57.

The Hon'ble Mr. Colvin, Messrs. T. Conlan, A. H. S. Reid and S. Amir-ud-din, for the appellants.

[208] The Public Prosecutor (Mr. A. Strachey), for the Crown.

JUDGMENT.

KNOX, J., (after dealing at length with the facts of the case) continued:—Still more extraordinary is a permission given before the case came on for trial by which the accused were granted copies of statements recorded by the police during the investigation. Such statements are recorded by police officers in the most haphazard manner. Officers conducting an investigation not unnaturally record what seems in their opinion material to the case at that stage and omit many matters equally material, and, it may be, of supreme importance as the case develops. Besides that, in most cases they are not experts of what is and what is not evidence. The statements are recorded often hurriedly in the midst of a crowd and confusion, subject to frequent interruption and suggestions from bystanders. Over and above all, they cannot be in any sense termed depositions, for they are not prepared in the way of a deposition, they are not read over to, nor are they signed by, the deponents. There is no guarantee that they do not contain much more or much less than what the witness has said. The law has safeguarded the use of them, and it never can have been the intention of the Legislature that, as in this case, copies of them should have been without question and as a matter of course made over to the accused or their counsel.

It is obvious that such statements, if used at all, should only be used after proper proof of them and of the circumstances under which they were recorded, and under the direct sanction of the presiding Judge.

Mr. Conlan, who conducted the case for the accused in the Sessions Court, assures us, and I accept of course the assurance without hesitation, that the statements put in by the defence for the purpose of contradicting the witnesses for the Crown were duly proved and put to each witness after proof. Still, such a matter should not have been left without note on the record, as it has been in some instances in this case. I cannot but feel considerable surprise at the entire absence of any attempt on the part of the Crown to call upon the witnesses to explain the contradictions, real or apparent. A [209] witness in this country to whom a statement is put, often fails to attempt an explanation from his confused state of mind at the moment; but it by no means follows that if he were given the opportunity and invited to explain, that he could not satisfactorily account for what appear to be discrepancies. It is in my opinion the distinct duty of a public prosecutor to give such opportunities to a witness, and not to leave the statements until it has been shown that an opportunity has been given to the witness for explanation. In these remarks my brother Burkitt has authorized me to say that he fully concurs.

16 A. 209 = 14 A.W.N. (1894) 22.

APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice and Mr. Justice Banerji.*DEBI SINGH (*Plaintiff*) v. JHANNO KUAR AND ANOTHER (*Defendants*).^{*}
[17th January, 1894.]

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APPEL-
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CIVIL.16 A. 209 =
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(1894) 22.*Act XIX of 1873 (N.W.P. Land Revenue Act), s. 77 — Landholder and tenant — Determination of rent — Suit for arrears of rent as so determined for a period prior to such determination.*

An order of a Settlement Officer under s. 77 of Act No. XIX of 1873 determining rent is a purely prospective order and will not entitle the landlord to sue his tenant for rent at the rate fixed thereby for any period antecedent to the 1st of July next following the date of such order. *Mahadeo Prasad v. Mathura* (1) distinguished.

[F., 2 A.L.J. 1; R., 20 A. 296 (298).]

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Jogindro Nath Chaudhri, for the appellant.*Mr. H. C. Niblett*, for the respondents.

JUDGMENT.

EDGE, C. J., and BANERJI, J.—This appeal has arisen in a suit for arrears of rent brought under s. 93 of Act No. XII of 1881 in a Court of Revenue. The defendants were ex-proprietary tenants. The landlord had obtained an order from a Settlement Officer under Act No. XIX of 1873 determining the rent. The arrears for which [210] he sued were in respect of a period prior to the date of that order. The learned District Judge held that s. 77 of Act No. XIX of 1873 applied and prevented the plaintiff from obtaining in respect of the period in question a decree for the rent as fixed by the order of the Settlement Officer. The plaintiff has appealed. The Full Bench ruling in *Mahadeo Prasad v. Mathura* (1) has been relied upon on behalf of the plaintiff-appellant, as has also the judgment of this Court in *Ranjit Singh v. Diwan Singh* (2). On the other hand, the judgment of this Court in *Radha Prasad Singh v. Jugal Das* (3) has been relied upon. We do not question the correctness of the judgment of the Full Bench in *Mahadeo Prasad v. Mathura*, but in that case, the rent of the occupancy-tenant had been determined on an application under s. 95, cl. (1) of Act No. XII of 1881. In the present case the determination of the rent was under Act No. XIX of 1873. It was competent to the landlord to have obtained a determination of the rent under Act No. XII of 1881, and if he had done so we could have applied the ruling of the Full Bench. In our opinion the effect of s. 77 of Act No. XIX of 1873 is to limit the determination of the rent determined by a Settlement Officer under that Act to the rent which shall be payable from the 1st day of July following the date of the order, and therefore cannot be treated as a determination of the rent at which the tenant is to be taken to be holding the land at or prior to the date of the order. The ruling in *Radha Prasad Singh v. Jugal Das* (3) is in conflict with that in *Ranjit Singh v. Diwan Singh* (2), and further, it seems to us contrary to the whole policy

* Second Appeal, No. 800 of 1892, from a decree of A. M. Markham, Esq., District Judge of Meerut, dated the 10th May 1892, confirming a decree of Seth Harnam Chunder, Deputy Collector of Bulandshahr, dated the 18th December 1890.

(1) 8 A. 189.

(2) 9 A. W. N. (1889) 175.

(3) 9 A. 185.

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of Act No. XIX of 1873 and Act No. XII of 1881 that a Civil Court should determine the rent payable in respect of a holding to which those Acts apply. We dismiss the appeal with costs.

Appeal dismissed.

16 A. 211 = 14 A.W.N. (1894) 22.

[211] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Banerji.

GHAMANDI LAL (*Plaintiff*) v. AMIR BEGAM (*Defendant*).*

[18th January, 1894.]

Civil Procedure Code, s. 365—Non-joinder—Death of appellant during pendency of appeal—One only of three representatives brought upon the record—Abatement of appeal.

The words "the legal representative" in s. 365 of the Code of Civil Procedure must, where there are more than one legal representative, be read in the plural.

Hence where a sole appellant died during the pendency of his appeal, leaving three legal representatives, and only one of such legal representatives was brought upon the record in the place of the deceased appellant within the prescribed period of limitation: *Held* that the appeal must abate. Either all the legal representatives of the deceased appellant should have been brought upon the record as appellants, or, if any had refused to be joined as appellants, they should have been brought on as respondents.

[(Overruled by 25 A. 27): F., 30 A. 117 = 5 A.L.J. 62 = A.W.N. (1908) 41 = 3 M.L.T. 207; 4 A.L.J. 344; R., 22 A. 222; D., 25 A. 27 = 22 A.W.N. 171; 23 M. 125 (131); 26 M. 230 (235) = 12 M.L.J. 368 (374).]

THE facts of the case sufficiently appear from the judgment of the Court.

Babu *Durga Charan Banerji*, for the appellants.

The respondent was not represented.

JUDGMENT.

EDGE, C. J., and BANERJI, J.—The plaintiff, appellant here, obtained a decree against a Muhammadan. From that decree the Muhammadan appealed, and after his appeal had been admitted on the register he died. The Muhammadan left three heirs. One only of those heirs was brought on the record as representative of the deceased appellant. The plaintiff respondent in the Court below, opposed the bringing on of one only of the heirs. The learned District Judge applied s. 544 of the Code of Civil Procedure. His view was that the original sole defendant having died, there were three separate defendants, his representatives, in existence, and that one of them might carry on the appeal. The Judge overlooked the fact that the three representatives were not on the record and could in no sense have been considered as three separate defendants. He also overlooked the fact that where a defendant dies after decree and leaves, say, three legal representatives, each of these representa- [212] tives is not entitled to bring a separate appeal against the decree. In such a case there could be only one appeal. Section 544 has no application to a case like this. The defendant, appellant in the Court below,

* Second Appeal, No. 735 of 1892, from a decree of A.M. Markham, Esq., District Judge of Meerut, dated the 10th May 1892, reversing a decree of Babu Piari Lal, Subordinate Judge of Meerut, dated the 23rd December 1890.

having died, the appeal could only be carried on if such person or persons as represented the interests of the deceased appellant were on the record. This lady, who was brought on adversely to the plaintiff, being a Muhammadan, did not represent the interest of the deceased Muhammadan defendant, although she may have represented her own interest as one of the heirs. In s. 365 the words "the legal representative" must, where there are more than one legal representative, be read in the plural. It might be that one only of the legal representatives of a deceased appellant was willing to carry on the appeal. In that case that legal representative should make the other legal representatives parties to the appeal as respondents, if they refused to join as appellants, so that the Court might have before it all the persons whose interests might be affected by the decree in appeal. The legal representatives of the deceased appellant not having been brought upon the record in the Court below within time, or at all, the appeal below abated, and an order to that effect should have been made. We allow this appeal with costs, and, setting aside the decree of the Court below with costs, we decree that the appeal below abated and that the decree of the first Court stood.

Appeal decreed.

16 A. 212 = 14 A.W.N. (1894), 49.

APPELLATE CRIMINAL.

Before Mr. Justice Tyrrell, and Mr. Justice Blair.

QUEEN-EMPRESS v. ROBINSON. [23rd January, 1894.]

Criminal Procedure Code, ss. 417, 421—Appeal by Government—Practice—Act XV of 1872 (Indian Christian Marriage Act), ss. 18, 66—False declaration—Act No. XLV of 1860 (Indian Penal Code), s. 193—Maxim "Ignorantia juris non excusat."

The maxim *ignorantia juris non excusat* cannot be applied to a declaration though in fact false, made under s. 18 of Act No. XV of 1872, inasmuch as the [213] declaration required by that section to be made is a declaration as to the belief only of the person making it; and further, in order to entail the penal consequences provided for by s. 66 of the said Act, such false declaration must be made "intentionally."

An appeal on behalf of Government in the exercise of the powers conferred by s. 417 of the Code of Criminal Procedure should not be entertained when the judgment appealed from is based upon facts and the conclusions of the Court are such as may reasonably be arrived at upon the facts found. *Empress of India v. Gayadin* (1) referred to.

[Diss., 17 C.P.L.R. 75 (92); R., 21 A. 122 (126); 7 P.R. 1904 Cr.=97 P.L.R. 1904; 2 L.B.R. 303 = 1 Cr.L.J. 1022.]

THE facts of this case are sufficiently stated in the judgment of the Court.

The Public Prosecutor (Mr. A. Strachey), for the appellant.

The judgment of the Court (TYRRELL and BLAIR, JJ.) was delivered by BLAIR, J :—

JUDGMENT.

This is an appeal by the Local Government under s. 417 of the Code of Criminal Procedure from the order of Mr. Lyle, Joint Magistrate of

* Criminal Appeal No. 840 of 1893 (by Government) from the order of H. W. Lyle, Esq., Joint Magistrate of Benares, dated the 5th of June 1893.

(1) 4 A. 148.

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16 A. 211 =
14 A.W.N.
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Benares, dated the 5th of June 1893, acquitting the abovenamed Francis Robinson of an offence punishable under s. 193 of the Indian Penal Code read with s. 66 of the Act XV of 1872, on the grounds, first, that it was essential to the doing of justice that the Magistrate should have summoned and examined as witnesses the Rev. H. A. Sealy and Mr. Charles Woodward under the powers conferred by ss. 252 and 540 of the Code of Criminal Procedure, inasmuch as the Magistrate was well aware of the importance of the evidence those witnesses were in a position to give, and, secondly, that the Magistrate ought not to have refused the complainant's application to summon certain witnesses. The applicant thereupon prayed this Court to direct the re-trial of the accused and to direct the Magistrate to take the evidence of the Rev. Mr. Sealy and Mr. Charles Woodward and to certify the said evidence to this Court. The Magistrate has been directed to take and certify such evidence as prayed and the evidence of the Rev. Mr. Sealy has been taken and certified accordingly. It has not been possible to take the evidence of Mr. Woodward.

There now remains for decision the single question whether the petition of appeal, in so far as it prays for a re-trial, ought to be [214] admitted or summarily rejected under the provision of s. 421 of Act X of 1882. The Court has perused the petition, the copy of the order complained of, has sent for and perused the record, and has heard the learned Public Prosecutor in support of the application.

The principles to be applied on the hearing of this appeal are fully and satisfactorily laid down in the case of the *Empress of India v. Gayadin* (1). In considering an appeal by Government against an order of acquittal, it is not for the High Court to say whether, if it had been trying the case, it might not have taken a view opposed to that of the lower Court. That is not the test to be applied to determine such an appeal. While the High Court fully recognizes the necessity for the existence of such powers in the Local Government in this country, it is equally clear that those powers should be most sparingly enforced; and, in respect to pure questions of fact, only in those cases where, through the incompetence, stupidity or perversity of a subordinate tribunal, such unreasonable or distorted conclusions have been drawn from evidence as to produce a positive miscarriage of justice. It is not because a Judge or Magistrate has taken a view of the case in which the Government does not coincide, and has acquitted the accused persons, that an appeal from his decision must necessarily prevail, or that the High Court should be called upon to disturb the ordinary course of justice by putting in force the arbitrary powers conferred by s. 417. The doing so should be limited to those instances in which the lower Court has so obstinately blundered and gone wrong as to produce a result mischievous alike to the administration of justice and the interests of the public. The Sessions Judge in the present case has had the witnesses before him, and consequently the best opportunity of judging their truth; and he appears to have conducted the inquiry with care and patience, and to have weighed and considered the facts to the best of his ability. It may be that the High Court may have arrived at a different view; but holding this decision to be an honest and not unreasonable one, of which the facts were susceptible, the High Court unhesitatingly dismissed the appeal.

[215] The facts of the present case are these:—The accused person, who is an Englishman and a member of the Church of England, was

(1) 4 A. 148.

contemplating marriage with the sister of his deceased wife. With a view to procuring the solemnization of the intended marriage, a sworn declaration was made by Robinson and the lady he intended to marry, the material words of which are :—" Deponents further make oath and say (each as to his and her own belief), that there is no let or impediment of pre-contract, kindred or alliance, or any other lawful cause whatsoever, or any suit pending in any Ecclesiastical Court, to bar or hinder the said intended marriage."

The defendant was brought into Court upon the allegation that at the time he made the said declaration he knew as a matter of fact that it was untrue. That he was aware that the person he intended to marry was the sister of his previous wife is beyond doubt, as is proved by a letter written by him to the Rev. Mr. Jones on the 13th of December 1892, but his defence was based on the statement that he was not aware at the time of making the declaration that such affinity constituted an impediment within the meaning of s. 18 of Act No. XV of 1872 to bar or hinder the said marriage.

That such a marriage between Roman Catholics would be illegal has been held by a Full Bench of the High Court of Calcutta in the case of *Lopez v. Lopez* (1), wherein it was held that the prohibited degrees for parties to that marriage (who were not of English domicile) were those prohibited by the customary law of the class to which they belonged, that is to say, the Law of the Roman Catholic Church as applied in this country. Three years later Mr. Justice Straight in an unreported case (*Pimen v. Hindhaugh*, Matrimonial Jurisdiction No. I of 1888) held that a similar marriage between English people who were also members of the Church of England was invalid, basing his decision on the ground that both parties were domiciled in England and, as such, were subject to the English Law.

In the case of *Hilliard v. Mitchell* in (2), Mr. Justice Wilson held that persons being of English domicile and also members of the [216] Church of England were prohibited from such a marriage, both by the law of England and by the law of the class, to wit, the Church of England, to which they belonged. We are not disposed on an *ex parte* application to controvert the soundness of these rulings, which indeed have not been questioned by the Magistrate in his adjudication.

We have now to consider whether this is a case to which the doctrine of "*ignorantia juris non excusat*" can be held to apply. Section 66 of Act No. XV of 1872 makes penal the "intentionally making a false oath." The alleged false declaration was made "to the best of the deponent's belief." The word "intentionally" would be superfluous if the law is taken to impute knowledge whether it in fact exists or not. The limitation "to the best of his belief" would be removed by holding that such belief or non-belief was immaterial. But s. 18 of Act XV of 1872 imposes a declaration of belief only. It is in these words "that he or she believes that there is not any impediment of kindred, or affinity, or other lawful hindrance to the said marriage." We therefore are of opinion that the Magistrate rightly tried the question whether it was proved satisfactorily that the accused was conscious that he was making a false declaration when he deposed that he did not in fact know that there was any legal impediment to the intended marriage. Indeed, we do not think the

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16 A. 212=
14 A.W.N.
(1894) 49.

(1) 12 C. 706.

(2) 17 C. 324.

1894
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APPEL-
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16 A. 212 =
14 A.W.N.
(1894) 49.

contrary proposition was seriously maintained or raised in the petition of appeal.

The evidence *pro* and *con* seems to have been ably and impartially discussed by the Magistrate, and we certainly do not think that the conclusion at which he arrived was an unreasonable one. The standard of proof in a criminal trial is not the same as in an ordinary civil case. No conviction should be arrived at unless upon clear, cogent and coherent evidence which leaves upon the mind no substantial doubt. The fact that one reverend gentleman was willing to perform the ceremony in the present case, and that another responsible functionary had, under the advice of the Advocate-General of Bengal, solemnized a marriage between persons similarly related, would hardly conduce to the belief that the prohibition of such [217] marriages was imperatively enacted by the law. It might have been so laid down by Ecclesiastical authority, and might also form part of the law of England; but to a person who knew or believed he knew that there were parts of the British dominions not remote from India where no similar restriction was in force, the inference would be by no means clear that the law in India followed in this respect the law of England. It was an inference not drawn by the Magistrate until referred to authority, nor by the Rev. Mr. Jones nor by Mr. Kemble. It seems difficult then to impute a more accurate knowledge to the manager of the refreshment-room at Buxar station. The evidence of the Rev. Mr. Sealy taken by special order of this Court is instructive on this point. He says:—"I was not sure that in India the law was the same as in England, nor did I know that there was any difference between the state of things in India and Ceylon." He states also, in relation to Mr. Charles Woodward, who was the brother of the lady proposed to be married and strongly opposed to the marriage, that "the reason he gave" (for opposing the marriage) "was that it was contrary to the law of the Church of England and that as a communicant member he objected to it." The inference seems obvious that Mr. Charles Woodward also was ignorant that such a marriage was illegal.

The silences and concealments on the part of the accused, upon which the prosecution relies as proof of guilty knowledge, may be fairly and naturally explained by his desire to escape obstruction by the Ecclesiastical authorities conscientiously acting for the enforcement of Church law and do not constrain us to impute to him knowledge that his proposed marriage was in violation of the law of the land. The evidence of Mr. Sealy, taken at the instance of the complainant, appears to us to fully justify the finding of the Magistrate. He says that Robinson expressed his willingness to go to Ceylon or some other colony to be married, if the intended marriage was illegal in India. Mr. Sealy also says in answer to the accused:—"I should not have thought it possible that you would have done anything which you knew to be contrary to the law, and which would render you liable to a criminal action. I never [218] pointed out that you would be liable to any legal penalty. I only pointed out what your position would be in society and in the eyes of the Church." Mr. Sealy also gave the accused a high character for integrity and straightforwardness.

Under these circumstances we are satisfied that no case has been established for the exercise of our exceptional jurisdiction. We therefore reject this petition of appeal.

16 A. 218 = 14 A.W.N. (1894) 45.

APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.*BHAGWAT DAS (*Plaintiff*) v. DEBI DIN AND ANOTHER (*Defendants*).
[24th January, 1894.]1894
JAN. 24.
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APPEL-
LATE
CIVIL.*Civil Procedure Code, ss. 159, 578—Application to summon witnesses—Duty of Court in respect of such application—Effect of refusal of Court to summon witnesses—Appeal.*16 A. 218 =
14 A.W.N.
(1894) 45.

Where a person making an application to a Civil Court for witnesses to be summoned has negligently or with intention to delay the hearing postponed the making of his application for a summons until a time when it would be impossible to obtain the attendance of the witnesses at the hearing, the Court might properly refuse to adjourn the hearing, but nevertheless it would be the duty of the Court to order the summons asked for to issue, as the Court is not given a discretion under s. 159 of the Code of Civil Procedure enabling it to refuse such an application.

Where under circumstances similar to those indicated above an application to summon witnesses was refused and that refusal was made one of the grounds of appeal against the decree in the suit: *Held* that s. 578 of the Code of Civil Procedure would apply if the irregularity in refusing the application did not affect the merits of the case. If it did affect the merits of the case, the ground of appeal would be a good one. *Krishna Churn Baisack v. Protab Chunder Surma* (1) and *Rai Kali v. Alarakh Pirbhai* (2) approved.

[R., 13 C.P.L.R. 152.]

THE facts of this case sufficiently appear from the judgment of the Court.

Maulvi Muhammad Ishaq, for the appellant.

Pandit Sundar Lal, for the respondents.

JUDGMENT.

[219] EDGE, C. J., and BANERJI, J.—The plaintiff in the suit out of which this appeal has arisen applied on the 17th of March, 1892, to the Subordinate Judge, in whose Court the suit was, to have some witnesses examined upon commission and to have other witnesses residing in Benares, Mirzapur and Ghazipur examined. The suit was in the Court of the Subordinate Judge of Allahabad. Benares, Mirzapur and Ghazipur are connected by railway and are within 200 miles of Allahabad. Consequently those persons are persons who would have been bound under s. 176 of the Code of Civil Procedure to attend in person and give evidence. The application for a commission related to persons whom it was desired to examine and who resided in Calcutta and Gorakhpur. The 11th of February, 1892, was the date which had been fixed for the settlement of issues, and the 21st of March, 1892, was the date fixed for the hearing of suit. The Subordinate Judge refused the application. We presume he thought it too late, and that the witnesses could not have been produced before the Court at the hearing on the 21st. We entirely agree with the High Court at Calcutta in *Krishna Churn Baisack v. Protab Chunder Surma* (1) that a Court ought not to refuse an application for a summons to compel the attendance of witnesses merely because in its opinion the witnesses cannot be present before the termination of the trial. To the same effect is the decision of

* Second Appeal No. 734 of 1892 from a decree of G. F. G. Forbes, Esq., Officiating District Judge of Allahabad, dated the 31st of May 1895, confirming a decree of Babu Piari Lal, Subordinate Judge of Allahabad, dated the 21st March 1892.

(1) 7 C. 560.

(2) 15 B. 86.

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16 A. 218=
14 A.W.N.
(1894) 45.

the Bombay Court in *Rai Kali v. Alarakh Pirbhai* (1). In each of these cases it was pointed out that the Court may refuse to adjourn the hearing in order that the witnesses may attend. We are of opinion that where the applicant for a summons has negligently or with intention to delay the hearing postponed the making of his application for a summons until a time when it would be impossible to obtain the attendance of the witnesses at the hearing, the Court might properly refuse to adjourn the hearing, but nevertheless it would be the duty of the Court to order the summons asked for to issue, as a Court is not given a discretion under s. 159 of the Code of Civil Procedure enabling it to refuse such an application. [220] We are not now referring to what would take place if the applicant did not within time fixed by the Court make the deposit referred to in s. 160 of the Code. We are also of opinion that where an application such as was made here has been refused and that refusal is one of the grounds taken by the appellant in appeal from the decree in the suit, s. 578 of the Code would apply, if the irregularity in refusing the application did not affect the merits of the case. If it did affect the merits of the case it would be a good ground of appeal.

Now in this case it is very difficult to ascertain, whether, if these witnesses had been called, their evidence would or would not have been admissible in the lower Appellate Court in this case. On behalf of the plaintiff, who was appellant, it was alleged that one Gopi Nath, who was one of the persons mentioned in the application, would be a material witness as to the contents of the *sarkhat* and the consideration, if any, given for the sale to the plaintiff. The lower Appellate Court went into the question of whether the evidence of Gopi Nath would have been admissible, the *sarkhat* not having been produced and its absence not having been in the opinion of the lower Appellate Court accounted for. On the evidence before us, we cannot arrive at a conclusion as to whether the lower Appellate Court was right or wrong in the opinion which it formed as to the inadmissibility of Gopi Nath's proposed evidence. In our opinion where a party in appeal desires to show that the evidence which he expected from a witness whom he desired to have summoned would be material, it is for that party by affidavit or otherwise to satisfy the Court that the evidence would have been admissible and would have been material.

In this case, although it is possible that Gopi Nath's evidence might not have been believed had he been examined, it might have been admissible and might possibly have been material.

We direct the lower Appellate Court to summon, subject to the plaintiff's making the necessary payments, such of the witnesses included in his application of the 17th of March, 1892, as were not summoned, and to take the material evidence, if any, which may be [221] admissible, of such witnesses; to consider the whole evidence in the case and to return the findings on the issues involved in the appeal to this Court. Ten days will be allowed for objections on the return.

Cause remanded.

16 A. 221 = 14 A.W.N. (1894) 47.

APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.*RAMA NAND AND OTHERS (*Plaintiffs*) v. SURGIANI (*Defendant*).^{*}
[2nd February, 1894.]*Hindu Law—Mitakshara—Inheritance—"Step-mother"—Custom—Nature of evidence necessary to establish a custom at variance with the general law.*1894
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According to the Mitakshara school of Hindu law a step-mother, not being one of the females expressly named in the Mitakshara and not being included under the term "mother" in Chapter II, s. 3, cannot inherit from her deceased step-son. *Gauri Sahai v. Rukko* (1), *Jagat Narain v. Sheo Das* (2), *Lala Joti Lal v. Musammat Durami Kower* (3), *Kessarbai v. Valab Raoji* (4) and *Kumaravelu v. Virana Goundan* (5) referred to.

Where it is sought to establish the existence of a custom, modifying or varying the general law, the kind of evidence that ought to be regarded is evidence showing that the right claimed by custom was more or less contested and the contest abandoned by some one who, if the custom had not existed, would have been entitled, or evidence showing that generally in the district the custom was followed to the exclusion of persons who, if it had not been for the custom, would presumably have enforced their right under the general law.

[F., 28 A. 187 = (1905) A.W.N. 242 = 2 A.L.J. 654; R., 37 C. 214 (219) = 11 C.L.J. 588 (590) = 14 C.W.N. 443 (445) = 5 Ind. Cas. 135 (136); 17 C.L.J. 405 (409) = 16 Ind. Cas. 900 (902); 34 P.R. 1907 = 112 P.W.R. 1907; 99 P.R. 1907 = 167 P.L.R. 1908, 3 P.R. 1908 = 94 P.L.R. 1908 = 16 P.W.R. 1908]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sunder Lal*, for the appellants.

Mr. *T. Conlan* and Pandit *Moti Lal*, for the respondent.

JUDGMENT.

EDGE, C. J., and BURKITT, J.—The appellants in this second appeal are the plaintiffs in a suit brought against one Musammat Surgiani to recover certain immoveable property which the plaintiffs alleged that they became entitled to upon the death of one Chote. Musammat Surgiani is the widow of one Kheri. Kheri [222] had a son named Balak who survived him. As Balak was a separated Hindu, on his death his widow Musammat Chote took the property in suit which had belonged to Balak in his lifetime. There are ten degrees of relationship between the plaintiffs and Balak. Both Balak and the plaintiffs are descended from a common ancestor, one Dharam Singh. Balak was the step-son of Musammat Surgiani, being the son of Kheri by another wife. In the written statement of Musammat Surgiani she denied that the plaintiffs were in any way related to Kheri or Balak. She alleged in the second paragraph that she had a preferential right to hold possession of the property on the ground that she was the wife of Kheri, the father of Balak. The third plea in the written statement alleged that the plaintiffs were not of the family of Kheri. There was no suggestion in the written statement that by any

* Second Appeal No. 859 of 1892 from a decree of Babu Sanwal Singh, Additional Subordinate Judge of Saharanpur, dated the 29th June, 1892, reversing a decree of Sheikh Maula Bakhsb, Munsif of Muzaffarnagar, dated the 12th December, 1891.

(1) 3 A. 45.

(2) 5 A. 311.

(3) B.L.R. Sup. Vol. 67.

(4) 4 B. 188.

(5) 5 M. 29.

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custom apart from Hindu law the defendant was entitled to possession as against the plaintiffs.

The first Court, finding the pedigree of the plaintiffs proved, gave them a decree for possession. The Subordinate Judge on appeal also found the pedigree proved, but he referred certain issues for trial under s. 566 of the Code of Civil Procedure. Some of those issues were apparently suggested by a confusion of thought as to the effect of decisions on questions of joint Hindu families and survivorship. The issues to which we have so referred are in our view immaterial. The third issue is as follows:—"What is the custom of the district in which the defendant-appellant lives as to the right of succession of the last female member of a joint Hindu family irrespective of her right of heirship to the last male or female member, *i.e.*, does she take the estate of the joint family or is excluded by the separate living heirs of the *propositus*?" No one had suggested that any question of local custom apart from the general law of the Hindus affected the rights of the parties. The Subordinate Judge apparently framed that issue of his own motion, and we rather infer that the issue was suggested to him by the decision in a Bombay case in which some reference was made to a custom in that Presidency. Evidence was taken by the Munsif [223] under the order of reference. The Munsif dealt with that evidence exhaustively. As he states the evidence as to ten out of the thirteen cases, they did not in any way support any such custom as would entitle the defendant to possession as against the plaintiffs. As to the other three cases without much more evidence than was put on the record concerning them, they would not afford evidence of a custom. A custom where it is disputed and where it goes to limit or vary well-known rules of law must be clearly proved by evidence. It is not sufficient, for instance, to take the present case, to show that a step-mother took and remained in quiet possession of immoveable property which had been in the possession of her deceased step-son, both being Hindus. Such evidence would be quite inconclusive. It would be consistent with there being no claimant for the property; with there being in fact an heir who could not prove his pedigree; with there being an heir who could prove his pedigree, but who allowed his step-mother to remain in possession of the property for her maintenance. It would be consistent with there being an heir who could prove his title and his pedigree, but who, having regard to the small value of the property, did not think it worth his while to enter upon possibly expensive litigation. In such a case the kind of evidence that ought to be regarded is evidence showing that the right claimed by custom was more or less contested and the contest abandoned by some one who, if the custom had not existed, would have been entitled, or evidence showing that generally in the District the custom was followed to the exclusion of persons who, if it had not been for the custom, would presumably have enforced their right under the general law. Evidence which is as consistent with there being a custom as with there being no custom at all is not evidence of a custom modifying or varying the general law. In this case, so far as we can see, there was no evidence of custom in the strict sense to be considered. But beyond that, the Subordinate Judge should not have raised a case on his own motion for the defendant which was not suggested by the defendant in her written statement, and which could not have been omitted from her written statement if she had been relying on a custom so much at variance with the ordinary rule of Hindu law as the custom found by the Subordinate Judge is. [224] In her appeal to the lower Appellate Court the

defendant never suggested any question of custom. It is not therefore necessary to consider what effect this custom might have had if the question had been raised and the custom had been proved.

The Subordinate Judge followed the decision of the Sadr Diwani Adalat of these Provinces in *Musammatt Bhuganee Daiee v. Gopaljee* (1). He being in ignorance of the later decisions of this Court, considered that that decision bound him. His attention was not drawn to the decision of a Division Bench of this Court in *Gauri Sahai v. Rukko* (2), in which it was decided that, according to the Mitakshara, none but females expressly named can inherit, and that consequently the widow of the paternal uncle of a deceased Hindu not being so named was not entitled to succeed to his estate. That decision was approved by a Full Bench of this Court in *Jagat Narain v. Sheo Das* (3). The decision of the Full Bench of the Calcutta Court in *Lala Joti Lal v. Musammatt Durani Kower* (4) shows clearly that in s. 3 of Chap. II of the Mitakshara the word used for 'mother' does not include stepmother. The same point was decided in *Kessserbai v. Valab Raoji* (5). At p. 208 of that report it is said:—"It is clear that the stepmother is not included by the Mitakshara within the term mother." The same view of the term 'mother' as used in the Mitakshara was maintained by the Madras High Court in *Kumaravelu v. Virna Goundan* (6).

There is no authority for holding, as the Subordinate Judge did, that a stepmother of a deceased son can inherit to him, either along with or to the exclusion of the heirs of the stepson, although they may be as far remote as ten degrees counting ascent and descent. It was a mistake on the part of the Subordinate Judge to imagine that the defendant, her stepson and Musammatt Chote, Balak's wife, had any community of interest in the property in question. They did not constitute a joint Hindu family possessed, as such, of this property as joint property. As we have said before, the Sub- [225] ordinate Judge was apparently led astray by the decision in *Musammatt Bhuganee Daiee v. Gopaljee* of the Sadr Diwani Adalat of these Provinces. That decision has been overruled by later cases.

We allow this appeal with costs, and, setting aside the decree of the lower appellate Court, we restore the decree of the first Court with costs. This decision will not militate against such rights of maintenance as the respondent may have.

Appeal decreed.

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(1) S. D. A. N.W.P. (1862), Vol. I, p. 306.

(3) 5 A. 311.

(5) 4 B. 188.

(2) 3 A. 45.

(4) B. L. R. Sup. Vol. 67.

(6) 5 M. 29.

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APPEL-

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16 A. 225 =
14 A.W.N.
(1894) 52.

16 A. 225 = 14 A.W.N. (1894) 52.

APPELLATE CIVIL.

(Before Mr. Justice Burkitt.)

AMANI BEGAM AND ANOTHER (*Defendants*) v. MUHAMMAD KARIM-
ULLAH KHAN (*Plaintiff*)* [15th February, 1894.]

Muhammadian Law—Widow's lien for dower—Consent of heirs to possession of widow.

Where a Muhammadian widow is in possession of the property of her deceased husband, having obtained such possession lawfully and without force or fraud, and her dower or any part of it is due and unpaid, she is entitled as against the other co-heirs of her husband to retain possession of such property until her dower debt is paid. It is immaterial to such widow's right to retain possession that such possession was obtained originally without the consent of the other co-heirs *Mussumat Bebee Bachun v. Sheik Hamid Hossein* (1), *Aziz-ullah Khan v. Ahmad Ali Khan* (2), and *Bibee Tajim v. Syud Wahed Ali* (3) referred to.

[F., P.L.R. (1900) 335; R., 32 A 563 = 7 A.L.J. 614 (616) = 6 Ind. Cas. 405 (406); 38 C. 475 (478) — 13 C.L.J. 427 (429) = 9 Ind. Cas. 1031 (1033); 17 Ind. Cas. 81 = 15 O.C. 257 (259).]

THE facts of this case sufficiently appear from the judgment of Burkitt, J.

Mr. *Abdul Majid*, for the appellants.

Munshi *Madho Prasad*, for the respondents.

JUDGMENT.

BURKITT, J.—In this case the plaintiff-respondent, Muhammad Karim-ullah Khan, sued to recover possession of certain fractional shares in the property left by one Muhammad Khan on the allegation that being one of Muhammad Khan's heirs under the Muhammadian law, he was entitled to the shares claimed by him. Several persons were impleaded as defendants and amongst them [226] two widows of the deceased Muhammad Khan who were in possession. The pleas raised by the latter, firstly, denied the plaintiff's pedigree and his right of inheritance, and, secondly, asserted that the widows were in possession in lieu of dower and could not be turned out of possession until that dower was tendered or paid. The Court of first instance found that the plaintiff's pedigree was proved and that he was entitled to the shares claimed, but dismissed the suit on the ground that the widows were in possession in lieu of dower and that as the plaintiff had not offered to pay that dower, his suit for possession could not succeed. On appeal to the Subordinate Judge it was contended that the widows had not obtained possession with the "consent of the heirs," and that therefore the plaintiff was entitled to succeed. After a remand to the Court of first instance, which on appeal was set aside by this Court, the Subordinate Judge decided that, as it was not proved that the widows had obtained possession of their late husband's estate in lieu of dower with the consent of other heirs express or implied, the plaintiff was entitled to succeed.

In appeal to this Court it was contended that the view of the law taken by the lower appellate Court is wrong, the consent of heirs not being necessary. It was also urged that as the widows are in lawful

* Second Appeal No. 940 of 1893 from a decree of Pandit Raj Nath, Subordinate Judge of Moradabad, dated 5th May 1893, reversing a decree of Babu Bhawani Chandar Chakravati, Munsif of Sambhal, dated the 11th June 1891.

(1) 14 M.L.A. 377.

(2) 7 A. 353.

(3) 22 W.R. 118.

possession of their husband's estate they cannot be deprived of that estate by the other heirs until the dower debt due to them is paid. On the other hand, it was contended for the respondent that the rule laid down by the lower Court is correct, and in support of it reference was made to *Ajuba Begam v. Nazir Ahmad* (1). For the appellant, the attention of the Court was drawn to the ruling of the Lords of the Privy Council in *Mussumat Bebee Bachun v. Sheikh Hamid Hossein* (2), in which, at page 381, their Lordships say:—"Whatever the right may be called, it appears to be founded on the power of the widow as a creditor for her dower to hold the property of her husband of which she has lawfully and without force or fraud obtained possession until her debt is satisfied, with the liability to account." Reference was also made to the case of [227] *Aziz-ulla Khan v. Ahmad Ali Khan* (3) where, at page 357 of the report, Mr. Justice Mahmood is reported to have said:—"It has been held in many cases by this Court and the Lords of the Privy Council that a Muhammadan widow lawfully in possession of her husband's estate occupies a position analogous to that of a mortgagee, whose possession cannot be disturbed until the dower debt has been satisfied." To the same effect is the language of the Calcutta High Court in the case of *Bibee Tajim v. Syud Wahed Ali* (4), where it was held that the other co-heirs to the estate of a deceased Muhammadan are only entitled to recover their share from the widow in possession of that estate upon paying her any debt which may be due to her from her deceased husband, and that the widow was therefore unquestionably entitled to hold the property until she was paid her dower, if dower was due to her.

In this case I do not understand that there is any denial of the fact that some dower is due to the appellants. It is unnecessary to enter into the question of the amount. The only matter I have to decide is, whether the plaintiff, as one of the co-heirs of the deceased Muhammad Khan, is entitled to succeed in this suit without paying the dower debt. In my opinion this case comes fully within the three precedents above cited. There is no allegation that the widows have got into possession unlawfully or by force or by fraud. Their possession appears to be perfectly lawful as heiresses of their deceased husband according to the Muhammadan law, and as creditors for their dower. I can find no authority for the proposition that the widow's possession is unlawful unless she has got such possession with the consent of the other co-heirs. Indeed, the facts in the case of *Mussumat Bebee Bachun v. Sheikh Hamid Hossein* (2) show that the widow in that case was not let into possession with the consent of the heirs, but, on the contrary, got possession in spite of their strenuous opposition, and yet their Lordships in that case held that the widow was entitled to retain her possession until her dower was discharged. The case of *Ajuba Begam v. Nazir Ahmad* (1) has been cited for the respondent. In [228] my opinion it does not support the conclusion which it is sought to draw from it. As far as I understand that case, the only proposition it lays down is that under its particular circumstances the widow had no power to convey to a third party her right of dower. No question of that kind arises in the present case. The only distinction I can see between this case and that of *Mussumat Bebee Bachun v. Sheikh Hamid Hossein* (2) is that in this case when the widows obtained mutation of their names they did not then expressly claim that any dower debt was due to them. Tho

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16 A. 225—
14 A.W.N.
(1894) 52.

(1) 10 A. W. N. (1890) 115.
(3) 7 A. 353.

(2) 14 M.I.A. 377.
(4) 22 W.R. 118.

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16 A. 225 =
14 A.W.N.
(1894) 52.

only claim which they appear to have made before the revenue authorities was their right as widows to share in their husband's estate. In my opinion, that matter does not affect the question. The defendants-appellants are undoubtedly in lawful possession of the property, and, such being the case, I hold, to use the words of the Calcutta High Court in the case of *Bibee Tajim v. Syud Wahed Ali* (1), that as dower is due to them and has not been paid, they unquestionably are entitled, as against the other co-heirs, to hold the estate, which is rightfully in their hands, until they are paid that dower.

For these reasons I am of opinion that the decision of the lower Court is wrong. I therefore allow this appeal, and, setting aside the decree under appeal, I restore that of the Court of first instance and dismiss the plaintiff's suit with costs in this Court and in the lower appellate Court.

Appeal decreed.

16 A. 228 = 14 A.W.N. (1894) 55.

APPELLATE CIVIL.

Before Mr. Justice Burkitt.

MUHAMMAD SAID KHAN (*Judgment-debtor*) v. PAYAG SAHU
(*Decree-holder*).^{*} [20th February, 1894.]

Civil Procedure Code. ss. 258, 320—Act No. XV of 1877, (Indian Limitation Act) ss. 19, 20—Execution of decree—Execution transferred to the Collector—Acknowledgment in the Court of the Collector of part payment of decretal money—Limitation.

Where, after a decree had been sent to the Collector for execution under the provisions of s. 320 of the Code of Civil Procedure, the decree-holder and judgment [229] debtor joined in an application to the Collector in which they stated, on the one hand, that the decree-holder had received Rs. 2,900 in part payment of the decretal amount, and, on the other, that there was a certain balance due from the judgment-debtor under the decree, and that arrangements had been made between the parties for the payment of such balance.

Held, that the above application was properly made to the Collector as being, within the meaning of s. 258 of the Code of Civil Procedure, "the Court whose duty it is to execute the decree," and that the application was a valid acknowledgment for all purposes and sufficient under ss. 19 and 20 of the Indian Limitation Act, 1877, to save limitation in respect of the execution of the decree.

[F., 35 B. 516 (523) = 13 Bom. L.R. 977 = 12 Ind. Cas. 572 (574) ; R., 26 A. 36 = 23 A.W.N. 179 ; 22 Bom. 722 (727) ; 15 Bom. L.R. 389 (391).]

THE facts of this case sufficiently appear from the judgment of Burkitt, J.

Munshi Gobind Prasad, for the appellant.

Pandit Sundar Lal, for the respondent.

JUDGMENT.

BURKITT, J.—This is an appeal from an order of the District Judge of Jaunpur in a case of execution of decree. The decree had been transferred, under s. 320 of the Code of Civil Procedure, and the rules made thereunder, to the Collector for execution. While the execution proceedings were pending before the Collector, the decree-holder and the

* Second Appeal No. 1022 of 1893, from an order of L. M. Thornton, Esq., District Judge of Jaunpur, dated the 9th August 1893, reversing an order of Rai Anant Ram Subordinate Judge of Jaunpur, dated 14th March, 1893.

(1) 22 W. R. 118.

judgment-debtor appeared before that officer on the 20th of December 1888, and put in a joint petition informing him that the decree had been partially satisfied, the decree-holder acknowledging that he had that day received a sum of Rs. 2,900 from the judgment-debtor in part satisfaction of the decree. The joint petition which sets forth this payment went on to state that certain other terms for the payment of the balance admitted to be still due on the decree had been arranged between the parties. On the verification of this petition by the parties to it, the Collector struck the execution proceedings off his file of pending cases and returned the record to the Civil Court. I should here state that the application for execution on which these proceedings originated was filed on the 9th of January 1888. The next application for execution to the Civil Court was made on the 19th of December 1891. Now, clearly, if the application of the 20th of December 1888 be not held to be sufficient to keep [230] the decree alive, its execution must be held to be barred, as the last preceding application was that of January 1888.

It is, however, contended, and this view has been accepted by the learned Judge of the Court below, that with reference to ss. 19 and 20 of Limitation Act, the acknowledgment by the respondent decree-holder of receipt of payment of a portion of the sum due under the decree, and also the judgment-debtor's acknowledgment of liability for the unpaid balance contained in the joint petition of the 20th of December 1888, are sufficient to prevent any limitation bar arising. On the other hand, it is contended by the present appellant, judgment-debtor, that, as the acknowledgment of part satisfaction was not made to the Civil Court, it is ineffectual and does not prevent the limitation bar from accruing.

Now, in the first clause of s. 258, it is provided that when money is paid out of Court in part satisfaction of a decree, the decree-holder shall certify such payment to the Court "whose duty it is to execute the decree." The question then arises is, what is the Court indicated by these last words? To ascertain this it is necessary to refer to s. 320 of the Code of Civil Procedure, inasmuch as it was strenuously contended before me for the appellant that the Collector in such a case as this, is no more than the ministerial officer of a Civil Court, and has no duties to perform beyond selling the property ordered for sale. Now a perusal of s. 320 shows to my mind that that which is under its provisions transferred to the Collector is not the mere duty of selling the property but the execution of the decree ordering a sale of property. And in fact the object which the Legislature had in view in enacting s. 320 and the following sections was to preserve from sale as far as possible, property which a Civil Court had ordered to be sold. When a Civil Court so transfers a decree all proceedings in execution in that Court come to an end for the time being, the whole execution having been transferred to the Collector. Such being the case, it appears to me that when once a Collector has so received a decree for execution under s. 320 it becomes his "duty" to execute that [231] decree, and that in fact as long as the decree remains in the hands of the Collector he, and he alone, can execute it. Once a decree has been transferred to the Collector, the only order which a Civil Court is authorized to pass respecting it is one withdrawing it from the Collector and restoring it to its own file. It seems to me therefore that under such circumstances the decree-holder and the judgment-debtor were perfectly justified in certifying the part satisfaction of the decree to the Collector, and that the acknowledgment so made is a valid acknowledgment for all purposes, under the first clause of s. 258. I

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(1894) 55.

am therefore of opinion, with reference to ss. 19 and 20 of the Limitation Act, that execution of the decree has not become barred by limitation.

Some argument was addressed to me as to the latter portion of the joint petition of the 20th of December 1888. It was contended that the intention of the parties was to put an end to the decree and to substitute a new contract enforceable only by a separate suit. As to that matter, I concur with the learned District Judge in holding that the latter part of the petition does not set out any new contract between the parties, and that it is nothing more than an agreement to give time for the recovery of the balance still due on the decree. Whether that agreement, not having been sanctioned in the manner required by s. 257 A, is or is not a valid agreement, is a question into which I need not enter. The only question in this appeal is as to whether execution of this decree is time-barred. I am of opinion that it is not so barred. I therefore dismiss this appeal with costs.

Appeal dismissed.

16 A. 231 = 14 A. W. N. (1894) 60.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

JAGAN NATH AND ANOTHER (*Plaintiffs*) v. MANNU LAL,
(*Defendant*).^{*} [9th January 1894.]

Hindu law—Joint Hindu family—Partition—Power of father as manager of joint family to refer to arbitration the partition of the joint family property—Civil Procedure Code, ss. 520, 521, 526—Award.

It is competent to the father of a joint Hindu family in his capacity of managing member of the family to refer to arbitration the partition of the joint family [232] property, and the award made on such a reference, if in other respects valid, will be binding on the sons.

In s. 526 of the Code of Civil Procedure, the word "shown" is not equivalent to "alleged," but it is necessary that one of the grounds mentioned in s. 520 or s. 521 should be proved to the satisfaction of the Court before the Court is justified in refusing to file the award. *Dutto Singh v. Dosad Bahadur Singh* (1) and *Dindekar v. Dindekars* (2) followed; *Hurronath Chowdhry v. Nistarini Chowdhry* (3), and *Ichamoyee Chowdhranee v. Prosunno Nath Chowdhry* (4) dissented from.

[F., 27 B. 287; 6 Ind. Cas. 123 (124); R., 17 A. 21; 18 A. 414 = 16 A. W. N. 116; 18 A. 422 (429); 1 C.L.J. 388 (397); 14 C.L.J. 188 (201) = 11 Ind. Cas. 481 (488); 13 C.P.L.R. 53; 9 M.L.J. 34; 6 M.L.T. 249 (250) = 3 Ind. Cas. 339 (340).]

N.B. In 14 A.W.N. (1894) 60, the date of the judgment is given as 23rd February 1894.

THE facts of this case sufficiently appear from the judgment of the Court.

Lala Sheo Charan Lal, for the appellants.

Babu Rajendro Nath Mukerji, for the respondent.

JUDGMENT.

EDGE, C. J., and BANERJI, J.—This appeal arises out of an application under s. 525 of the Code of Civil Procedure for the filing of an award

* Second Appeal No. 391 of 1892, from a decree of R. Scott, Esq., District Judge of Jhansi, dated the 8th January 1892, reversing an order of Maulvi Ahmad Ali Khan, Munsif of Orai, dated the 13th November, 1891.

(1) 9 C. 575.

(2) 6 B. 663.

(3) 10 C. 74.

(4) 9 C. 557.

made by arbitrators appointed without the intervention of the Court. The submission to arbitration was made by the mother and guardian of the appellants, who are minors, and by the deceased father of the respondent, and related to the partition of certain joint property. The Court of first instance ordered the award to be made a rule of Court and passed a decree in accordance with it. On appeal the lower appellate Court held that the respondent's father was not competent to make a reference to arbitration in respect of property to which the respondent was entitled jointly with his father, and that the award was not binding on the respondent after his father's death. Such Court accordingly set aside the decree and dismissed the appellants' application.

It is contended on behalf of the appellants that as the decree of the Court of first instance was passed in accordance with the award no appeal lay from it. We are of opinion that the finality of the decree depended on the validity of the award, and if the award was not a valid one according to law, the decree passed in accordance with it was appealable. It was therefore open to the lower appellate Court to entertain and consider the question of the validity of the award.

[233] We are, however, of opinion that the ground on which the learned Judge has held the submission to arbitration and the award made upon it not to be binding on the respondent is untenable. The respondent and his father formed a joint Hindu family, of which the father was the manager. As such manager he fully represented the family, and in the absence of fraud or collusion, which has not even been suggested in this case, his acts are binding on the other members of the family. It was held in *Pitam Singh v. Ujagar Singh* (1) that a compromise effected by the father whereby he agreed to a partition of the family estate with other co-sharers was binding on his son. The principle of that ruling applies to this case. The respondent's father was therefore competent to go into arbitration for the purpose of dividing property which on partition would have devolved on him and his son, and the respondent is bound by the reference to arbitration made by his father. Consequently, the award which resulted from the reference is as much binding on the respondent as it was binding on his father. We are accordingly of opinion that the lower appellate Court has erred in rejecting it.

It has been urged by Mr. *Rajendro Nath* for the respondent that, as the respondent showing cause against the application of the appellants set up one of the grounds mentioned in s. 520, namely, that the award was illegal, the Court was bound under s. 526 to refuse to make the award a rule of Court, and it was not necessary for it to enter into the question of the validity or otherwise of the ground alleged. He has referred us to the rulings of the Calcutta High Court in *Hurronath Chowdhry v. Nistarini Chowdhrani* (2) and *Ichamoyee Chowdhranee v. Prosunno Nath Chowdhri* (3) which no doubt support his contention. We are, however, unable to adopt the same view of s. 526 as was held in those cases. That view was expressly dissented from by two other learned Judges of the same Court in *Dutto Singh v. Dosad Bahadur Singh* (4), and it is opposed to that of the Bombay High Court in *Dandekar v. [234] Dandekars* (5). We concur with the rulings last referred to. We are of opinion that the words "ground shown" in s. 526 are not equivalent to ground alleged," and that the section requires that not only should one of the grounds mentioned in 520 or 521 be alleged, but it must also be established. It is only when the

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16 A. 231 =

14 A.W.N.

(1894) 60.

(1) 1 A. 651. (2) 10 C. 74. (3) 9 C. 557. (4) 9 C. 575. (5) 6 B. 663.

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alleged ground has been "shown," that is, proved to the satisfaction of the Court, that the Court should refuse to file the award.

Holding as we do that the award in this case was not invalid, we decree the appeal with costs, and, setting aside the decree of the lower appellate Court, restore that of the Court of first instance with costs.

Appeal decreed.

[NOTE.—See also *Surjan Raot v. Bhikari Raot* (I.L.R., 21 Calc. 213)—Ed.]

16 A. 231 =
14 A.W.N.
(1894) 60.

16 A. 234 = 14 A.W.N. (1894) 71.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

GANESHI LAL AND OTHERS (*Opposite Parties*) v. MUSARRAT ALI (*Petitioner*).^{*} AND GIRWAR LAL AND OTHERS (*Opposite Parties*) v. MUSARRAT ALI (*Petitioner*). [23rd February and 14th March, 1894.]

Civil Procedure Code, ss. 351, 355, 356, 357—Insolvent but undischarged judgment debtor—Application by scheduled creditors to sell subsequently-acquired property of the insolvent Civil Procedure Code, s. 588, cl. (17)—Appeal.

The provisions of s. 357 of the Code of Civil Procedure are not applicable until the insolvent has been discharged under s. 351 or s. 355 of the Code.

Hence where some of the scheduled creditors of a judgment-debtor, who had been declared an insolvent and in respect of whose property a receiver had been appointed, but who had not been discharged, presented an application to the Court, purporting to be made under s. 357 of the Code of Civil Procedure, praying for the sale of certain property which had come by inheritance to the judgment-debtor, and the Court, also purporting to act under s. 357 of the Code, made an order on such application allowing the property in question to be released from attachment on deposit by the insolvent of one-third of the scheduled debts; it was held that although the Court might have acted under s. 356 of the Code, yet as its order purported to be under s. 357 it was *ultra vires* and must be set aside.

[235] Held also that the above-mentioned order was appealable as an order under s. 357 by virtue of s. 588, cl. (17) of the Code of Civil Procedure.

Mr. A. H. S. Reid, for the appellants.

Mr. M. Hameed-ullah and Babu Jogindro } in each appeal.

Nath Chaudhri, for the respondents.

THESE were two appeals by different sets of scheduled creditors of an insolvent judgment-debtor against an order of the District Judge of Aligarh upon an application of the scheduled creditors for sale of certain immoveable property of the insolvent which had come to him since he was so declared. The facts of the case sufficiently appear from the judgment in F. A. No. 167 of 1893.

The judgment of the Court (EDGE, C.J., and BURKITT, J.) was delivered as follows:—

JUDGMENT.

F. A. No. 167 of 1893.—Musarrat Ali, the respondent in this appeal, was declared an insolvent on the 29th of July 1880. The Nazir of the Court appears to have been appointed a receiver. So far as Mr. Hameed-ullah, who appears for Musarrat Ali, has shown us, the insolvent was not

^{*} First Appeals Nos. 167 and 168 of 1893, from decrees of J. H. Harrison, Esq., District Judge of Aligarh, dated the 15th June 1893 and the 19th June 1893, respectively.

discharged under s. 351 or s. 355 of Act No. XIV of 1882 or under the corresponding sections of the previous Code of Civil Procedure. On the 23rd of July 1892 certain of the scheduled creditors of the insolvent presented an application to the Judge of Aligarh alleging that the insolvent's father had died, and that 14 sihams out of 40 sihams of the village which belonged to the insolvent's father had come to the insolvent, and asking that these 14 sihams might be sold by auction. The applicants, who are appellants here, stated in their application that it was made under s. 357 of the Code of Civil Procedure. The Judge of Aligarh ordered that—
 "On deposit of Rs. 2,610, one-third of the scheduled debt, after deducting the sum received, the attached property shall be released, and if the pleader for the applicants prove within a week that the attached property is sufficient to cover interest also, it also shall be awarded." The Judge apparently conceived that he was making an order under s. 357 of the Code of Civil Procedure, 1882. That section only applies where an insolvent [236] has been discharged under s. 351 or s. 355, or by analogy under the corresponding sections of the previous Code. The insolvent not having been discharged under s. 351 or s. 355, s. 357 did not apply. It appears to us that the learned Judge might have treated the statement in the petition that the application was made under s. 357 of the Code of Civil Procedure as surplusage, and have proceeded under the proviso to s. 356. We have no materials before us to enable us to pass an order under s. 356; but we set aside the order passed by the Judge on the 15th of June 1893, which is the subject of this appeal, and remand the case under s. 562 of the Code of Civil Procedure. As the Judge's attention was not drawn to the fact that s. 357 was inapplicable, we make no order as to costs.

F. A. No. 168 of 1893. -The order concluding the judgment of the 15th of June 1893, although not strictly speaking a formal order was an order, and can be treated for the purposes of this appeal as such. It was an order made on an application under s. 357 of the Code of Civil Procedure, and although it happens, as was pointed out in our judgment in First Appeal No. 167 of 1893, delivered on the 23rd of February 1894, that s. 357 did not apply in this case, still we must treat it as an order made by the Judge upon the assumption that s. 357 applied and enabled him to make it. It was consequently appealable under cl. (17) of s. 588 of the Code. It did not come under cl. (c) of s. 244, as it was not made between parties to a suit in which a decree had been made.

For reasons similar to those stated in our judgment in First Appeal No. 167 of 1893, delivered on the 23rd of February 1894, we make a similar order in this case.

Cause remanded.

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 16 A. 234 =
 14 A.W.N.
 (1894) 71.

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APPEL-
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16 A. 237 = 14 A.W.N. (1894) 61.

[237] APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice and Mr. Justice Burkitt.*MUHAMMAD ISLAM (*Decree-holder*) v. MUHAMMAD AHISAN
(*Judgment-debtor*). [24th February, 1894.]16 A. 237 =
14 A.W.N.
(1894) 61.*Execution of decree—Limitation—Act No. XV of 1877, sch. ii, art. 178—Decree for possession of immovable property, execution being contingent on non-payment of annuity.*

Where a decree was for possession of immovable property, but its execution was contingent on default being made by the judgment-debtor in the payment year by year of a certain annuity to the decree-holder.

Held that the decree-holder was not obliged to execute such decree once and for all upon the occurrence of the first default, but might execute it on occasion of any subsequent default; also that the limitation applicable to the execution of such decree was that provided for by art. 178 of sch. ii of the Indian Limitation Act, 1877. *Thakur Das v. Shadi Lal* (1), referred to.

[R., 16 A. 371; 17 A. 39; 23 A. 13 (16); 30 C. 407; 26 M. 780 = 13 M.L.J. 412; D., 1 S.L.R. 18 (20).]

THIS was an appeal from an order of the Subordinate Judge of Moradabad, in the execution department, allowing the objection of the respondent judgment-debtor to the execution of a decree held against him by the decree-holder appellant.

The facts of the case are as follows:—

On the 2nd of April 1868 the decree-holder obtained a decree against the judgment-debtor on a compromise to the following effect. A decree for possession of the property claimed was passed in favour of the decree-holder, subject to the condition that if the judgment-debtor paid to him year by year ending with the Dasehra for his maintenance so long as he might live an allowance of Rs. 210, the decree for possession should not be executed: if the judgment-debtor made default in payment of any one year's allowance up to Dasehra, the decree-holder would be entitled to delivery of possession of the property in execution of that decree.

The decree-holder applied on the 9th of March 1892 for possession under the above decree, alleging that the judgment-debtor had made default in payment of the allowance for 1297 F. which ended on the 4th of October 1889.

[238] The judgment-debtor objected that the application for execution was barred by limitation under art. 179 of sch. ii of the Indian Limitation Act, because more than three years had elapsed since a default made on the 4th October 1878 (the Dasehra of 1286 F.), which default was not cured by a subsequent payment of that year's annuity on the 17th of December 1878. The objector relied on the ruling in *Ugrah Nath v. Laganmani* (2).

The Subordinate Judge, holding the ruling above mentioned to be applicable, allowed the objection and dismissed the decree-holder's application for execution.

The decree-holder then appealed to the High Court.

Pandit *Sundar Lal* and Babu *Ratan Chand*, for the appellant.

Mr. *Abdul Raoof* and Munshi *Madho Prasad*, for the respondent.

* First Appeal, No. 96 of 1893, from an order of Babu Mrittonjoy Mukerji, Subordinate Judge of Moradabad, dated the 18th February 1893.

(1) 8 A. 56.

(2) 4 A. 83.

JUDGMENT.

EDGE, C.J., and BURKITT, J.—This appeal has arisen out of an application to execute a decree for possession of immoveable property. The Court of first instance dismissed the application, holding that it was barred under art. 179 of sch. ii of Act No. XV of 1877. That Court found that there had been a default in 1288 F. and applied three years' limitation. That Court evidently construed the decree as one entitling the decree-holder to execute the decree for the possession of the property only on the occurrence of the first default in paying the annuity decreed. In our opinion that construction of the decree is erroneous. The decree was one for possession of the property, but it contained a condition that if the judgment-debtor paid year by year, ending with the Dasehra, to the decree-holder Rs. 210 for his maintenance, the decree should not be executed, but if default was made in the payment of any year's annuity the decree-holder would be entitled to execute the decree for possession. In our opinion under that decree the decree-holder could hold his hand on the first default, on the second default and on the third default, and would be entitled to execute it on the fourth default, that is to say, he was not bound once and for all to execute [239] it on the occurrence of the first default. The judgment-debtor could only prevent the execution of the decree by paying each year, ending with the Dasehra, the full amount of the annuity due for that year. There was a default within three years of this application. In our opinion art. 179 of sch. ii of Act No. XV of 1877 cannot possibly apply in this case. It is quite clear that cl. (6) does not apply, for the application was not one to enforce a payment. It is clear that the prior clauses of art. 179 cannot apply, because the decree might only become executable many years subsequently to the expiration of three years from its date, or the date of the final decree of the appellate Court or the date of a decision which might have been passed on review. Article 178 refers to s. 230 of the Code of Civil Procedure, which is a section dealing with applications for execution of decrees, and it appears to us that, as art. 179 cannot possibly apply to the execution of decrees of this kind, art. 178 must apply. Our view is consistent with the decision of this Court in *Thakur Das v. Shadi Lal* (1). In that case this Court applied art. 178 to an application for the execution of a decree, apparently holding that from the nature of the decree art. 179 could not apply. The Court below having dismissed this application on the ground of limitation, we set aside its decree and remand the case under s. 562 of the Code of Civil Procedure. Costs of this appeal and hitherto will abide the result.

Cause remanded.

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16 A. 237 =

14 A.W.N.

(1894) 6

(1) 8 A. 56.

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16 A. 240 (F.B.) = 14 A.W.N. (1894) 62.

[240] FULL BENCH.

FULL
BENCH.*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox and
Mr. Justice Burkitt.*16 A. 240
(F.B.) =
14 A.W.N.
(1894) 62.BADRI PRASAD (*Plaintiff*) v. BHAGWATI DHAR AND OTHERS
(*Defendants*).^{*} [1st March, 1894.]*Bengal Regulation No. XXVII of 1814, ss. 13, 21—Act No. VIII of 1859, ss. 16, 17 and
18—Act No. XX of 1865—Act No. X of 1877, s. 39—Civil Procedure Code, ss. 36, 37
—Vakalatnamah—Vakalatnamah authorizing pleader to present an appeal signed
by person having only a verbal authority from the appellant to do so.*

Under the provisions of Act XIV of 1882 the appointment of a pleader to make or do any appearance, application or act in or to a Civil Court must be in writing, and that writing must be executed by the party or by a person acting on his behalf and acting under the authority of a general power of attorney or *mukhtar namah*, unless the person making the appointment is the "recognized agent" of the party within the definition of s. 37 of Act No. XIV of 1882.

[F., 1 S.L.R. 191 (193); R., 22 A. 55.]

THE facts of this case, so far as they are necessary for the purposes of this report, sufficiently appear from the judgment of the Court.

Pandit Sundar Lal, for the appellant.

Babu Jogindro Nath Chaudhri, for the respondents.

JUDGMENT.

EDGE, C.J., KNOX and BURKITT, JJ.—This is an appeal from a decree in appeal of the District Judge of Gorakhpur dismissing the plaintiff's appeal to his Court. The appeal in the Court below was dismissed upon the short ground that the pleader who had filed the appeal had not a *vakalatnamah* executed by the plaintiff or by any one except a person calling himself the plaintiff's *karinda*. That *karinda* held no general power of attorney and no *mukhtarnamah* authorizing him to employ a pleader to file the appeal or authorizing him personally to file the appeal on behalf of the plaintiff. The plaintiff was a resident within the jurisdiction of the Court of the District Judge of Gorakhpur, and consequently was not a person [241] to whose case cl. (a) or cl. (c) of s. 37 of Act No. XIV of 1882 would apply. The so-called *karinda* was not a certificated mukhtar; consequently he did not come within cl. (b) of s. 37. Further, as we have said, he held no special power of attorney authorizing him to act in any respect for the plaintiff.

The question really arises upon the construction of s. 36 of Act No. XIV of 1882, which is an enabling section and is as follows:—"Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party to a suit or appeal in such Court, may, except when otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf: Provided that any such appearance shall be made by the party in person if the Court so direct." The term 'recognized agent' is defined in s. 37, and as we have said, the *karinda* in question was not a recognized agent as defined in that section. He would not have come within cl. (c) of that section, even

* Second Appeal, No. 633 of 1892, from a decree of H. Bateman, Esq., District Judge of Gorakhpur, dated the 30th March 1892, confirming a decree of Maulvi Muhammad Sakhawat Ali, Munsif of Bansi, dated the 7th July 1890.

if the plaintiff had been residing outside the jurisdiction of the Court of the District Judge, because he was not a person carrying on a trade or business for and in the name of the plaintiff within the local limits of the jurisdiction of the Court. Even if the plaintiff had been non-resident within the jurisdiction, the *karinda*, unless expressly authorized by a power of attorney, would not, in our opinion, come under the words in the concluding portion of cl. (c) of s. 37. We consider that the words "expressly authorized" there used must be construed as meaning expressly authorized in a manner *ejusdem generis* with the authorization of cl. (a) or cl. (b) of the section.

It is advisable, we think, to refer back to what, so far as we can ascertain, was the law prior to the passing of Act No. XIV of 1882. The first Regulation to which we have been referred by the learned vakils engaged in this case was Regulation No. XXVII of 1814. By s. 21 of that Regulation a party desirous of retaining a vakil for the prosecution or defence of a civil suit was compelled to execute to such vakil a *vakalutnamah*. [242] The instrument, to be in accordance with that section, had to be attested by the seal or signature or the mark of the party, if he could not write, in the presence of two credible witnesses, who also had to attest it in the same manner, and who had to attend Court and prove the *vakalutnamah* in all cases in which it might be adjudged necessary. That section apparently did not contemplate the appointment of a vakil except by a *vakalutnamah* executed by the client in the manner prescribed, and by him alone. However, we find in s. 13 of the same Regulation a provision made for the employment of another vakil, in case the vakil who received his *vakalutnamah* should be unable, in consequence of illness or other sufficient reason, to attend the Court. It was provided by that section that in such case "if the management of the case shall be entrusted to any other pleader of the Court, instead of filing a *vakalutnamah*, it shall be sufficient for the party or his mukhtar to endorse on the back of the original *vakalutnamah* a written declaration that he has appointed some other vakil of the Court to conduct the case, either permanently or during the absence of the pleader first appointed." That section contemplates the legality of a mukhtar duly authorized appointing a vakil for this client.

On the 15th of September 1843, the Sadr Diwani Adalat of the Lower Provinces made the following rules which were subsequently, on the 2nd of October 1843, adopted and passed by the Sadr Diwani Adalat of the Western Provinces:—"Rule 7. *Vakalutnamahs*, whether executed by principals or their attorneys and agents, and *mukhtarnamahs* under the authority of which *vakalutnamahs* are executed, shall not hereafter be required to be verified on oath. The responsibility in regard to all such documents being properly and correctly executed shall rest entirely with the *Vakeels*. Rule 8. The above rule does not apply to cases in which only *mukhtars* or agents are employed. In all such cases the *mukhtarnamah* shall be verified on oath as at present." These rules are to be found in the "Code of unrevoked Circular Orders of the late Sudder Court of Calcutta (Civil Side)" published with the permission of the High Court by T. C. Ledlie in 1872 (at p. 134). These [243] rules clearly indicate that from 1843 down to 1872 at any rate *vakalutnamahs* could only be executed by principals or by persons holding *mukhtarnamahs* under the authority of which they could execute a *vakalutnamah* for their principal.

When Act No. VIII of 1859 was passed, s. 21 of Regulation XXVII

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of 1814 was still unrepealed. Section 16 of Act No. VIII of 1859 authorized applications and appearances in Civil Courts, except when otherwise specially provided by the Act, to be made by the party in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf. The result is that when Act No. VIII of 1859 was passed, a pleader could only be duly appointed to act on behalf of a party in a Civil Court by a *vakalatnamah* executed by the party or executed by a person holding authority to execute a *vakalatnamah*. It is needless to say that in the case of delegation of authority the *mukhtarnamah* delegating the authority, whether it was proximate or whether it was remote, must have been executed by the party. In s. 17 of Act No. VIII of 1859 "recognized agents" are defined, and in the clause headed 'secondly' we find as "recognized agents" persons carrying on trade or business for and in the name of parties not within the jurisdiction of the Court in matters connected with such trade or business only, where no other agent is expressly authorized to make such applications and appearances. At that time, so far as we can ascertain, no agent could be expressly authorized to make such applications or appearances under a general power of attorney or an ordinary *mukhtarnamah*.

Owing to one of the arguments in this case it is necessary to refer to s. 18 of Act No. VIII of 1859. That section provided that the appointment of a pleader to make any application or appearance in a Civil Court should be in writing and should be filed in the Court, and provided that such appointment should be in force when so filed "until revoked by a writing filed in the Court." Section 39 of Act No. X of 1877 made such an appointment so filed of force "until revoked with the leave of Court by a writing signed by the client and filed in Court, or until the client [244] or the pleader died, or all proceedings in the suit were ended so far as regards the client." It was contended that the proviso in s. 39 of Act No. XIV of 1882, which is the same as that which we have just quoted, showed, by the insertion of the words "by a writing signed by the client," that the words in the earlier part of the section which made it necessary that the appointment should be in writing, did not mean writing signed by the party himself, and consequently that any person having any authority, whether oral or otherwise, might sign a *vakalatnamah* appointing a pleader for a party in a Civil suit. That is not the inference which we draw from the alteration effected in the Code of Civil Procedure. Under s. 18 of Act No. VIII of 1859, as under s. 39 of Act No. XIV of 1882, the appointment of a pleader for a party in a Civil suit would in our opinion be valid if made by a writing signed by the party or by a person holding a general power of attorney or *mukhtarnamah* authorizing him to make such an appointment. Under s. 18 of Act No. VIII of 1859, in our opinion the appointment of a pleader could have been revoked by a writing filed in Court and signed either by the party or by a person holding a general power of attorney or a *mukhtarnamah*, and that would be consistent with s. 13 of Regulation XXVII of 1814; but it probably appeared to the Legislature that, once a *vakil* or pleader was formally appointed and his appointment notified to the Court by the filing of the *vakalatnamah*, his authority should only be revoked by a document under the hand of the client and with the leave of the Court, and that no person holding a general power of attorney or an ordinary *mukhtarnamah* should have power thereby to revoke the appointment of the pleader or *vakil*, and that such was the reason for the alteration in the law.

So far as we can ascertain, s. 21 of Regulation XXVII of 1814 was not repealed until its repeal was effected by Act No. XX of 1865. We find that in the Codes of Civil Procedure which have been passed since Act No. XX of 1865 the wording of the sections which empower persons other than the parties to make appearances and applications and do acts in Civil Courts for the parties have [245] closely, so far as is material here, followed the wording of Act No. VIII of 1859, and consequently we infer that the Legislature intended by Act No. X of 1877, and later by Act No. XIV of 1882, that pleaders should only be appointed to act in Civil Courts in the same manner as they could be lawfully appointed under Act No. VIII of 1859. We are consequently of opinion that under Act No. XIV of 1882, the appointment of a pleader to make or do any appearance, application or act in or to a Civil Court must be in writing, and that writing must be executed by the party, or by a person acting on his behalf and acting under the authority of a general power of attorney or *mukhtarnamah*, unless such agent making the appointment is the recognized agent of the party within the definition of s. 37 of Act No. XIV of 1882.

It was contended that the effect of ss. 186 and 187 of the Indian Contract Act, 1872, was to make it lawful for an agent having only an oral, as distinct from a written and signed, authority from his principal to execute a *vakalatnamah*. In our opinion those sections do not affect the question. The words "express" in s. 186 and "expressed" in s. 187 are not used in the same sense as the word "expressly" in cl. (c) of s. 37 of Act No. XIV of 1882, as it was contended they were.

It has also been contended that a notice which was given by the plaintiff that he adopted the appeal and the *vakalatnamah* which he executed appointing the same pleader to prosecute the appeal effected a ratification of the act of the *karinda*. The notice and *vakalatnamah* to which we have just referred were produced in Court long after the period of limitation for the filing of the appeal in the Court below had expired, and long after the decree in the defendants' favour in the first Court had become final, if there was no good appeal presented within time. Section 200 of the Indian Contract Act, 1872, expressly precludes the contention that acts done subsequently to the date when the decree in the first Court became final, owing to there being no valid appeal from it, could ratify the act of the *karinda* and of the pleader in filing the [246] appeal, when the pleader was not duly appointed to act in the Court on behalf of the plaintiff.

The cases in which this question has arisen have come to this Court from the District of Gorakhpur. It would appear that there has been there some lax system, apparently not recognized by the Courts, and not shown to have been known to the Courts, by which parties entrusted the appointment of pleaders for the filing of appeals to servants, friends or neighbours going to the town in which the Court was situated. We regret that people should have been so foolish as to set up a practice unknown to the Courts, and in our opinion illegal and fraught with so much danger to litigants and others. It is a matter which concerns not only the Courts but the legal practitioners practising in the Courts. We have had experience by cases in this Court of persons repudiating suits and proceedings filed in their names in the Courts below. It is necessary for Courts, so far as they can, to take precautions that such repudiations shall not be easily made, and that can only be done by adhering to the practice laid down for the guidance of litigants by the Legislature. It is

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also to the interest of gentlemen practising in the law that in these respects those rules should be strictly adhered to. It might happen that a vakil might honestly believe that he was appointed to act on behalf of a litigant, assuming that the person who executed his *vakalutnamah* had some authority to execute it; and it might subsequently appear that such person had no authority, and the vakil or pleader might possibly find himself liable to a suit for damages, if the result of his unauthorized interference in the litigation of the party was to cause damage to the party on whose behalf he considered that he was entitled to act. We do not say what might be the result of such a suit.

On the whole, we have come to the conclusion that the Court below was right, and that the person who filed this *vakalutnamah* in that Court had no authority coming within Act No. XIV of 1882 to do any act in or to the Court on behalf of the plaintiff, and [247] the *vakalutnamah* being an ineffectual document did not effect on its filing a legal appointment of the pleader.

We dismiss the appeal with costs.

Appeal dismissed.

16 A. 247 = 14 A.W.N. (1894) 70.

APPELLATE CIVIL.

Before Mr. Justice Banerji.

KARIM BAKHSH (*Plaintiff*) v. KHUDA BAKHSH (*Defendant*).
[7th March and 4th May, 1894.]

Muhammadan Law—Pre-emption—Shafi-i-khalit—Nature of pre-emptive right arising by common enjoyment of rights appended to property.

In order that two persons may become *Shafi-i-khalits*, or persons having a right of pre-emption in virtue of the common enjoyment of, e.g., a road, it is necessary that such road should be a private road and not a thoroughfare.

Among persons who are *Shafi-i-khalits* by reason of being sharers in a right of way, all those who are sharers in such right of way have equal rights of pre-emption, although one of them may be a contiguous neighbour.

[F., 33 A. 637 (641) = 8 A.L.J. 700 (705) = 10 Ind. Cas. 626 (627).]

THE facts of this case sufficiently appear from the judgment of Banerji, J.

Munshi Madho Prasad, for the appellant.

Mr. Abdul Raoof, for the respondent.

JUDGMENT.

BANERJI, J.—The suit out of which this appeal has arisen was brought by the appellant to enforce his right of pre-emption under the Muhammadan law. The property claimed is a house. The appellant alleged himself to be a pre-emptor by right of vicinage and he objected to the amount of sale price. The respondent vendee denied the appellant's right of pre-emption and averred that the amount of consideration mentioned in the sale-deed was correct. The Court of first instance decreed the appellant's claim, but it held the actual amount of the sale price to be

* Second Appeal, No. 964 of 1893, from a decree of H. P. Mulock, Esq., District Judge of Moradabad, dated the 11th May 1893, reversing a decree of Babu Bhagwati Chander Chakravati, Munsif of Sambhal, dated the 24th December 1892.

that specified in the sale-deed. On appeal the lower appellate Court dismissed the claim on two grounds, namely, first, that there were [248] waiver and acquiescence on the part of the appellant; and, secondly, that he had offered to pay a smaller sum than the actual sale-price.

As regards the first ground, the conclusions of the learned Judge are based upon a misapprehension of the respondent's allegation on the point. The learned Judge seems to think that before the completion of the sale and when negotiations for it were going on, the appellant induced the respondent to believe that he had waived his right of pre-emption. The fact, however, is, that the respondent himself never asserted that before the sale actually took place the plaintiff had declined to purchase the property sold. What the respondent alleged in the fourth paragraph of his written statement was that after his purchase he sent a notice to the appellant by post of the fact of his purchase, but the appellant remained silent and thereby accepted the purchase by his acquiescence. According to Muhammadan law, "the surrender of a right of pre-emption before a sale has taken place is not valid" (Baillie's Digest of Muhammadan Law, p. 506). Therefore, even if the appellant did surrender his right before the sale, such surrender could not deprive him of his right of pre-emption. According to the respondent himself the appellant did nothing before the sale whereby the respondent could be induced to believe that the appellant would not pre-empt the property after it was actually sold. He is not therefore estopped by his conduct before the sale from asserting his right of pre-emption, and his case is distinguishable from that of *Brojo Kishore Surmah v. Kirtee Chunder Surmah* (1), on which the learned counsel for the respondent has relied. After a sale has actually taken place and the right of pre-emption has been established such right can be rendered void by the rule of the Muhammadan law in one of the two ways described in Chapter VIII of Baillie's Digest (see p. 505). The second of these, namely, the death of the pre-emptor, has not occurred in this case. As for the first, it is not asserted that there was an express renunciation by the appellant of his right of pre-emption and none of the other acts by which acquiescence would be implied was done [249] by him. All that he did was that when a notice was sent to him after the sale he gave no reply to it and remained silent. Such evidence cannot certainly be held to be acquiescence by implication within the meaning of the Muhammadan law so as to defeat his right of pre-emption. The first ground, therefore, on which the learned Judge has dismissed the appellant's claim is untenable.

The second ground is equally untenable. It has been found that the appellant performed the preliminaries of immediate demand and confirmatory demand as required by Muhammadan law. He was ready and willing to purchase the property for what he considered in good faith to be the actual amount of consideration paid for it. What he asserted was that the sum mentioned in the sale-deed was not the actual amount for which the property was sold. In his plaint, however, he offered to pay such amount as the Court might declare to be the real consideration for the sale. It was held in *Lajja Prasad v. Debi Prasad* (2) that where a person having a right of pre-emption offers a smaller sum than the actual price in the belief that such sum is the real amount of consideration for the sale, he does not thereby lose his right of pre-emption. In this view I fully concur. For the above reasons the grounds on which the lower appellate Court has dismissed the claim cannot be supported.

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Mr. *Abdul Raoof*, the learned counsel for the respondent, has contended that the decree of the Court below is a right decree, inasmuch as upon the finding of the learned Judge the appellant has not a preferential right of pre-emption. He argues that as the learned Judge has found that the respondent is a *Shafi-i-khalit* by reason of his having rights over the passages common to his house and to the house sold, he has a superior right of pre-emption to that of the appellant, who is a neighbour, or at least a right equal to his.

According to the rule of Muhammadan law a *Sharik*, or partner in the substance of a thing, has the first right of pre-emption: next to him comes a *Khalit*, or partner in its immunities and [250] appendages (such as the right to water and to roads), and a *khalit* has a preferential claim to a neighbour (Baillie's Digest, p. 481, and Hidayah, vol. iii, p. 562).

It appears that the house sold abuts on a lane. Adjacent to it, and on the same side of the lane with it is the house of the appellant. Across the lane and on the other side of it is the house of the respondent. If the lane is not a thoroughfare, both the parties to this suit are *Khalits*, and the fact that the appellant is also a neighbour does not confer on him a higher right than that of the respondent. It has been urged on behalf of the appellant that among *Khalits* the special is preferred to the general, and as the appellant is also a neighbour he must be held to be a special *Khalit* and to have a preferential right of pre-emption. This argument is fallacious. A mere neighbour is not a special *Khalit* within the meaning and intention of the Muhammadan law. The rule on the subject is explained and illustrated in Baillie's Digest (p. 481) as follows:—
"Take the case of a mansion which is situated in a street without a thoroughfare * * * The right of pre-emption belongs * * * to the inhabitants of the street equally without any distinction between those who are contiguous and those who are not so; for they are all *Khalits* in the way. * * * If there be another street leading from this street, and having no thoroughfare, and a house in it is sold, the right of pre-emption belongs to the inhabitants of this inner street, because they are more specially intermixed with it than the people of the other street. But if a house in the other street be sold, the right of pre-emption belongs to the people of the inner as well as to those of the outer street, for the intermixture of both in the right of way is equal." This passage shows what is meant by a special *Khalit*. And it is clear that among the persons who are *Shafi-i-khalits* by reason of being partners in a right of way, all those who participate in that right have equal rights of pre-emption, although one of them may be a contiguous neighbour. If therefore both the appellant and the respondent are *Khalits*, the former has not a preferential right because his house is adjacent to the house sold.

[251] The next question for consideration is whether the respondent has a right to pre-empt the property in suit as a *Shafi-i-khalit*. He claims to be a *Khalit* on the ground that he is a partner in one of the appendages of the said property, namely, in the right of way. In order that he may be regarded as a *Khalit* of this description, it is essential that the road in which he participates should be a private road and not a thoroughfare. According to the Hidayah (Vol. iii, p. 565) "it is necessary that the road or rivulet, the joint participation in which gives a claim to the privilege of *Shufa*, be private." The same rule is stated in Baillie's Digest (p. 482) in these terms "If the street were open with a passage through, and a mansion in it were sold, there would be no right of pre-emption except for the adjoining neighbour. In like manner when there is a thoroughfare

which is not private property between two mansions (that is, when they are situate on opposite sides of the way) and one of them is sold, there is no pre-emption except for the adjoining neighbour. If the road be private property, it is the same as if it were no thoroughfare. A thoroughfare which does not give the right of pre-emption is a street that the people residing in it have no right to shut." In this case it has not been found by either of the Courts below whether the lane which lies between the house sold and the house of the respondent is a private lane or a thoroughfare. If it is a thoroughfare, the respondent has no right of pre-emption and the appellant's claim as a contiguous neighbour must prevail. The following issue is accordingly referred to the lower appellate Court under s. 566 of the Code of Civil Procedure for trial:—Whether the lane lying between the disputed house and the house of the respondent is a private lane or a thoroughfare.

On receipt of the finding ten days will be allowed for objections.

On return being made to the above order of reference the following judgment was delivered:—

FINAL JUDGMENT.

BANERJI, J.—It has been found by the lower appellate Court that the lane lying between the house in question and the house of the respondent is "a private lane or passage and not a thorough- [252] fare." This finding is conclusive. The appellant has therefore no priority of right over the respondent. The appeal is accordingly dismissed with costs.

Appeal dismissed.

16 A. 252 = 14 A.W.N. (1894) 64.

APPELLATE CIVIL.

Before Sir John Edge, Kt. Chief Justice, and Mr. Justice Burkitt.

HASAN ALI (*Defendant*) v. SIRAJ HUSAIN AND OTHERS (*Plaintiffs*).^{*}
[8th March, 1894.]

Civil Procedure Code, ss. 13, 561—Res-judicata—Remand—Appeal—Decree in appeal from order of remand dismissing appeal from decree in the suit.

It is competent to a High Court in an appeal from an order of remand under s. 562 of the Code of Civil Procedure to pass a decree dismissing the appeal preferred to the lower Court from the decree in the suit. *Bhau Bala v. Bapaji Bapuji* (1) and *Abraham Khan v. Faiz-un-nessa* (2) referred to.

[F., 19 A. 517 ; 20 M. 152 ; 15 O.C. 33 (35) = 15 Ind. Cas. 181 (182).]

THE facts of this case were as follows:—

In 1880, Kazim Husain, Mehndi Husain and Jawaz Husain, three of the four plaintiffs in the suit out of which this appeal arose, sued the present defendant, Hasan Ali, for recovery of possession of a certain 2 annas zamindari share by right of inheritance from their father Niamat Husain. The defendant pleaded that as to 1 anna he was in possession under a gift from Niamat Husain, and as to the other moiety that he held it on account of money lent to him by Niamat Husain. The Court

^{*} First Appeal from order No. 102 of 1893, from an order of L. M. Thornton, Esq., Officiating District Judge of Jaunpur, dated the 14th June 1893.

(1) 14 B. 14.

(2) 17 C. 168.

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1894 (Subordinate Judge of Jaunpur) found that the defendant held the property in suit in lieu of money lent by him to the plaintiffs' father and that the plaintiffs were not entitled to a decree for possession until such money had been paid, and dismissed the plaintiffs' suit. That judgment was apparently not appealed against and became final as between the parties thereto.

Subsequently, the plaintiffs, together with one Siraj Husain, to whom the plaintiffs had sold 1 anna out of the 2 anna share in suit, sued the same defendant for recovery of the same property.

[253] The Court of the first instance (Subordinate Judge of Jaunpur) held that the suit was barred by limitation, as also by s. 13 of the Code of Civil Procedure, and dismissed it.

The plaintiffs appealed to the District Judge who, reversing the decree of the Court below, remanded the suit for trial upon the merits under the provisions of s. 562 of the Code of Civil Procedure.

From this order of remand the defendant appealed to the High Court.

The Hon'ble Mr. Colvin, Mr. T. Conlan, Mr. Abdul Majid and Pandit Sundar Lal, for the appellant.

Mr. Amir-ud-din and Maulvi Ghulam Mujtaba, for the respondents.

JUDGMENT.

EDGE, C. J., and BURKITT, J.—The first Court found, amongst other things, that s. 13 of the Code of Civil Procedure applied. That Court, on that and other issues, dismissed the suit of the plaintiffs. They appealed. The District Judge held that s. 13 did not apply and remanded the suit under s. 562 of the Code. The appeal before us is an appeal from that order. One of the grounds of appeal was that the District Judge had no jurisdiction owing to the value of the property. The appeal lay to the Court of the District Judge, as the valuation which the plaintiff put on his suit governed the appeal. That was decided in *Mahabir Singh v. Bihari Lal* (1).

In our opinion this case comes within Explanation 11 of s. 13 of the Code of Civil Procedure. In the former suit the plaintiffs might and ought to have made an alternative charge, in which, if they had made it, they would have been successful. They could not succeed here except on the alternative charge, *i.e.*, they could only succeed here on paying the amount, if any, which might be found to be due to the defendant. The suit accordingly was barred.

It is contended that we cannot pass a decree dismissing the appeal in the Court below. In our opinion we can dispose of the appeal in the Court below, as the defendant-appellant having succeeded in this appeal on the ground that s. 13 of the Code applied [254] to the suit, the suit must necessarily be dismissed as barred *in limine*. If we were simply to set aside the order of the Court below and tell the Court below that it was to dismiss the plaintiffs' appeal to it, as s. 13 applied, we should be merely putting the parties to extra expense and adding a useless stage to the procedure of the case. This is the view of the law which has been taken by this Court in previous cases. Apparently it was the view taken by the Full Bench of the Bombay High Court in *Bhau Bala v.*

(1) 13 A. 320.

Bapaji Bapuji (1), and the same view has been taken by the Calcutta High Court in *Abraham Khan v. Faiz-un-nessa* (2). We allow this appeal with costs, and, setting aside the decree of the Court below, dismiss the appeal in the Court below with costs and restore the decree of the first Court.

Appeal decreed.

16 A. 254 = 14 A.W.N. (1894) 72.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Blair.

GOBARDHAN AND ANOTHER (*Defendants*) v. SUJAN
(*Plaintiff*).^{*} [13th March, 1894.]

Mortgage—Usufructuary mortgage—Mortgage satisfied out of usufruct—One of several co-mortgagors obtaining possession of the whole property—Adverse possession.

In the case of a usufructuary mortgage by several co-mortgagors, when such mortgage is satisfied out of the usufruct, each co-mortgagor is not entitled to recover possession of more than his share of the mortgaged property. Consequently where in such a case one of several co-mortgagors gets possession of the whole of the mortgaged property, he does not occupy the position of a mortgagee to his co-mortgagors but his possession is adverse to them. *Fakir Bakhsh v. Sadot Ali* (3) followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi Madho Prasad, for the appellants.

Pandit Moti Lal, for the respondent.

The judgment of the Court (BLAIR and BANERJI, JJ.) was delivered by BANERJI, J.:—

JUDGMENT.

The suit out of which this appeal has arisen [255] was brought by the respondent to recover possession of 26 bighas 14 biswas of land out of 170 bighas 13 biswas which were owned by five persons, *viz.*, Tonda, Girwar Indra, Sabla and Ballu, and were mortgaged by them in 1858 or 1859 to one Cheta. The land claimed is the share of Tonda and has been acquired by the respondent. The appellants represent Indra and Sabla. The mortgage referred to above was satisfied out of the usufruct some time before 1865, and thereupon possession of a half of the mortgaged land was taken by Girwar and of the other half by Indra and Sabla. That half is at present in the possession of the appellants, who are consequently in possession of a half out of the 26 bighas and 14 biswas claimed by the respondent. The lower Courts have made a decree for the said half share in favor of the respondent against the appellants. The claim of the respondent in regard to the said half share was resisted by the appellants on the ground that they were in adverse proprietary possession of it. The lower appellate Court has overruled their objection, and has held that Indra and Sabla redeemed half of 170 bighas 13 biswas from the mortgage of 1858 and took possession of it, their possession could not be

^{*} Second Appeal, No. 1130 of 1892, from a decree of Babu Baij Nath, Subordinate Judge of Agra, dated the 29th June 1892, modifying a decree of Maulvi Muhammad Azim-ud-din, Munsif of Maliabad, dated the 11th January 1892.

(1) 14 B. 14.

(2) 17 C. 168.

(3) 7 A. 376.

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regarded as adverse to Tonda or to the respondent his representative, but is a continuance of the possession of the mortgagee.

It is contended in appeal that this view of the lower Court is erroneous, and we are of opinion that the contention has force. There can be no doubt that when one of several mortgagors redeems a mortgage by payment of the mortgage-money and takes possession of the mortgaged property, he steps into the shoes of the mortgagee as regards the shares of his co-mortgagors and his possession over those shares can only be regarded as the possession of a mortgagee; but where the amount of the mortgage is satisfied out of the usufruct, the mortgage becomes extinct and the parties are relegated to the position in which they were before the mortgage. In such a case one of the mortgagors can only claim from the mortgagee whose mortgage has been satisfied out of the usufruct his own individual share, and he acquires no right to take possession of the shares of his co-mortgagors. This view is supported by the ruling of this Court [256] in *Fakir Bakhsh v. Sadat Ali* (1) which was approved in *Sheo Narain Rai v. Sheopal Rai* (2). Accordingly when the mortgage of 1858 was satisfied from the usufruct of the mortgaged property, Indra and Sabla became entitled to take possession of their own shares only out of the said property and they had no right to take over possession of the share of Tonda. Their possession over Tonda's share is thus without title and cannot but be regarded as adverse to the owner of that share. That being so, since the predecessors in title of the appellants have been in adverse possession of the property decreed to the respondent for more than 12 years, whatever right the respondent had to that property has now become extinct, and the respondent's claim should have been dismissed as time-barred. We accordingly set aside the decree of the Court below and, decreeing this appeal with costs, dismiss the claim of the respondent as against the appellants.

Appeal decreed.

16 A. 256 = 14 A.W.N. (1894) 73.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Burkitt.

JASODA BIBI (*Plaintiff*) v. PARMANAND (*Defendant*).
[15th March, 1894.]

Act XV of 1877, s. 10—Trust—Suit by representative of settlor against trustee on failure of the object of a trust to recover the trust money for herself.

Section 10 of Act No. XV of 1877 does not apply to a suit brought on failure of the object of a trust to recover for the plaintiff's own use and not for the purposes of the trust the trust-money remaining in the hands of the trustee. *Balwant Rao v. Puran Mal* (10 I. A. 90 = 6 A.1) followed.

[*Diss.*, 6 C.L.J. 535; F., 132 P.R. 1907.]

THE plaintiff in this case sued to recover from the defendant a sum of Rs. 2,000 which she alleged to have been deposited with him by her on instructions from her father Har Prasad on the 15th of April 1869 to meet certain expenses of her sister, Musammatt Gango. The plaintiff alleged

* Second Appeal, No. 600 of 1891, from a decree of A. McMillan, Esq., District Judge of Cawnpore, dated the 12th May, 1891, confirming a decree of Syed Akbar Husain, Subordinate Judge of Cawnpore, dated the 2nd August, 1890.

(1) 7 A. 376.

(2) 14 A.W.N. (1894) 14 (15).

that the said money was never spent by Musammat Gango, who died in September, 1872, and that the money had all along remained with the defendant. She further [257] alleged a demand and a refusal by the plaintiff to restore the money on the 1st July 1887. The suit was filed on the 20th of June 1890.

The defendant *inter alia* pleaded that the suit was barred by limitation.

The Court of first instance (Subordinate Judge of Cawnpore) held that s. 10 of Act No. XV of 1877 did not apply, but that the suit was barred either under Art. 62 or under Art. 120 of sch. ii of Act No. XV of 1877, and accordingly dismissed the suit.

The plaintiff appealed; and the lower appellate Court (the District Judge of Cawnpore) confirmed the first Court's judgment. The District Judge held that the suit was to be considered as a suit for money had and received by the defendant for the plaintiff's use, and that the limitation applicable was that prescribed by Art. 62 of Act No. XV of 1877. He also relied on the case of *Johori Mahton v. Thakoor Nath Lukee* (1).

The plaintiff then appealed to the High Court.

The Hon'ble Mr. Colvin and Mr. T. Conlan, for the appellant.

Pandit Sundar Lal and Pandit Baldeo Ram for the respondent.

JUDGMENT.

EDGE, C. J. and BURKITT, J.—The suit out of which this appeal has arisen was one to recover a sum of money placed in the hands of the defendant with instructions to pay out of it such sums as a certain lady might require for the purposes of performing pilgrimages. The lady died as far back as 1872, and at that time there remained in hands of the defendant the whole amount which had been placed in his hands, no portion of it having been paid to or expended by the lady. This suit was instituted on the 20th of June 1890. It was dismissed by the first Court on the ground that it was barred by limitation. The second Court dismissed the plaintiff's appeal, holding that the suit was barred by limitation whether Art. 62 or Art. 120 of sch. ii of the Indian Limitation Act applies. From that decree this appeal has been brought. It has been contended here that s. 10 of the Indian Limitation Act, 1877, applies, and consequently that the suit was not time-barred. [258] It was contended that the money became vested in the defendant in trust for a specific purpose within the meaning of s. 10, and that on the death of the lady in 1872 a trust arose for the settlor according to the principle of equity embodied in s. 83 of the Indian Trusts Act, 1882.

It is not in our opinion necessary to decide whether the money at any time vested in the defendant in trust for a specific purpose within the meaning of s. 10 of the Indian Limitation Act, 1877, nor is it necessary to decide whether, if there was a trust for a specific purpose within the meaning of s. 10 of the Indian Limitation Act, 1877, that section would apply after the death of the lady for whose benefit the trust, if it was one, was created.

This suit is brought by the plaintiff to recover the money for her own benefit and not with the object of having the money applied for the specific purposes for which the trust, if it was one, was originally created. For present purposes there is no essential difference between the wording of s. 10 of Act No. XV of 1877 and s. 10 of Act No. IX of 1871. Now their

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(1) 5 C. 890.

1894 Lordships of the Privy Council in *Balwant Rao v. Puran Mal* (1) held that
MARCH 15. the words in s. 10 of Act No. IX of 1871—"for the purpose of following
 — in his or their hands such property"—meant² for the purpose of recovering
 [APPEL- the property for the trusts in respect of which it had given. That inter-
 — LATE pretation limits the application of the section, and, applying that interpre-
 CIVIL. tation, we hold that s. 10 of the Indian Limitation Act, 1877, does not
 — apply to this case.

16 A. 256 = It was also contended in appeal before us that Art. 145 of sch. ii of
14 A.W.N. the Indian Limitation Act, 1877, might be applied in this case. There is
(1894) 73. ample authority to show that that article is inapplicable to a claim of this
 kind in which it was never intended that the specific coins deposited should
 be returned. We dismiss the appeal with costs.

Appeal dismissed.

16 A. 259 (F.B.) = 14 A.W.N. (1894) 74.

[259] FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell,
 Mr. Justice Knox, Mr. Justice Blair, Mr. Justice
 Banerji and Mr. Justice Burkitt.*

**FATEH CHAND AND OTHERS (Plaintiffs) v. MUHAMMAD BAKHSH
 AND OTHERS (Defendants).*** [19th March, 1894.]

*Act No. XXVII of 1860, s. 2—Act No. VII of 1889, s. 4—Act No. I of 1868, [s. 6—
 Procedure—Act No. IV of 1842, s. 88—Suit for sale on a mortgage—Suit by
 representative of deceased mortgagee—Production of certificate of succession a
 condition precedent to decree,*

Section 4 of Act No. VII of 1889 made no change in the substantive law, but
 enacted merely a rule of procedure. Inasmuch, therefore, as "no one has a
 vested right in any particular form of procedure" the abovementioned section is
 applicable to suits instituted before the coming into force of Act No. VII of
 1889. *Ganga Sahai v. Kishan Sahai* (2) followed: *The Republic of Costa Rica
 v. Erlanger* (3) *Warner v. Murdoch* (4) and *Wright v. Hale* (5) referred to.

Section 4 of Act No. VII of 1889 applies to suits for sale under s. 88 of the
 Transfer of Property Act, 1882. *Ammanna v. Gurumurthi* (6) distinguished.
Kanchan Modi v. Baijnath Singh (7) dissented from.

[Diss., 26 C. 839 = 4 C.W.N. 558; Not F., 28 B. 630; 29 M. 77; F., 9 A.L.J. 766 =
 16 Ind. Cas. 108; R., 16 A. 418; 17 A. 537 (545); 20 M. 232; 34 M. 442
 (446) = 5 M.L.T. 278 (280) = 1 Ind. Cas. 535 (536); 20 A.W.N. 95; 6 Ind. Cas.
 1015 (1016) = 13 O.C. 152 (153); 14 Ind. Cas. 570 (571); 10 O.C. 378 (382).]

THE facts of this case are fully stated in the judgment of the Court.
 Mr. *Roshan Lal* for the appellants.

Mr. *Abdul Raoof* and *Ratan Chand*, for the respondents.

The judgment of the Court (EDGE, C. J., TYRRELL, KNOX,
 BLAIR, BANERJI and BURKITT, JJ.) was delivered by EDGE, C. J.:—

JUDGMENT.

The suit in which this second appeal has arisen was brought upon a
 mortgage by the mortgagees against the mortgagor. Certain persons

* Second Appeal, No. 833 of 1891, from a decree of H. P. Mulock, Esq., District
 Judge of Moradabad, dated the 18th May 1891, confirming a decree of Babu Anant
 Ram, Subordinate Judge of Moradabad, dated the 6th February 1891.

(1) 10 I.A. 90 = 6 A. 1.

(2) 6 A. 262.

(3) 3 Ch. D. 69.

(4) 4 Ch. D. 752.

(5) 6 H. and N. 227.

(6) 16 M. 64.

(7) 19 C. 336.

claiming interests in the mortgaged property, or portions of it, were subsequently added as defendants.

The reliefs claimed in the plaint were a decree against the mortgagor for Rs. 3,000, mortgage-money with interest and costs; in default of payment a sale of the mortgaged property, and in case [260] the proceeds of such sale should not be sufficient to satisfy the money decreed, then a decree for the balance against the mortgagor personally and her property other than that which was subject to the mortgage.

There were various defences pleaded, but for the purposes of the questions which we have to decide we need not consider them; nor need we consider how far, if at all, the allegations in the plaint were sufficient, if not traversed, to entitle the plaintiffs to the reliefs sought, or to any of them.

The suit was instituted in the Court of the Subordinate Judge of Moradabad on the 21st of June 1888. After the institution of the suit Lachman Das and Ratan Lal, two of the plaintiffs, who were necessary parties, died, and on the 22nd of November 1888, persons alleged to be the legal representatives of the deceased plaintiffs respectively were brought upon the record as such representatives. It was neither denied nor admitted by the defendants that the persons so brought on the record were the legal representatives of the deceased plaintiffs.

On the 5th of March 1890, the Subordinate Judge dismissed the suit, on the ground that s. 4 of Act No. VII of 1889 applied, and that no decree against the mortgagor could be passed, as the persons who had been brought on the record as the legal representatives of the deceased plaintiffs had not produced any such probate, letters of administration, or certificate as are specified in s. 4 of Act No. VII of 1889.

On appeal the District Judge set aside the decree of the Subordinate Judge, on the ground that the Subordinate Judge had not given the persons brought upon the record as representatives an opportunity to produce certificates so as to comply with section 4 of the Act. The District Judge on the 2nd of August 1890, remanded the case, apparently under s. 562 of the Code of Civil Procedure.

After the order of remand the Subordinate Judge gave the plaintiffs time to produce certificates in compliance with s. 4 of Act No. VII of 1889.

[261] The persons, who had been brought upon the record as the legal representatives of the deceased plaintiff, Ratan Lal, produced a certificate granted to them under Act No. VII of 1889, but the persons who had been brought upon the record as the legal representatives of the other deceased plaintiff, Lachman Das, having failed to produce any such certificate, and the legal representatives of Lachman Das being necessary parties, the Subordinate Judge on the 6th of February 1891 dismissed the suit, acting apparently under s. 158 of the Code of Civil Procedure.

On appeal, the District Judge on the 18th of May 1891, affirmed the decree of the 6th of February 1891 of the Subordinate Judge. From the decree of the District Judge of 18th of May 1891 this second appeal has been brought.

After the 6th of February 1891, and prior to the 18th of May 1891, the persons who had been brought upon the record as the legal representatives of the deceased plaintiff Lachman Das, obtained a certificate under Act No. VII of 1889.

On behalf of the appellants here it has been contended that the suit having been instituted before Act No. VII of 1889 was passed, s. 6 of Act

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1894 No. I of 1868 (The General Clauses Act, 1868) prevents s. 4 of Act No. VII
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— It was also contended on behalf of the appellants that s. 4 of Act No.
FULL VII of 1889 restricted rights already vested in the mortgagees and their
BENCH. representatives before that Act was passed, and that the Act not having
been declared in terms to be retrospective, section 4 of the Act did not
16 A. 259 apply in this case.

(F.B.) = It was also contended on behalf of the appellants that s. 4 of Act No.
14 A.W.N. VII of 1889 does not apply to a suit on a mortgage by a mortgagee against
(1894) 74. a mortgagor for sale of the mortgaged property, and consequently that a
decree for sale should have been made notwithstanding the failure of the
persons who were brought on the record as the representatives of Lach-
man Das to produce a certificate before the decree of the Subordinate
Judge of the 6th of February [262] 1891 had been passed. *Kanchan Modi*
v. Baijnath Singh (1) and *Ammanna v. Gurumurthi* (2) were cited in
support of that contention.

It was further contended on behalf of the appellants that the persons
who had been brought on the record as the legal representatives of the
deceased plaintiff, Lachman Das, having obtained prior to the 18th of
May 1891 a certificate under Act No. VII of 1889, the District Judge
should have given them an opportunity of producing it and have allowed
their appeal, although that certificate had not been obtained until after
the decree in appeal, namely, that of the Subordinate Judge of the 6th of
February 1891 had been passed.

It appears to us that the contention that s. 6 of Act No. I of 1868
prevents s. 4 of Act No. VII of 1889 applying in this case, is based upon
a misreading of s. 6 of Act No. I of 1868, and upon a misconception of the
effect and object of s. 2 of Act No. XXVII of 1860. Section 2 of Act
No. XXVII of 1860 gave a person claiming to be entitled to the effects or
any part of the effects of a deceased person no right in, or to, any debt
due to such deceased person. That right, if it existed, existed indepen-
dently of s. 2 of Act No. XXVII of 1860. That section was merely a
section which disentitled a person claiming to be entitled to the effects of
a deceased person, and who had not produced a certificate under that Act
or probate or letters of administration, to compel by legal process a debtor
of the deceased person to pay a debt due to the deceased person to the
person so claiming, if the payment of the debt was not withheld
from any fraudulent and vexatious motives, but from a reasonable
doubt as to who was the person entitled to receive it. It was merely
a section which compelled a plaintiff suing for the recovery of a debt
due to a deceased person to prove his title to sue, as he would have
been bound to do in any Court of Justice, whether that section had been
made part of the Statute Law or not, when that title was disputed or not
admitted. The section was one of procedure, [263] and did not confer
upon a plaintiff any right of action. It merely enacted inferentially what
in certain events should be the *prima facie* evidence of his title, and what
in certain events should be the result of that *prima facie* evidence not
being produced. The section was one for the protection of debtors from
whom payment of debts due to deceased persons or their estates was
demanded by persons claiming to be entitled to receive payment of such
debts. Section 6 of Act No. I of 1868 does not prevent the provisions of
a Statute or Act applying the procedure to be followed in the future in

(1) 19 C. 396.

(2) 16 M. 64.

proceedings which had been commenced before such Statute or Act came into force.

By section 6 of Act No. I of 1868 it is not enacted that no Act shall affect the future procedure in any proceedings commenced before such Act shall have come into operation. What that section does enact is "The repeal of any Statute, Act or Regulation shall not affect anything done or any offence committed or any fine or penalty incurred or any proceedings commenced before the repealing Act shall have come into operation."

As we understand s. 6 of Act No. I of 1868, all it effects or was intended to effect is to prevent the mere repeal of a Statute, Act or Regulation from making an act done under the repealed Statute, Act or Regulation an act done without statutable authority, or an offence committed against the repealed Statute, Act or Regulation to cease to be an offence: from relieving a person who had incurred a penalty or fine under the repealed Statute, Act or Regulation from such penalty or fine: and from invalidating or making irregular proceedings commenced under the repealed Statute, Act or Regulation. In other words, the object of s. 6 of Act No. I of 1868 was, in our opinion, to leave things which had been done under a repealed Statute, Act or Regulation as they were and with the same legal consequences as they had at the time when the repealed Statute, Act or Regulation was repealed. For instance, a right of action already vested under a Statute or Act is not divested by the mere repealing of such Statute or Act. Such divesting would require specific enactment for that purpose. [264] Section 6 does not say that such legal consequences shall not be put an end to, modified, or altered by specific enactment in that respect contained in the Act by which such Statute, Act or Regulation is repealed. The word "repeal" is, in our opinion, the governing word of the section when the section has to be construed for the purpose of seeing whether the section applies or not. In our opinion s. 6 of Act No. I of 1868 does not limit the effect or application of s. 4 of Act No. VII of 1889 in respect of proceedings commenced before Act No. VII of 1889 came into force, although the latter Act did expressly repeal so much as then remained unrepealed of Act No. XXVII of 1860, including s. 2.

There was much confusion in the argument in this case between a right of action and a right to have an action conducted in a particular way. The former is a vested right, the latter is merely a question of procedure in which no litigant or intending litigant has any vested right whatever. It is competent to the Legislature by enactment to deprive a subject of a vested right of action, but the intention to do so must be clearly and unmistakeably expressed in the Statute or Act. No right of action vested or otherwise was intended to be or was taken away, or in any respect modified, altered or interfered with, by the repeal of s. 2 of Act No. XXVII of 1860.

In *Republic of Costa Rica v. Erlanger* (1) Mellish, L. J., held that "no one has any vested interest in the course of procedure." In *Warner v. Murdoch* (2) James, L. J., held that "no one has a vested right in any particular form of procedure." In *Wright v. Hale* (3) Pollock, C. B., said:—"There is a considerable difference between new enactments which affect vested rights and those which merely affect the procedure in Courts of Justice, such as those relating to the service of proceedings, or what evidence must be produced to prove particular facts." Later on that learned Judge said:—"When an Act alters the proceedings which

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(1) L.R. 3 Ch. D. 69.

(2) L. R. 4 Ch. D. 752.

(3) 69 H. and N. 227.

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MARCH 19. are to prevail in the administration of justice, and there is no provision that it shall not apply to suits then pending, I [265] think it does apply to such action." In the same case Channell, B., said:—
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FULL "In dealing with Acts of Parliament which have the effect of taking
BENCH. away rights of action, we ought not to construe them as having a retrospective operation, unless it appears clearly that such was the intention of the Legislature; but the case is different where the Act merely regulates practice and procedure." In the same case Wilde, B., said:—
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16 A. 259 "I am prepared to decide this case upon principle. The rule applicable
(F.B.)= to cases of this sort is that when a new enactment deals with rights of
14 A.W.N. action, unless it is so expressed in the Act, an existing right of action is
(1894) 74. not taken away. But where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions whether commenced before or after the passing of the Act. That this is the true principle sufficiently appears from the cases that have been referred to on both sides."

Such we also believe to be the true principle, and that is the principle which was recognized and acted upon by a Full Bench of this Court (Stuart, C. J., dissenting) in *Ganga Sahai v. Kishan Sahai* (1).

Such alteration as was made in the law by s. 4 of Act No. VII of 1889, was an alteration in procedure only not affecting any vested right of action; and in our opinion the procedure provided by that section applied in this case as soon as Act No. VII of 1889 came into force.

We need not decide what would be the effect of s. 6 of Act No. I of 1868 in the case of a repeal of an Act of procedure as regards proceedings pending at the date of the repeal, if by the repealing Act no other procedure was provided for the carrying on of such proceedings, and the repealed procedure was not expressly kept alive for the purpose of such proceedings. It may well be, and from the point of view of convenience it ought to be, that the repealed procedure would and should apply to such pending proceedings until some other procedure was provided by legislative enactment for such proceedings. That question does not arise here, as Act No. VII [265] of 1889, which repealed s. 2 of Act No. XXVII of 1860, does provide in s. 4 of the procedure.

As to the contention that the persons who had been brought upon the record as the legal representatives of Lachman Das having obtained a certificate under Act No. VII of 1889 before the District Judge passed his decree of the 18th of May, 1891, the District Judge should have given them an opportunity of producing it, and not have dismissed their appeal, all that need be said is that the certificate was not produced, and further, that if it had been produced in the appeal before the District Judge, in which his decree of the 18th of May 1891 was passed, it would have been produced too late to affect the validity of the decree of the Subordinate Judge of the 6th of February, 1891. If section 4 of Act No. VII of 1889 applied in this case, as we hold it did, the Subordinate Judge was entitled to proceed and dispose of the suit, as apparently he did, under s. 158 of the Code of Civil Procedure on the non-production of the certificate for the production of which he had given time. The certificate was not produced in the Court of the Subordinate Judge, and, in fact, it was not in existence at the time when the Subordinate Judge passed his decree of the 6th of February, 1891. No subsequent production of the certificate could show that the decree of the Subordinate Judge was contrary to law.

(1) 6 A. 262.

This case is not analogous to that of a plaintiff who, appealing against a decree dismissing his suit on the ground that the evidence had not established that he had a cause of action, produces in the Court of appeal fresh evidence showing that, when he brought his suit and at the time of the decree from which he appeals, he had a cause of action.

As to the contention that s. 4 of Act No. VII of 1889 does not apply to a suit for sale upon a mortgage, we have arrived at a conclusion with more difficulty. Our difficulty is partly due to the respect we entertain for the decisions of the learned Judges who were parties to the judgment in *Kanchan Modi v. Baijnath Singh* (1), in which it was held that s. 4 of Act No. VII of 1889 [267] did not apply to a suit for sale on a mortgage. In *Ammanna v. Gurumurthi* (2) the suit was one for foreclosure of a mortgage, and we think that there can be no doubt that a suit for foreclosure of a mortgage could not in any sense be considered as a suit for a decree for payment of a debt. So far as is material for present purposes, s. 4 of Act No. VII of 1889 is as follows:—

“4 (1) No Court shall—

(a) pass a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person or to any part thereof, * * * except on the production, by the person so claiming of “one or other of the documents specified in paragraphs (i), (ii), (iii), (iv) and (v) of sub-section (1). Sub-section (2) of section 4 defines a debt thus,—“(2) the word ‘debt’ in sub-section (1) includes any debt except rent, revenue or profits payable in respect of land used for agricultural purposes.”

Money lent on the security of a mortgage is a debt due from the mortgagor to the mortgagee, although from the terms of the contract it may not be recoverable from the mortgagor personally or except by a decree for sale of the mortgaged property. A mortgagee who brings his suit for sale is bringing his suit against his debtor, the mortgagor, for payment of his debt, and the decree which he seeks in that suit is a decree for payment of his debt by sale of the mortgaged property. A decree for sale under s. 88 of Act No. IV of 1882 (The Transfer of Property Act, 1882) orders that “an account be taken of what will be due to the plaintiff for principal and interest on the mortgage,” * * * or the decree for sale declares “the amount so due at the date of such decree.” The decree for sale also orders that in default of the defendant paying the amount found or declared to be due, “the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is so found due to the plaintiff, &c.” Section 88 of Act No. IV of 1882 appears [268] to us to show that a suit for sale is a suit in which, if the plaintiff succeeds, the decree which the Court passes is one form of a decree for payment of a debt. It may be that the proceeds of the sale may not be sufficient to discharge such debt, and in that case the mortgagee has recourse to s. 90 of the same Act when that section applies. In our opinion s. 4 of Act No. VII of 1889 applies to suits for sale under s. 88 of the Transfer of Property Act, 1882. A mortgagor needs as much protection as any other debtor when sued for a debt by a person claiming to be entitled to the effects of his deceased creditor.

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(1) 19 C. 336.

(2) 16 M. 64.

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14 A.W.N.
(1894) 74.

We were asked, in case we should take a view adverse to the appellants on the questions to which we have referred, to allow them to withdraw from the suit under s. 373 of the Code of Civil Procedure, with liberty to bring a fresh suit instead of dismissing this appeal. The main ground for such application was that the failure of the representatives of Lachman Das to produce a certificate in time was due to unreasonable and vexatious delays of the Munsif, to whom the application for the grant of the certificate was made. We think it only just under the circumstances to comply with that request, and we permit the plaintiffs-appellants to withdraw from the suit, with liberty to bring a fresh suit for the subject-matter of this suit on payment by the plaintiffs-appellants to the defendants, or into Court, of all the taxed costs of the defendants in this suit, in the appeal below and in this appeal, or of such part thereof as still remains unpaid, which costs, or part thereof, as the case may be, we order the plaintiffs-appellants to pay to the defendants or into Court for them.

Decree modified.

16 A. 269 = 14 A.W.N. (1894) 79.

[269] APPELLATE CIVIL.

Before Mr. Justice Blair.

BHAWANI PRASAD (*Applicant*) v. BRIJ LAL AND OTHERS
(*Opposite parties*).^{*} [27th March, 1894.]

Mortgage—Foreclosure—Decree giving future interest—Such interest not a charge upon the land—Act IV of 1882, s. 86—Civil Procedure Code, s. 209.

Where in a decree for foreclosure interest subsequent to the decree was included in the amount made payable to the plaintiff, it was held that such future interest, supposing it could be properly awarded, concerning which no opinion was expressed, could not be treated as a charge upon the land; but the judgment-debtor was entitled to resist foreclosure on payment within the prescribed period of the mortgage-money and interest up to date of decree, the decree-holder being at liberty to recover the future interest only from the judgment-debtor personally.

[R., 12 C.P.L.R. 78.]

THE facts of this case sufficiently appear from the judgment of Blair, J.

Mr. *Muhammad Ahmed* and *Maulvi Muhammad Ishaq*, for the appellant.

Mr. *J. Simeon*, for the respondents.

JUDGMENT.

BLAIR, J.—This is an appeal against an appellate order refusing to grant an order for foreclosure of a mortgage. The decree was for a sum of Rs. 447-1-11. The particulars were principal mortgage-money, interest from the date of execution to due date, interest from the due date to the institution of the suit, and costs of the suit. The decree further ordered that the defendant mortgage-debtor should pay future interest at 8 annas per cent. per mensem until the date of payment. A sum

^{*} Second Appeal No. 1091 of 1893, from an order of G. Forbes, Esq., District Judge of Jhansi, dated the 1st September 1893, confirming the order of *Maulvi Syed Muhammad Tajammul Hussain*, Munsif of Jalaun, dated the 3rd June 1893.

was tendered by the debtor larger than the amount of Rs. 447-1-11, but less by one rupee fifteen annas and two pies than the amount of Rs. 447-1-11 plus interest at 8 annas per mensem up to the date of the tender. Both Courts have refused to make absolute the plaintiff's decree. I think they were right. Section 86 enacts that on plaintiff's succeeding in a foreclosure suit account shall be taken of principal and interest on the mortgage and the plaintiff's costs of the suit. The decree should further [270] order that upon the defendant paying to the plaintiff or into the Court the amount so due on a day within six months from the date of fixing the amount, the plaintiff should transfer the property to the defendant and put him in possession. The amount so due, it appears to me, is the amount made up of the items set forth in the early part of the section. It is admitted by Mr. *Muhammad Ishaq*, who appears for the appellant, that s. 86 of the Transfer of Property Act does not empower the Court to make an order for future interest, and he craves in aid s. 209 of Act XIV of 1882, which gives to the Court ordering the payment of the money a general discretion to order further interest for the period between the date of the decree and the date of the payment. Such an order may perhaps be legally made in a foreclosure suit; I have not now to decide whether that is so; but there is in s. 209 no word or words to make such further interest a charge upon the land. In the absence of such words, and no cases having been cited to me in support of the appellant's contention, I must hold that the amount tendered was enough to cover the decretal sum under s. 86. The further order for future interest is not a part of the charge upon the property. It can only be recovered against the defendant personally. This appeal is dismissed with costs.

Appeal dismissed.

16 A. 270 = 14 A.W.N. (1894) 80.

APPELLATE CIVIL.

Before Mr. Justice Burkitt.

RAJ KUMAR (*Objector*) v. BISHESHAR NATH AND OTHERS
(*Decree-holders*).^{*} [28th March, 1894.]

Execution of decree—Act IV of 1882, ss. 83 and 89—Suit for sale on a mortgage—Future interest.

A decree for sale under s. 88 of the Transfer of Property Act, 1882, in a suit for sale on a mortgage declared a certain sum, including principal and interest up to date of decree, to be payable to the plaintiff within a stated time, and also provided that the decree should carry future interest. The judgment-debtor did not pay within the specified time, and subsequently the decree-holder applied for an order absolute for sale under s. 89 of the above-mentioned Act. *Held* that the amount which could be realized by the decree-holder by sale of the mortgaged property would include future interest from the date of the decree under s. 88 to the date of sale, and that it was not [271] necessary that specific mention of future interest should be contained in the order under s. 89 of the Act.

THE facts of this case are fully stated in the judgment of Burkitt, J.
Mr. *Abdul Raoof*, for the appellant.
Mr. *T. Conlan* and Pandit *Moti Lal*, for the respondents.

^{*} First Appeal No. 222 of 1893, from an order of Maulvi Muhammad Anwar Husain Khan, Subordinate Judge of Farakhabad, dated the 7th October 1893.

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BURKITT, J.—This is an appeal from an order of the Subordinate Judge of Farakhabad, dated the 7th of October 1893, in a case of execution of decree. The suit was instituted on a mortgage, dated the 9th of March 1875, to recover Rs. 99,999, principal, with Rs. 11,291 interest already accrued, by sale of the mortgaged property. A decree was given in favour of the plaintiffs on the 30th of March, 1889. By that decree it was declared that on the 31st of October 1889, the sum of Rs. 1,23,524-6-8 with interest at the rate of 8 annas per cent. per mensem up to date of payment will be due to the plaintiff. Of that sum it is explained that Rs. 1,20,870-10 8 are on account of the principal and interest due on the mortgage of March the 9th, 1875, and that Rs. 2,653-12-0 are on account of costs; and as to Rs. 1,20,870 we are further informed that Rs. 1,11,290-11-0 are on account of the principal and interest decreed, i.e., the amount to recover which the suit was instituted (Rs. 99,999 + Rs. 11,291 + 1,11,290.), and that the balance Rs. 9,580 (making up 1,20,870) is on account of interest accrued "during the pendency of the case" up to the 30th of March 1889. From the above figures three facts clearly appear, namely, firstly, that the sum of Rs. 11,291 was decreed as being interest due at the date of the institution of the suit; secondly, that a sum of Rs. 9,580 was decreed as interest accrued due between the date of the institution of the suit and the date of the decree, and thirdly, that no sum for interest accruing due between the 30th of March and the 30th of October 1889 was added to the amount found due to the plaintiff. As to that, the Court which passed the decree provided that the sum so found due should bear interest at the rate of 8 annas per cent. per mensem up to date of payment (*ta yom wasul*). This I take to be the clear [272] unmistakable meaning of the decree. The decree then went on to direct in the usual manner that if the amount mentioned above (*zar-i-mazkura bala*), i.e., the Rs. 1,23,524 with interest at 8 annas per cent. per mensem were not paid to the plaintiff or into Court on or before the 31st of October 1889, the mortgaged property or a sufficient portion of it should be sold, &c., &c. Nothing more appears to have been done in this matter till long after the 31st of October 1889. The next order I find is that on the 26th of April 1890 an order for sale was passed in the manner provided by s. 89 of the Transfer of Property Act. That order, after reciting the decree and that the judgment-debtor had failed to make payment as directed by that decree, went on to order that, in compliance with the decree (*ba-pabandi hukm*) the property be sold on the 20th of July 1890, or on whatever subsequent date should be fixed for the sale, and that the amount to be paid to the decree-holder out of the proceeds of the sale should be the sum of Rs. 1,33,113-14-8, made up of Rs. 1,23,524-5-8, described as being the sum due to the decree-holders on the 30th of March 1889, and Rs. 9,585-8-0, described as interest up to the date of sale, and Rs. 4 costs. Apparently the judgment-debtor took at this time no objection to the item of interest. It appears next that the execution proceedings were suspended for a time by a claim made by a third party, said to have been the judgment-debtor's wife, to the property. Consequently the sale did not take place on the 20th of July as directed. Subsequently, in 1892, further proceedings in execution were taken. A sale proclamation issued, and the sum to be recovered and paid to the decree-holders out of the proceeds of the sale was in it stated to be Rs. 1,51,158 odd, being some Rs. 18,000 more than the amount mentioned in the order of 1890. The additional sum was arrived at by adding interest at 8 annas per cent. per mensem to

the amount mentioned in the order of the 23rd of April 1890. This is the item to which the appellant objects and as to which he appeals against the order of the Subordinate Judge rejecting his objection. His argument is that, as the order for sale is a decree and contains no directions as to future interest, the Court executing the decree should not have allowed such interest.

[273] In my opinion this objection is unsound. Whether the order for sale passed under s. 89 of the Transfer of Property Act did or did not make provision for interest accruing after its date, is, I think, perfectly immaterial. Such an order, as has been frequently held by this Court, is an order in execution. It is an order which the Court is bound to make on its being shown that the decree passed under s. 88 for payment to the plaintiff or into Court of the amount found due to the plaintiff has not been obeyed. The order for sale under s. 89 was professedly made under the terms (*ba pabindi*) of the decree passed under s. 88, and it was quite unnecessary that it should do anything more than direct sale of the property, or of a sufficient portion of it, and finally order (in accordance with s. 88) that the proceeds of the sale should be paid into Court and applied in payment of the amount found due to the plaintiff on taking the account prescribed by the first clause of s. 86. There is no reason why it should be considered necessary to recapitulate in the order for sale the terms of the decree passed under s. 88. That order is not in itself a supplemental decree, but is simply an order directing that certain things shall be done in execution of the decree. The decree to be executed is the decree passed under s. 88, and the procedure provided by s. 89 is but one of the steps to be taken towards and in the execution of that decree. Now in the present case, as I have already shown, the decree under s. 88 of the Transfer of Property Act, does in the clearest terms provide that the sum found due to the plaintiff is to bear interest at 8 annas per cent. per mensem up to date of payment (*ta yom wasul*), i.e., up to the date on which the decree may be satisfied, either by the defendant paying to the plaintiff or into Court the amount found due to the plaintiff, or by the proceeds of the sale being found sufficient to discharge the debt. The order for sale under s. 89, simply followed the directions of the decree in allowing interest, and the subsequent order of which the appellant complains did just the same. In so ordering the Court which passed those orders put, in my opinion, a correct construction on the decree which it was executing. For the above reasons I dismiss this appeal with costs.

Appeal dismissed.

16 A. 274 (P.C.) = 6 Sar. P.C.J. 433.

[274] PRIVY COUNCIL.

PRESENT:

Lords Macnaghten and Morris, and Sir Richard Couch.

[On Appeal from the High Court at Allahabad.]

KUAR NIRBHAI DAS (*Defendant*) v. RANI KUAR (*Plaintiff*).
[28th February, 1894.]

Civil Procedure, section 596—Restriction of power in India to grant leave to appeal to Per Majesty in Council—Concurrence of two Courts in deciding fact.

Where the decree of an appellate Court has affirmed the decision of the Court immediately below it, upon an issue of fact, and no substantial question of law

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is involved, no appeal is open, under s. 596 of the Code of Civil Procedure, and leave to appeal should not be granted by the High Court in such a case.

APPEAL from a decree (15th February, 1889), affirming a decree (5th July, 1887) of the Subordinate Judge of Bareilly.

The question which the appellant attempted to raise was as to the effect of the evidence in a suit for Rs. 19,000, brought by the respondent against him; this being the balance of a sum of Rs. 30,000 said to have been deposited by the plaintiff, Rani Kuar, with the defendant, on the 11th February, 1886, Rs. 11,000 having been returned to her on various dates.

The defence was that no money was due, no deposit having been made as alleged. That the sum of Rs. 30,000 had been withdrawn by the plaintiff from a Bank at Agra about that time, the defendant assisting in the business, was not in dispute. The question between the parties, stated generally, was what had been thereupon done with that sum. Amongst the documentary evidence was a letter of the 16th February, 1886, from the defendant, admitting the deposit with him.

The defendant put forward that this letter was a fictitious receipt given by him to the plaintiff, at her request, to assist her in concealing from others the fact of her keeping the money in her own possession.

The Subordinate Judge, on the evidence, decreed the claim. He disbelieved the defendant's case; and, on an appeal by the latter, a division Bench of the High Court affirmed his decree. According to the judgment, delivered by EDGE, C.J., (TYRRELL, J., concurring,) the suit, which was in effect for money had and received by the [275] defendant to the plaintiff's use, must be decreed. She was a *parda-nashin* widow who, having Rs. 30,000 in the Uncovenanted Service Bank at Agra, wished to withdraw that sum. This she could do through an agent, on his giving the security which the Bank required, and for this purpose the defendant recommended to her one Mathura Parshad. The security was given; the money was drawn; and was taken to the defendant's house, not to the plaintiff's. The defendant, after a time, paid Rs. 11,000 of the Rs. 30,000 to the plaintiff. He afterwards declined to pay any more. On the 16th February, 1886, he had written to the plaintiff that: "The Rs. 30,000 held by me in deposit will be sent to you at any time you will ask me to do so." There were other documents; and, going through all the evidence, the appellate Court agreed in every respect with the findings and conclusions of the Subordinate Judge.

On the 12th November, 1889, on the defendant's application, the High Court certified that the case, regarding its nature and value, fulfilled the requirements of section 596, Civil Procedure (1), and, on the 22nd March, 1890, an order was made for the transmission of the transcript of the Record.

On this appeal.

Mr. W. A. Raikes, for the appellant, submitted that the burden of proof had not been rightly adjusted; and contended that, on the whole case, the suit should not have been decreed.

(1) It was enacted in Act VI of 1874, s. 5, that, where there are concurrent decisions on fact, the case must involve some substantial question of law in order to render applicable the provisions as to the admission in the High Court of an appeal to Her Majesty in Council. The power to enact this (clause 39 of the Letters Patent, 1865, being considered) was discussed in "The petition of *Feda Hossen*," I.L.R., 1 Calo. 481. Section 594, Civil Procedure, is identical in terms with section 5, Act VI of 1874.

Mr. G. E. A. Ross, for the respondent, was not called upon.
Their Lordships' judgment was delivered by Lord MACNAGHTEN.

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JUDGMENT.

This is an unfounded appeal. The question at issue between the parties was simply a question of fact. Both the Courts below decided against the appellant. Both courts believed the evidence on the part of the respondent, who was the plaintiff, and disbelieved the evidence on the part of the appellant, who was the defendant. In the circumstances, no appeal was open to the appellant under the 596th section of the Civil Procedure Code, unless he could show the High Court that there was a substantial question of law involved. There was, however, no question of law at all in the case, and their Lordships are of opinion that the High Court ought not to have granted leave to appeal.

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Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitor for the appellant:—Mr. T. C. Summerhays.

Solicitors for the respondent:—Messrs. Barrow and Rogers.

16 A. 276 = 14 A.W.N. (1894) 82.

REVISIONAL CRIMINAL.

Before Mr. Justice Burkitt.

QUEEN-EMPRESS v. TOTA RAM AND OTHERS.*

[9th March, 1894.]

Act XI of 1878 (*Indian Arms Act*), s. 19—*Unlawful possession of arms—Temporary custody of arms not for use as such.*

The mere temporary possession without a license of arms for purposes other than their use as such, as, for instance, where a servant is carrying his master's gun to a blacksmith for repairs, or where a blacksmith has a gun left with him for repairs, is not an offence within the meaning of s. 19 of the Indian Arms Act, 1878. *Queen-Empress v. Alexander William* (1) and *Queen-Empress v. Blure* (2) referred to.

[R., 4 N.L.R. 78 (80) = 8 Cr. L.J. 18; 4 N.L.R. 146 = 8 Cr. L.J. 406 (407).]

THIS was a reference made by the Deputy Commissioner of Garhwal, under s. 438 of the Code of Criminal Procedure, with a view to an acquittal or reduction of sentence in a case under s. 19 of the Indian Arms Act, 1878, tried by a Magistrate subordinate to him.

The facts of the case are fully stated in the Magistrate's referring order, which is as follows:—

"I have to-day inspected the record of the case *Queen-Empress v. Tota Ram, Kalua and Nathu Bari* decided by Pandit Manik Lal, Magistrate, 1st class, on 12th October 1893. I called for the case [277] on its coming to my notice in connection with the Arms Act Report for 1893.

"The Deputy Magistrate convicted Tota Ram under s. 19 (f), Arms Act, and sentenced him to a fine of Rs. 40, in default one month's rigorous imprisonment; he convicted Nathu under s. 19 (f), Arms Act and sentenced him to a fine of Rs. 20, in default one month's rigorous imprisonment,

* Criminal Revision No. 142 of 1894.

(1) 11 A.W.N. (1891) 208.

(2) 12 A.W.N. (1892) 221.

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and he convicted Kalua under s. 19 (a) of the same Act, and sentenced him to a fine of Rs. 20, in default one month's rigorous imprisonment.

"Kalua is a lohar. Tota Ram's gun was given to him (Kalua) by Nathu to repair. The Deputy Magistrate writes—'Kalua had no business to take the arm for repair without having been licensed to repair fire-arms'. 'I am of opinion that Kalua's conviction was illegal. He certainly did not manufacture or sell, or keep, offer or expose for sale the gun in regard to which he has been convicted. Possibly the lower Court was of opinion that by repairing, he converted the gun within the meaning of the section, but the Deputy Magistrate entirely overlooked the orders printed at the foot of page 20, Dep. 6, Manual of Government Orders, which are as follows :—

"When a person who repairs arms is also a maker of arms, it is necessary under the existing law that he should provide himself with a license in the latter capacity. In regard to persons in the position of ordinary blacksmiths and others who may have arms in their temporary keeping for purposes of repair, it formed no part of the intention of the Arms Act to require licenses to be taken out, and no license will be required merely for carrying on the business of repairing arms.' There is nothing on the record to show that Kalua was also a maker of arms, and it is practically certain, in my opinion, that he was nothing of the sort. In my opinion, therefore, Kalua's conviction is illegal and should be reversed.

"As regards Nathu, the conviction seems to me certainly questionable. He seems to have told Tota Ram that Kalua could [278] repair his gun and to have been the intermediary who handed the gun to Kalua. He may or may not be technically guilty under s. 19 (f), Act XI of 1878. But if he be guilty, I think Rs. 20 fine an unduly severe punishment for his offence. Tota Ram seems to have been guilty under s. 19 (f) Act XI of 1878, but I think Rs. 40 fine an unduly severe punishment for him too. His license expired on 31st December, 1892, and he carelessly neglected to renew the license as he ought to have done. But Rs. 20 fine, in addition to the confiscation of his gun, would have been, I think, an ample punishment for him.

"The record is accordingly submitted for the orders of the Honorable High Court, with the following recommendations :—

- (1) That the sentence on Kalua be reversed and the fine refunded.
- (2) That the propriety of the conviction of Nathu be considered, and that if it be held that the conviction was right, the fine, Rs. 20, be reduced to some much smaller sum, such as the Court may think fit.
- (3) That the fine imposed on Tota Ram, Rs. 40, be reduced to some such smaller sum, as in the opinion of the Court will be a suitable punishment for the offence.

"The reason why this reference is submitted nearly four months after the conviction is that my attention was only drawn to the case to-day."

On this reference the following order was made by BURKITT, J.:—

ORDER.

In this case it appears that three persons were convicted and sentenced to pay various fines by the Deputy Magistrate on conviction of offences under the Arms Act. The case having attracted the attention of the Deputy Commissioner, he has reported it to this Court for orders with certain recommendations. The persons convicted are named, respectively, Tota Ram, Nathu and Kalua.

As to Tota Ram, he failed to renew his license after the expiration of the period for which it was granted, and has no doubt been rightly convicted, but, for the reasons given by the District Magistrate, I think the sentence of Rs. 40 imposed on him is excessive. [279] I reduce it to five rupees, and direct that the balance of thirty-five rupees, if paid, be refunded.

As to Nathu, all that has been proved against him is that he was the servant of Tota Ram, and, as such servant, took the gun to Kalua for repairs. His case, in my opinion, clearly comes within the cases of *Queen-Empress v. Alexander William* (1) and of *Queen-Empress v. Bhure* (2). In accordance with the judgment of this Court in those cases, I am of opinion that no offence has been committed by Nathu in simply carrying the gun from his master's house to the blacksmith for repairs. I annul the conviction and sentence passed on him, and direct that the fine, if paid, be refunded.

As to Kalua, the only matter proved against him is that he received the gun for repairs. The District Magistrate has very properly pointed out that persons in the position of Kalua who may receive fire-arms into their temporary custody for the purposes of repair are not required to take a license. It therefore follows that, in my opinion, Kalua did not commit any offence. I annul the conviction and sentence passed on Kalua and direct, that the fine, if paid, be refunded.

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APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

GANESHI LAL AND ANOTHER (*Defendants*) v. KHAIRATI SINGH
(*Plaintiff*).^{*} [28th March, 1894.]

Misjoinder of parties and of causes of action—Meaning of "cause of action"—Civil Procedure Code, ss. 28, 31, 53, 373, 578.

Where a plaintiff alleging himself to be entitled on the death of a Hindu widow to the possession of certain immoveable property, upon the death of such widow brought a joint suit against three sets of defendants, being persons to whom the widow in her lifetime had by separate alienations transferred separate portions of the property claimed. *Held*, that such suit was bad for misjoinder of both parties and causes of action, and that s. 578 of the Code of Civil Procedure could not be applied to cure the defect: but the plaintiff was allowed on terms to withdraw his suit as against two out of three sets of defendants with liberty to bring a fresh [280] suit on the same cause of action. *Vasudeva Shanbhaga v. Kuleadi Narnapai* (3), *Banee Krishun v. Koondun Lal* (4), *Koondun Lal v. Rae Himmut Singh* (5), *Narsingh Das v. Mangal Dubey* (6), *Kachar Bhoj Vaija v. Bai Rathore* (7), *Sudhendu Mohun Roy v. Durga Dasi* (8), and *Ram Narain Dut v. Annoda Prosad Joshi* (9), referred to.

[R., 5 A.L.J. 568 = 1908 A.W.N. 231 = 4 M.L.T. 385 (395); 9 C.P.L.R. 125; 4 L.B.R. 183 (185); 7 N.L.R. 43 (45) = 10 Ind.Cas. 737 (738); 3 O.C. 215 (219); 6 O.C. 379 (381); 9 O.C. 326 (329); 1 P.R. 1905 = 83 P.L.R. 1905; D., 29 A. 267 = A.W.N. (1907) 36 = 4 A.L.J. 121; 30 A. 560 = (1908) A.W.N. 235 = 5 A.L.J. 647 (652) = 4 M.L.T. 392 (F.B.); 2 C.L.J. 602; 13 C.P.L.R. 9.]

^{*} Second Appeal No. 1007 of 1892 from a decree of E. J. Kitts, Esq., District Judge of Moradabad, dated the 12th July, 1892, reversing a decree of Babu Mritunjoy Mukerji, Subordinate Judge of Moradabad, dated the 20th June, 1891.

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| (1) 11 A.W.N. (1891) 208. | (2) 12 A.W.N. (1892) 221. | (3) 7 M.H.C.R. 290. |
| (4) 2 N.W.P. H.C.R. 221. | (5) 8 N.W.P. H.C.R. 86. | (6) 5 A. 163. |
| (7) 7 B. 289. | (8) 14 C. 435. | (9) 14 C. 681. |

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THE facts of this case are sufficiently stated in the judgment of the Court.

Mr. *Abdul Majid*, for the appellants.

Munshi *Ram Prasad*, for the respondent.

JUDGMENT.

EDGE, C. J., and BURKITT, J.—In the suit out of which this appeal has arisen the plaintiff sued several defendants. The plaintiff alleged that he became entitled to certain property on the death of a Hindu widow, and he impugned three different sale-deeds made by that Hindu widow whilst she was in possession. Some of the defendants claimed title under one sale-deed as to a portion of the property. Others of the defendants claimed title under another of the sale-deeds as to other portions of the property; and still others of the defendants claimed title under the third sale-deed as to other portions of the property in suit. There were practically three sets of defendants, each set in possession of distinct and separate portions of the property claimed. In this case there was no question of collusion between the defendants. The first Court dismissed the suit on the ground of misjoinder. On appeal the learned District Judge, being of opinion that the plaintiff's cause of action was the relationship in which he stood to the deceased Hindu widow, Musammât Akka Kuari, held that it was desirable that the validity or otherwise of the whole of the alienations made by her and questioned in the suit should be decided in the same suit. The learned District Judge found all the issues in favor of the plaintiff and gave him a decree. From that decree the defendants have appealed.

The District Judge was mistaken in assuming that the relationship in which the plaintiff stood to the deceased Musammât Akka Kuari was or constituted his cause of action. That relationship, [281] or rather his relationship to Musammât Akka Kuari's deceased husband, formed part of his separate cause of action against each set of defendants. The cause of action comprised not only his title, when in issue, but, amongst other things, the wrongful possession of the separate sets of defendants respectively over the lands held by them respectively. There was, so far as these three sets of defendants were concerned as sets, no joint cause of action against them in respect of the same matter. There was, further, no relief claimed against these separate sets of defendants, or any two of the sets in the alternative, in respect of the same matter. As a matter of fact, there was claimed a joint relief against all the defendants in this way that without limiting the portions of the land from which the plaintiff claimed to have the separate defendants ejected, he claimed a decree in ejectment jointly in respect of the whole property in suit. That was a decree which he could not obtain, even if his suit was not liable to the objection of misjoinder, because as a matter of fact the defendants were not, and never had been, jointly in possession of all or any of the property in suit. Each set of defendants had been in possession of that portion of the property only which the widow purported to convey by the specific sale-deed to them or their ancestors. It was not a suit which was authorized by s. 28 of the Code of Civil Procedure. It was not a suit which was protected by the first paragraph of s. 31 of that Code, as there was in it not only misjoinder of parties but misjoinder of causes of action. It was a case in which the Court of first instance might properly have returned the plaint under s. 53, cl. (h), sub-s. (iii) of the Code for amendment on the ground that it was wrongly framed by reason of misjoinder of parties and misjoinder of causes.

of action. Possibly in some cases it may be convenient to have in one suit all the transfers made by a Hindu widow and impugned by the plaintiff, but we have been referred to nothing in the Code of Civil Procedure which authorizes the bringing by a plaintiff of a suit against several defendants who were brought in, each in respect of a cause of action in which the others were not concerned, as was the case here. In *Vasudeva Shanbhaga v. Kuleadi Narnapai* (1), the High Court at [282] Madras, in a case similar to this held:—"It is manifest that the number and nature of the alienations are no unimportant elements for the determination of their propriety. It is most desirable that the whole of them should be at once before the Court called upon to decide the question, in order to secure the soundness of the particular decision and perhaps the avoidance of discordant decisions in different cases upon facts nearly the same." With regard to that decision, we may observe that apparently in that case the decision as to the rights of one person might be affected by the evidence as to the rights claimed by another alienee of the property, and, further, we may observe that where a particular alienation was made on the ground of necessity, the person challenging that alienation might show from evidence of other alienations that with regard to the particular alienation challenged no necessity existed, without the necessity of joining in one suit separate alienees claiming in respect of separate properties under separate alienations. On the other hand, although no precisely similar case to that before the High Court at Madras, which we have just cited, has apparently been before this Court, there are decisions of this Court which show that the plaintiff cannot join as defendants persons against whom he has only separate causes of action in respect of separate portions of property. In our opinion the decisions in *Banee Krishun v. Koondun Lal* (2), *Koondun Lal v. Rae Himmud Singh* (3), and *Narsingh Das v. Mangal Dubey* (4), show that this plaintiff is not entitled in one suit to sue all three sets of defendants for the causes of action alleged and proved in this suit. The same principle is to be found in the cases of *Kachar Bhoj Vaija v. Bai Rathore* (5), *Sudhendu Mohun Roy v. Durga Dasi* (6), and *Ram Narain Dut v. Annoda Prosad Jhosi* (7).

We consequently hold that this suit, so far as it is a suit against all the defendants, is bad for misjoinder of causes of action and of defendants. Section 31 of the Code of Civil Procedure would prevent the suit being defeated for misjoinder of parties only; but here [283] there was not only misjoinder of parties, but the causes of action against the parties misjoined were separate and distinct.

It has been contended that we should apply s. 578 of the Code of Civil Procedure in this case. We need not decide whether the proceeding to judgment and decree in favor of a plaintiff in a suit in which there was misjoinder of causes of action and of parties coupled together would be a mere error, defect or irregularity. In our opinion the merits of the case might, and most probably would be affected by such misjoinder, and by proceeding with the suit against all the defendants. One set of defendants might have a perfectly good case which might be prejudiced by false or doubtful evidence given by others of the defendants in support of their case. In our opinion it would be dangerous to hold that s. 578 of the Code applied to a case of this kind.

(1) 7 M. H. C. R. 290.

(3) 3 N. W. P. H. C. R. 86.

(5) 7 B. 289.

(2) 2 N. W. P. H. C. R. 221.

(4) 5 A. 163.

(7) 14 C. 681.

(6) 14 C. 435.

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16 A. 279=
14 A.W.N.
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MARCH 28. Mr. *Ram Prasad* has asked us to allow his client under s. 373 of the Code of Civil Procedure to abandon his claim as against the defendants Nos. 1 to 11 inclusive with liberty to bring a fresh suit or suits in respect of the part or any of it so abandoned. We make an order under s. 373 permitting the plaintiff to abandon his claim against the defendants 1 to 11 inclusive and granting him permission, on his paying to those defendants their taxed costs in this suit, including this appeal and the appeal below, to bring a fresh suit or suits in respect of the part of the claim so abandoned. The plaintiff having thus abandoned his claim in the manner above-mentioned as against defendants 1 to 11 inclusive, the suit as against the defendants 12 to 20 inclusive is not open to objection on the ground of misjoinder, and, the facts having been found entirely in favor of the plaintiff in the lower appellate Court, we dismiss the appeal, so far as it relates to the decree against the defendants Nos. 12 to 20 inclusive, or any of them, with costs.

The result is that S. A. No. 1007 of 1892 is dismissed with costs, and in S. A. No. 31 and S. A. No. 451 of 1893, which relate to the part of the claim which has been abandoned, our order is that, the claim so far as these appellants are concerned having been abandoned [284] as before mentioned, the appellants in these appeals respectively shall be paid their taxed costs in all Courts by the respondent, or so much of such taxed costs as have not been paid to them.

Appeal dismissed.

16 A. 284 = 14 A.W.N. (1894) 38.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Burkitt.

JANKI PRASAD AND ANOTHER (*Plaintiffs*) v. ULFAT ALI
(*Defendant*).^{*} [31st January, 1894.]

Civil Procedure Code, s. 244—Representative—Mortgagee under a conditional sale deed who has become owner in pursuance thereof.

A person who becomes owner by process of law of property mortgaged to him by a deed of conditional sale must be considered as the representative of his mortgagor within the meaning of s. 244 of the Code of Civil Procedure.

[*Appr.*, 20 M. 378 = 7 M.L.J. 89; *R.*, 1 N.L.R. 49.]

THE facts of this case, as stated in the judgment of the lower appellate Court, are as follows:—

"An eight pie share in mauza Chak Bahira was mortgaged to the plaintiffs, respondents, by Mehdi Hasan: a suit was brought and a decree of conditional sale was obtained and eventually the plaintiffs, respondents, became its owners.

"Subsequently Bakhshi Ram obtained a mortgage-decree (on the basis of a mortgage-deed anterior in date to that of the plaintiffs) against this very property and also against another property. After the death of Bakhshi Ram one of his two sons transferred the decree to Raj Bahadur, who in his turn transferred it to Ulfat Ali, the defendant, appellant in this case.

^{*} Second Appeal No. 898 of 1892, from a decree of Maulvi Muhammad Siraj-ud-din, Subordinate Judge of Allahabad, dated the 30th June 1892, reversing a decree of Babu Shiva Sahai, Munsif of Allahabad, dated the 25th April 1892.

"Ulfat Ali applied for the execution of the decree against both the properties comprised therein, and the plaintiffs, respondents, objected to its execution as regards the property in Chak Bahira of which they had become the owners. Their objection was thrown out, and they then brought a suit in the Munsif's Court for a declaration that that property was not liable for sale in execution of Bakhshi Ram's decree; they also prayed that if their first prayer be not granted then this property may be sold if the proceeds of the [285] sale of the other property prove insufficient for the satisfaction of the decree.

"Ulfat Ali contested the suit by saying that when Chak Bahira was mortgaged to the plaintiffs, they knew of its previous mortgage to Bakhshi Ram and therefore they were not entitled to the relief prayed for by them.

"The Court below has decreed the claim. The defendant has preferred this appeal against that decree and the plaintiffs have filed cross objections."

The lower Appellate Courts then proceeded to frame issues and decreed the appeal, disallowing the plaintiffs' objections.

The plaintiffs thereupon appealed to the High Court.

Babu *Becha Ram Bhattacharji*, for the appellants.

Babu *Rajendro Nath Mukerji*, for the respondent.

JUDGMENT.

KNOX and BURKITT, JJ.—The only question that we need determine in this second appeal is that raised in the second plea taken in the memorandum of appeal, as in our opinion the decision upon it will determine the appeal. The question that arises on that second plea is whether the lower Appellate Court was right in holding that the plaintiffs-appellants, being vendees by private sale from Mehdi Hasan, the mortgagor, should be considered his representatives for the purposes of s. 244 of the Code of Civil Procedure. This question has been decided by the Calcutta Court in *Gour Sundar Lahiri v. Hem Chunder Chowdhury* (1). The learned Judges who decided that case came to the conclusion that a person in the position of these appellants is a representative of his vendor within the terms of s. 244. We see no distinction between the facts in that case and the facts before us. The plaintiffs-appellants misunderstood their remedy. They should have appealed from the order disallowing their objection and not have brought a separate suit. Under this decision the whole suit fails, and this appeal stands dismissed with costs.

Appeal dismissed.

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16 A. 284 =
14 A.W.N.
(1894) 38.

(1) 16 C. 355 (364).

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16 A. 286 = 14 A.W.N. (1894) 84.

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APPELLATE CIVIL.

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CIVIL.[286] *Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.*MADHO DAS (*Defendant*) v. RAMJI PATAK (*Plaintiff*).^{*}
[31st March, 1894.]16 A. 286 =
14 A.W.N.
(1894) 84.*Jurisdiction—Valuation of suit—Valuation put by plaintiff in plaint—Amount of decree awarded—Act XII of 1887 (Civil Courts Act), Chapter III—Execution of decree—Civil Procedure Code, s. 244—Representative of judgment-debtor—Purchaser of property attached under a simple money decree—Attachment—Civil Procedure Code, s. 266—Debt of which the amount is unascertained.*

The pecuniary jurisdiction of a Civil Court on its original or appellate side is, ordinarily speaking, governed by the value stated by the plaintiff in his plaint; and if a suit, having regard to the valuation in the plaint, is within the jurisdiction, such jurisdiction is not ousted by the Court finding that a decree for a sum exceeding the limit of its pecuniary jurisdiction should be given to the plaintiff. There is nothing in Act No. XII of 1887, to confine the sum for which a Civil Court may pass a decree to the limit of its jurisdiction to entertain a suit. *Mahabir Singh v. Behari Lal* (1) referred to.

A purchaser by private sale of immoveable property from a judgment-debtor is not a representative of the judgment-debtor within the meaning of s. 244 of the Code of Civil Procedure, where the decree against the judgment-debtor is a simple money-decree and creates no charge upon specific property.

Where money is due by an agent or vendee to his principal or vendor, the principal's or vendor's claim against his agent or vendee may be attached and sold in execution of a decree against the principal or vendor as a debt under s. 266 of the Code of Civil Procedure, and it is not necessary that the exact amount due to the principal or vendor should be ascertained prior to attachment and sale.

Syud Tuffuzzol Hossein Khan v. Rughoonath Pershad (2), *Bebce Tokai Sherob v. Davod Mullick Fureedoon Beglar* (3), *Abbott v. Abbott and Crump* (4) and *Hill v. Boyle* (5) discussed.

[*Diss.*, 21 A. 20; *F.*, 33 A. 97 (99) = 7 A.L.J. 963 (965) = 7 Ind. Cas. 385 (386); 10 Ind. Cas. 402 (403); 64 P.R. 1912 = 113 P.W.R. 1912 = 14 Ind. Cas. 40 (42); *Appr.*, 19 A. 332; 22 A. 243; 9 Ind. Cas. 414; *R.*, 17 A. 69 (76); 26 A. 447 (457) = A.W.N. (1904) 61 (65); 23 A. 545 = A.W.N. (1906) 99 = 3 A.L.J. 266 (*F.B.*); 32 A. 222 = 7 A.L.J. 203 (205) = 5 Ind. Cas. 875 (876); 28 C. 492 (497); 34 C. 954 = 11 C.W.N. 1133 = 6 C.L.J. 255; 18 A.W.N. 74; 9 C.L.J. 485 = 1 Ind. Cas. 213 (215); 20 A.W.N. 107; A.W.N. (1906) 195 = 3 A.L.J. 511; 17 C.W.N. 116 (119); 16 Ind. Cas. 940 (941) = 16 C.L.J. 77; 2 O.C. 103 (107); 6 O.C. 258; *D.*, 18 Ind. Cas. 520 (521) = 24 M.L.J. 298 = 13 M.L.T. 218 = (1913) M.W.N. 285 (286).]

THE facts of this case are fully stated in the judgment of the Court.

Mr. D. N. Banerji, Munshi Jwala Prasad and Munshi Madho Prasad, for the appellant.

Babu Jogindro Nath Chaudhri, for the respondent.

JUDGMENT.

EDGE, C. J., and BANERJI, J.—The plaintiff in the suit out of which this appeal has arisen obtained on the 24th of December 1881, [287] a simple decree for money against one Mahabir Prasad. During Mahabir Prasad's lifetime this present plaintiff obtained under that money-decree attachment of half of a garden then belonging to Mahabir

* Second Appeal No. 413 of 1891 from a decree of G. J. Nicholls, Esq., District Judge of Benares, dated the 30th March 1891, reversing a decree of Babu Mritunjoy Mukerji, Subordinate Judge of Benares, dated the 4th September, 1887.

(1) 13 A. 320.

(2) 14 M.I.A. 40.

(3) 6 M.I.A. 510.

(4) 5 B.L.R. 382.

(5) L.R. 4 Ex. 260.

Prasad. After the death of Mahabir Prasad, his widow, Makundi Bibi, was brought on the record as his representative, and subsequently she sold to Babu Madho Das, the defendant-appellant in this appeal, the half of the garden which was then still under attachment, and certain other property which was in her possession, as the widow of Mahabir Prasad. That took place in 1884. By the sale-deed under which this other property was sold, it was agreed that Rs. 50,000 of the purchase-money should be treated as paid "on account of the demand of the decrees" of Babu Madho Das, and that two lakhs of the purchase-money should remain on deposit with Babu Madho Das, to be applied in payment of certain debts, and that if any balance should be left after the payment of those debts, Babu Madho Das should pay that balance to Makundi Bibi. Ramji Patak, the plaintiff in the suit against Mahabir Prasad, proceeded to execute his money decree by sale of the half of the garden. Babu Madho Das filed an objection to that execution, claiming, not as the representative of Mahabir Prasad or of Makundi Bibi, but as purchaser in his own right of the half of the garden. That objection was allowed. In execution of his decree for money the present plaintiff brought to sale the balance remaining due to Makundi Bibi out of the two lakhs which were left in Babu Madho Das' hands to be applied in discharge of the debts mentioned in the sale-deed to which we have referred. At the sale the present plaintiff purchased that balance for Rs. 100. Madho Das denied that there was any balance remaining. Thereupon the plaintiff brought this suit against Madho Das to obtain a declaration of his right to bring the half of the garden to sale in execution of his money-decree, and he also claimed that Madho Das should be compelled to produce the account of the purchase-money, i.e., the Rs. 2,50,000, and that the balance should be ascertained and should be decreed to be payable to him. He estimated such balance at Rs. 500, but the frame of his relief shows that he not only asked for such Rs. 500, but for any amount which might be found in excess of that sum as the balance due. The [288] suit was brought in the Court of the Subordinate Judge of Benares. The Subordinate Judge dismissed the suit. The plaintiff appealed to the District Judge, and the District Judge on appeal gave the plaintiff a decree declaring his right to bring the half of the garden to sale under his decree for money, and also decreed in favour of the plaintiff Rs. 7,082-11, as the balance payable by Madho Das of the Rs. 2,50,000 purchase-money. From that decree this appeal has been brought by Babu Madho Das.

It has been contended that the District Judge had no jurisdiction to hear the appeal presented to him, as the plaintiff had left it uncertain in his relief claimed what the actual amount claimed as the balance was, and further that the District Judge had no jurisdiction as a Court of appeal to give a decree in appeal in the plaintiff's favour for any sum exceeding Rs. 5,000. These contentions were based upon Chap. III of Act No. XII of 1887, which is the Chapter which prescribes the ordinary jurisdiction of Munsifs, Subordinate Judges and District Judges. Now it has been held by this Court in *Mahabir Singh v. Behari Lal* (1) that "for the purpose of determining the proper Appellate Court in a civil suit, what is to be looked to is the value of the original suit, that is to say, 'the amount or value of the subject-matter of the suit.' Such 'amount or value of the subject-matter of the suit' must be taken to be the value assigned by the plaintiff in his plaint and not the value as

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MARCH 31. found by the Court, unless it appear, that, either purposely or through gross negligence, the true value of the suit has been altogether misrepresented in the plaint." As a matter of fact in this case the value assigned by the plaintiff in his plaint was Rs. 1,500. That valuation made the suit one which was triable in the Court of the Subordinate Judge, and that valuation also made the appeal from the decree of the Subordinate Judge lie to the Court of the District Judge. The law contemplates that, in many cases, it may be impossible for a plaintiff, at the inception of his suit to state correctly the value of the relief which he seeks, as, for example, in cases to which s. 11 of the Court-Fees Act, 1870 (Act No. VII of 1870) [289] applies. This was particularly a case in which, until all the evidence had been taken, it was impossible for the plaintiff to put anything more than a hypothetical value on the relief claimed *qua* the balance in the hands of Babu Madho Das. In our opinion it would be impossible to hold that the jurisdiction of an Appellate Court should depend upon the amount of the decree of the Appellate Court. Take for example, this case. The lower Appellate Court here being satisfied that the plaintiff under his second relief was entitled to a decree for over Rs. 7,000, gave him that decree. If the lower Appellate Court had not jurisdiction to give that decree, what would have been the result? According to the argument for the defendant-appellant the lower Appellate Court could have done nothing except return the memorandum of appeal for presentation in the High Court. It could not, according to that contention logically worked out, have given the plaintiff in his appeal a decree for any sum whatever, even a sum less than Rs. 5,000, as, if that contention was correct, its jurisdiction was determined by the finding that the plaintiff was entitled in appeal to a sum exceeding Rs. 5,000. If that contention were correct and the lower Appellate Court returned the memorandum of appeal and it was presented in this Court as a first appeal, it is conceivable that this Court might have come to the conclusion that the plaintiff was entitled, we shall say, to Rs. 2,000 only. Now, if the defendant's contention were correct, in that event what could this Court do except again return the memorandum of appeal to be presented in the Court having jurisdiction, *i.e.*, that of the District Judge? That is an illustration which we think goes to show that it is the plaintiff's valuation in his plaint which controls the jurisdiction, not only of the first Court, but of the Appellate Court, and not the amount which may be found and decreed by the first Court or by the Appellate Court. There are other considerations which lead us to the same conclusion. Take, for instance, a suit for pre-emption. The plaintiff brings his suit, for example, in the Court of a Munsif claiming pre-emption at a price of Rs. 700, honestly believing that that was the sale-price and honestly, so far as he was concerned, alleging that the price in the sale-deed of Rs. 1,500 was false and fictitious. Now it appears to [290] us that in that suit the Munsif would have jurisdiction to decree pre-emption at a price of Rs. 1,500, if he found that the price alleged in the sale-deed was the true price, and that his jurisdiction to make a decree would not be ousted by that finding. If it were not so, see what the result might be. The Munsif would return the plaint to be presented in the Court of the Subordinate Judge. The Subordinate Judge taking a different view of the evidence might come to the conclusion that Rs. 1,500, the price alleged in the sale-deed, was a fraudulent and fictitious price, and that the true price was that alleged by the plaintiff, *viz.*, Rs. 700. If the argument of the defendant in this case is correct, the Subordinate Judge in such a case would have to return the plaint to the plaintiff, so that he might comply with s. 15 of the

Code of Civil Procedure by presenting his plaint again in the Court of lowest jurisdiction, namely, in the Court of the Munsif who had held previously that he had no jurisdiction. There are many other examples which might be given to show that convenience would require that the jurisdiction to hear a suit and make a decree, or to hear an appeal and make a decree in appeal, must be determined by the value assigned in the plaint, otherwise there would be no certainty as to the Court in which a suit should be brought, or as to the Court in which an appeal should be brought. It is to be observed that there is nothing in Chapter III of Act No. XII of 1887, which says that a Munsif shall not make a decree for more than Rs. 1,000 in a suit in his Court, or that a District Judge in an appeal from a Subordinate Judge shall not make a decree for more than Rs. 5,000. If other examples were necessary, we might refer to what might happen in a suit on a mortgage. Chapter III of Act No. XII of 1887 specifies the Court in which an original suit or an appeal shall be brought, but it does not limit the jurisdiction of any such Court as to the decree which it may make in a suit otherwise within its jurisdiction. We hold that the Court of the District Judge had jurisdiction to hear the appeal and to make the decree which the District Judge made in this case.

The next question to which we shall refer, is the contention on behalf of the defendant that s. 244 of the Code of Civil Procedure [291] bars this suit so far as the claim in respect of the half of the garden is concerned. That contention depends on whether Babu Madho Das was the representative within the meaning of s. 244 of the Code of Civil Procedure, of a party to the decree for money which this plaintiff had obtained against Mahabir Prasad. A legal representative he certainly was not. It has been held, and we think rightly, by the High Court at Calcutta and the High Court at Bombay and by this Court that where the decree in execution is a decree for sale of hypothecated property a purchaser who had purchased under a private sale from the judgment-debtor the property, or part of it, so decreed to be sold was a representative within the meaning of s. 244, and there was good reason for so holding, because the suit and the decree were based on the mortgage or hypothecation-bond. The proceeding was really one *in rem qua* the property, and the person claiming title to the property affected by those proceedings would be a representative within the meaning of s. 244. In a suit for sale under the Transfer of Property Act, 1882. (Act No. IV of 1882) such a purchaser, if his purchase was made before the institution of the suit, and if the plaintiff in the suit had notice of the purchaser's interest, would, by reason of s. 85 of that Act, be a necessary party to the suit. If the purchase was made after the suit was instituted it was made *pendente lite*. In either case, if for no other reason, convenience suggests that such purchaser should be treated as a representative of the defendant-mortgagor from whom he purchased the whole or part of the property, the sale of which was sought by the plaintiff in the suit. The same principle would, we consider, apply if the purchase was made before suit, and the plaintiff had before suit no notice of the purchaser's interest. In this case, however, the decree against Mahabir Prasad was not a decree based upon any document hypothecating any property; it was not a decree for sale; it was a simple money-decree, and the only connection between that decree and the defendant here is that the plaintiff sought in execution of that money-decree to bring to sale property purchased by the defendant here from the legal representative of the judgment-debtor. In our opinion, it would be stretching s. 244 too far to hold that that section [292] included in an application for execution of a

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simple money-decree a person who had purchased from the judgment-debtor property against which the decree was sought to be executed, but which was not affected by the decree itself and would not be affected until an order for attachment or an order for sale in execution of the decree was made. We therefore hold that the objection of Babu Madho Das to the attachment of the half-garden was one which came under s. 278 of the Code of Civil Procedure, and, that objection having been allowed, s. 283 of the Code applied and this suit was the plaintiff's sole remedy.

The last point to which we shall refer, although it was the first argued in the appeal, was that there could be in law no attachment of the balance of Rs. 2,50,000 remaining unappropriated in the hands of Babu Madho Das. It was contended that in law you cannot attach as a debt money which may be due unless the amount has been ascertained. The first case which was relied on in support of that contention was *Syud Tuffuzzool Hossein Khan v. Raghoonath Pershad* (1). It appears to us that the case which their Lordships of the Privy Council were dealing with, bore no resemblance to that here, and that so far as their Lordships' judgment could be applicable in a case like this, it would support the contention of Mr. Jogindro Nath Chaudhri, who appears here for the plaintiff-respondent, that the balance in question was attachable. In that case what was attempted to be attached was the possible debt which might be awarded by arbitrators to be a debt. That the debtor, whose debt was sought to be attached had, prior to the agreement to refer to arbitration, property which was capable of attachment was beside the point, because by the agreement of reference the rights of the parties to that agreement were made to depend, not on the facts as they existed at the date of the agreement of reference, but on such award as the arbitrators should make. We need only quote one passage from the judgment of their Lordships of the Privy Council: "In the present case the attachment, as it has been observed, is not of the antecedent share in the undivided assets. It is of a claim under a future award, as to which it is wholly uncertain, until the award [293] be made to what the debtor will be entitled. The uncertainty at the time of the attachment and sale was not limited to a mere question of *quantum*, it was wholly uncertain, as Sir George Couper has correctly explained in his judgment, in what the arbitration might terminate." We were also pressed with the decision of their Lordships of the Privy Council in *Bebee Tokai Sherob v. Davod Mullick Fureedoon Beglar* (2). As to that case we need only say that there the claimant established adverse title, and that further the Privy Council held that an uncertain right in unascertained property was not the subject of attachment. In the case of *Abbott v. Abbott and Crump* (3) what was sought to be attached was the assets of a judgment-debtor as yet unascertained in partnership business which were in the hands of a receiver, the decree-holder being one of partners. Until the dissolution of the partnership and the ascertainment of the share in the assets of the partners such share could not be treated as a debt attachable in execution of a decree. The decision of Sir J. Stuart, V. C., in *Hill v. Boyle* (4) does not apply to a case like this, even assuming it to be a correct exposition of the law, as to which matter we express no opinion. There can, in our opinion, be no doubt that money or a balance in the hands of an agent, which he has received from, or holds for, his principal to be applied to certain purposes can be

(1) 14 M.I.A. 40. (2) 6 M.I.A. 510. (3) 5 B.L.R. 382. (4) L.R. 4 Ex. 260.

recovered from that agent as money had and received to the use of the principal, if the agent fails to apply it, or if, the agent having applied part of it, a balance remains in the hands of the agent; and the fact that when the principal brings his suit to recover such balance he may, until the agent's accounts are produced, be unable to specify the particular amount of the balance remaining in his agent's hands and due to him does not prevent such balance being a debt due to the principal. Such balance is a sum of money which the agent is bound on principles of justice and equity to pay over on demand to his principal, although there may have been no actual but only an implied agreement to re-pay such balance. Such a balance was always assignable in equity and passed to the assignee in equity a good title [294] to sue, and was so assignable as a debt. We are not referring to a case in which the agent loses the money pending the agency, so that it was never held by him to any use other than that of the agency, nor are we referring to a case in which an agent having received money from his principal to pay to a third party had, before the agent had notice that his authority to pay had been revoked, given notice to the third party that he held the money for him. As this case is not one of such cases, we need express no opinion as to what would be the rights of the principal or of the agent in such cases.

It was contended on behalf of the plaintiff-appellant that those cases in which it has been held that equity will not enforce the assignment of a mere naked right to litigate applied in this case. It appears to us that those cases have absolutely no application to the case of a debt in the hands of a vendee or an agent sought to be attached by a creditor of the person to whose order and for whose benefit the money is held. What was attached here was, in our opinion, a debt; although the amount of the debt was unascertained, it was capable of being ascertained, and as such debt it was attachable under s. 266 of the Code of Civil Procedure; it was not a mere right to sue for damages which would have been excluded from attachment by the proviso to that section. We are consequently of opinion that the balance which was found to have been in the hands of Babu Madho Das was legally attachable, was legally sold in execution of the decree for money and vested in the auction-purchaser, although that auction-purchaser happened to be the decree-holder.

There was one other question which was raised as to the construction of the sale-deed from Makundi Bibi to Babu Madho Das. It was contended that the Rs. 50,000 were to be treated as applied in satisfaction of the decrees held by Babu Madho Das in his own name. The sale-deed was incorrectly translated in the paper book here, but even on that incorrect translation, which we have given, the clause relating to Rs. 50,000 is capable of applying to decrees obtained by Babu Madho Das *ism farzi*, and that is the view of the Court below. We dismiss this appeal with costs.

Appeal dismissed.

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16 A. 286=

14 A.W.N.

(1894) 84.

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16 A. 295 =

14 A.W.N.
(1894) 93.

16 A. 295 = 14 A.W.N. (1894) 93.

APPELLATE CIVIL.

[295] *Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.*TAJJO BIBI (*Plaintiff*) v. BHAGWAN PRASAD AND OTHERS (*Defendants*).^{*}
[3rd April, 1894.]*Mortgage, redemption of—Two mortgages between the same parties over the same property—Mortgagor not bound to redeem both together—Consolidation—Act No. IV of 1882 (Transfer of Property Act), ss. 61, 62—44 and 45 Vic., Cap. 41, s. 17.*

A mortgagee held two mortgages over the same property from the same mortgagor, the one being a usufructuary mortgage in respect of interest only, and the other being a simple mortgage. The mortgagor sued to redeem the usufructuary mortgage. The mortgagee objected that the mortgagor was bound to redeem both mortgages. *Held*, that the mortgagor, in the absence of a special contract to redeem both mortgages simultaneously, could not be compelled to do so. *Vithal Mahadev v. Daud Valad Muhammad Husen* (1) dissented from. *Shuttleworth v. Laycock* (2) and *Jennings v. Jordan* (3) referred to.

[R., 27 A. 313 = A.W.N. (1904), 273; 31 A. 482 (488) = 6 A.L.J. 654 = 2 Ind. Cas. 859 (862).]

THE facts of this case are as follows :—

On the 20th of July, 1881, Ilahi Bakhsh, Mubammad Bakhsh and Bakhshan mortgaged with possession a 6 anna-share of the zamindari of mauza Pilkhani, pargana Haswa, in the district of Fatehpur, for Rs. 6,000, to Bhagwan Prasad, defendant No. 1. On the 20th December, 1886, Bhagwan Prasad, in execution of a decree of the Revenue Court for profits obtained against Ilahi Bakhsh, sold a 2-annas share belonging to him (Ilahi Bakhsh) out of the property mortgaged, and purchased it himself for Rs. 700. At the time of sale Bhagwan Prasad notified the amount due on another bond. This bond, dated the 30th of January, 1882, had been executed by all the three persons mentioned above, and it pledged the entire 6-annas share for Rs. 499. On the 1st June, Muhammad Bakhsh and Bakhshan, defendants Nos. 1 and 2, sold, jointly with Ilahi Bakhsh, a 6-annas share (out of which 4 annas had been mortgaged to Bhagwan Prasad by the deed of the 20th of July, 1881, together with the share of Ilahi Bakhsh) to the plaintiff Musammat Tajjo Bibi, for Rs. 14,000.

[296] The plaintiff thereupon sued Bhagwan Prasad for redemption of the mortgage of the 4 annas share of Muhammad Bakhsh and Bakhshan, and paid into Court Rs. 4,000 the rateable amount of the mortgage money.

Muhammad Bakhsh and Bakhshan who were named as *pro forma* defendants admitted the plaintiff's claim. The defendant, Bhagwan Prasad, pleaded that, the sale to the plaintiff having been made in violation of a covenant against alienation contained in the mortgage-deed, so far from the plaintiff being entitled to redeem, he was entitled to recover the whole amount of the mortgage money from the mortgagors. He also pleaded a right of pre-emption as against the plaintiff, whom he alleged to be a stranger in the village.

The Court of first instance, while disallowing the defence set up by Bhagwan Prasad, held that the plaintiff was only entitled to a decree on redemption of both mortgages, and gave her a decree to that effect.

^{*} Second Appeal No. 1073 of 1892, from a decree of A. Mc Millan, Esq., District Judge of Cawnpore, dated the 25th July, 1892, confirming a decree of Syed Akbar Husain, Subordinate Judge of Cawnpore, dated the 30th June, 1891.

(1) 6 B.H.C.R.A.C. 90.

(2) 1 Vernon 245.

(3) L.R. 6 App. Cas. 698.

The plaintiff appealed ; and the lower appellate Court (the District Judge of Cawnpore) held that the decree of the first Court was right, and inasmuch as the plaintiff had omitted to comply with it declined to give her a decree at all.

The plaintiff then appealed to the High Court.

Pandit *Sundar Lal* and Maulvi *Ghulam Mujtaba*, for the appellant.

Munshi *Ram Prasad*, for the respondents.

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JUDGMENT.

EDGE, C.J., and BURKITT, J.—The suit out of which this appeal has arisen was one in which the plaintiff sought a decree for possession of land of hers held by the defendants in virtue of a usufructuary mortgage. The usufructuary mortgage was usufructuary *qua* interest. The plaintiff claimed possession on payment of the balance due. The defendants also held a simple mortgage, hypothecating the lands in question. The first Court being of opinion that the plaintiff could not, so to speak, redeem the usufructuary mortgage alone, *i. e.*, without discharging [297] the liability under the simple mortgage, gave the plaintiff a decree *in invitum* for redemption of both mortgages on payment of the sum due on both mortgages. The plaintiff appealed to the Court of the District Judge against that part of the decree which related to the simple mortgage. The defendants not being satisfied with the amount of interest allowed to them by the first Court, also filed an appeal. The District Judge, taking the same view of the plaintiff's rights as that held by the first Court, dismissed the plaintiff's suit with costs because she was not satisfied with the decree of the first Court. She has appealed here.

Under s. 62 of the Transfer of Property Act, 1882 (Act No. IV of 1882), the mortgagor, in the case of a usufructuary mortgage, has a right to recover possession of the property, where the mortgage is usufructuary *qua* interest, when the term, if any, prescribed for payment of the mortgage money has expired and the mortgagor pays or tenders to the mortgagee the principal money, or deposits it in Court as provided by the Act. We are not concerned in this case with the rights of the parties when the usufructuary mortgage is one for principal and interest. Such the Legislature in 1882 declared to be the rights of a person in the position of the plaintiff here. We must now see whether in the Transfer of Property Act there is any provision otherwise limiting the right to recover possession, which s. 62 declares that a mortgagor in such a case as this has. Section 61 of that Act has been relied on by Mr. *Ram Prasad* for the defendants, respondents, not as expressly enacting that where the mortgagees hold two mortgages over the same property from the same mortgagor the mortgagor shall not be entitled to redeem or discharge one without redeeming or discharging both, but as implying that in such a case a mortgagor could not redeem or discharge one of such mortgages without redeeming or discharging the other. That contention was based on the words "on property other than that comprised." In our opinion we could not form such words as those in section 61 imply a restriction on the otherwise declared rights [298] by the Act of the mortgagor. Further, s. 61 of Act No. IV of 1882 obviously had its origin in section 17 of 44 and 45 Vic., Cap. 41, which was passed in the year 1881. Now section 17 of 44 and 45 Vic., Cap. 41 was enacted for the sole purpose of restricting the consolidation of mortgages. From the body of the section that is apparent, and if the marginal note may be looked at, we find that it is "restriction on the consolidation of mortgages." It must

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be remembered that when Act No. IV of 1882 was brought upon the Indian Statute book it was brought on, because, according to the preamble, it was expedient to define and amend certain parts of the law relating to the transfer of property by acts of parties. There had been apparently a reported case of the Bombay High Court in which that Court had applied the English equitable doctrine of consolidation of mortgages to mortgages in that province. That was the case of *Vithal Mahadev v. Daud Valad Muhammad Husen* (1). In that case the Bombay High Court said:—"Here the mortgagors seek to redeem No. 7, and it is found that there is another mortgage between the same parties, though possibly not of the same land; the Court will not therefore assist the plaintiff who seek to redeem, unless they are ready to do equity by paying off all the mortgages." It is said by the learned editor of Stokes' Anglo Indian Codes, in his note to section 61 of the Transfer of Property Act, 1882, that in that case the Bombay High Court applied to the Muhammadan mortgage there the rule established in England by *Shuttleworth v. Laycock* (2). If *Shuttleworth v. Laycock* were the first case to establish that principle, it would be advisable before applying that principle to this country to read the note in 1 Vernon, p. 245, which gives the facts on which that rule of equity was applied in that case. Section 61 of Act No. IV of 1882, it appears to us, was enacted with the object not of indicating that there might be some other restriction on the rights of a mortgagor, but of prohibiting the application of the principle of consolidation to this country, except where the parties had by contract agreed that such consolidation should take place. Section 80 similarly in our opinion was not enacted with the object [299] of recognizing the English principle of tacking in mortgages, but of prohibiting, as therein enacted, one English form of tacking which gave an unjust priority to the holder of a third mortgage over the holder of a second mortgage when the third mortgagee had paid off the first mortgage. In the case of *Allu Khan v. Roshan Khan* (3), the parties had expressly agreed that the mortgages should be discharged at the same time and not at different times. Of course it is competent to the parties to make such an agreement as that. No authority in India has been brought to our attention, except the case we have mentioned from the Bombay High Court, to show that, apart from contract, a mortgagor who has given two mortgages to the same person over the same property cannot obtain redemption of one of them after the due date without redeeming the other. The principles of tacking and consolidation in England had their origin apparently in Courts of Equity to which mortgagors who wished to redeem were obliged to have recourse, and the principles seem to have been adopted upon the ground that a mortgagor who came into a Court of Equity to obtain relief by redemption of a mortgage should discharge all the debts due to the mortgagee and secured to him by mortgages on that or on other property of the mortgagor. It may be doubted, from the observations of two, if not more, of the learned Lords in *Jennings v. Jordan* (4) whether the equitable principles of tacking and consolidation would, if the matter were *res integra*, be adopted nowadays for the first time. There is absolutely no analogy between the usufructuary mortgage in this case and the ordinary forms of mortgage with reference to which the English principles of tacking and consolidation arose. In the case of a usufructuary mortgage and in the case of a simple mortgage there is in this country no conveyance of

(1) 6 B.H.C.R. A.C. 90.
(3) 4 A. 85.

(2) 1 Vernon 245.
(4) L. R. 6 App. Cas. 698.

the legal estate. In such cases the peg upon which these equitable doctrines were hung in England does not exist here. We are aware of no authority for holding that in these Provinces a mortgagor not otherwise bound by contract cannot redeem one or two or more mortgages held by his mortgagee over the same property without redeeming another or the others. If parties wish to [300] lend their money or make further advances on the terms that one mortgage on the property shall not be redeemed until the money due on another mortgage is paid, they can easily effect that object by making it expressly part of their contract.

We decree this appeal, and set aside the decree of the Court below, and remand the case under s. 562 of the Code of Civil Procedure to be replaced upon the file of pending cases and disposed of according to law. We give the appellant his costs of this appeal in any event.

Cause remanded.

16 A. 300 = 14 A.W.N. (1894) 91.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Banerji.

MUHAMMAD NASIR-UD-DIN (*Defendant*) v. ABUL HASAN
(*Plaintiff*).^{*} [4th April, 1894.]

Pre-emption—Offer by pre-emptor to vendee—Waiver of right of pre-emption.

Where a pre-emptor continues to assert his pre-emptive right and on the strength of that right, and in his character of pre-emptor offers to take the property from the purchaser by paying him the sale-price, without resorting to, and with a view to avoid litigation, he cannot be said to have acquiesced in the sale and waived his right of pre-emption.

[Appl., 19 A. 334.]

THIS was a suit for pre-emption under the Muhammadan law. The plaintiff came into Court alleging that he had complied with all the requirements of the Muhammadan law and offering to pay what he alleged to be the true sale consideration. Both the vendors and the vendee defended the suit at length; the vendee amongst other pleas alleging certain circumstances in the way of previous negotiations between himself and the plaintiff, which, according to him, constituted a waiver of the right of pre-emption, if any such right existed, on the part of the plaintiff.

The Court of first instance found all the issues in favour of the plaintiff and gave him a decree for pre-emption at the price alleged by him. The defendant vendee appealed, and again raised the question of waiver of the right of pre-emption on the part of the plaintiff respondent. [301] On this point the lower appellate Court (the District Judge of Moradabad) found that "the only negotiations that the plaintiff pre-emptor made with the defendant vendee here were for the purpose of a friendly transfer at the actual contract price paid without having recourse to the Civil Court. The plaintiff neither by word or action tacitly or directly ever admitted defendant's right to purchase the property in preference to him (pre-emptor). Such negotiations were in furtherance and assertion of plaintiff's right, and not in any form an admission that would damage him or lead anybody

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^{*} Second Appeal No. 1074 of 1892, from a decree of H. P. Mulock, Esq., District Judge of Moradabad, dated 7th June 1892, confirming a decree of Babu Mritunjoy-Mukerji, Subordinate Judge of Moradabad, dated the 7th December 1891.

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to believe that he had agreed to forego his right." On the other points in the case also the lower appellate Court found in favour of the plaintiff respondent ; and affirmed the decree of the first Court.

The defendant vendee thereupon appealed to the High Court.

Mr. *Hameed-ullah*, *Maulvi Ghulam Mujtaba* and *Babu Rajendro Nath Mukerji*, for the appellant.

Mr. *Abdul Majid*, for the respondent.

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JUDGMENT.

KNOX, J.—*Maulvi Abul Hasan*, respondent to this second appeal, was plaintiff in the Court of first instance. His claim was for pre-emption of a house purchased by *Muhammad Nasir-ud-din*, the present appellant. The claim was based upon Muhammadan law, and the allegations contained in the plaint set out that the plaintiff had fulfilled all the necessary conditions of pre-emption. He bases this right to demand pre-emption on Muhammadan law, and adds that the defendant, while at first he appeared ready to give up the house, now refuses upon one pretext or another.

Both the Courts below have given the respondent a decree, and the plea taken in second appeal is that the respondent by an offer made to purchase the property has rendered any right of pre-emption he might have had void.

The authority upon which the appellant bases his contention is a passage to be found in *Baillie's Digest of Muhammadan law* (2nd edition), p. 505 :—"The right of pre-emption is rendered void by implication, when anything is found on the part of the pre-emptor that indicates acquiescence in the sale to the purchaser * * * or [302] in like manner when he has made an offer for the house to the purchaser."

It appears to me that, before we can declare the right of pre-emption void in this particular case, we must be satisfied, not only that an offer was made by the pre-emptor for the house to the purchaser, but also that that offer indicates acquiescence in the sale to the purchaser. The mere fact of the offer made will not in itself suffice. The making of such an offer may often be evidence of acquiescence, but when, as in the present case, the offer has been made to avoid litigation, and it is found by the lower appellate Court that the respondent "neither by word or action tacitly or directly ever admitted appellant's right to purchase the property in preference to him," this finding precludes our considering the offer, which was undoubtedly made, as being an act on the part of the pre-emptor indicating acquiescence in the sale to the appellant.

The appeal therefore fails and must be dismissed with costs.

BANERJI, J.—I am of the same opinion. I must confess that at the hearing I was inclined to think, that having regard to the fact that by reason of the right of pre-emption being a right in derogation of the ordinary rights of property it was a right weak in its nature, and that consequently a strict adherence to the rules enjoined for its enforcement was absolutely necessary, it would be placing rather wide interpretation on the passage in *Baillie's Digest of Muhammadan law* referred to by my learned brother Knox were we to hold that, after having made an offer to the vendee of the property sold to purchase it from him, a person could still claim to pre-empt that property. Upon a careful consideration of that passage I am of opinion that the interpretation put upon it by my learned brother is the true interpretation of it. As I understand the rule of Muhammadan law on the subject, it is this, that a person who, having knowledge of a sale,

offers to buy the property sold from the purchaser without asserting his own right of pre-emption must be presumed to have acquiesced in the sale and thereby forfeited his right of pre-emption. But where, as in this case, the pre-emptor continues to assert his pre-emptive right, and on the strength of that right and in his [303] character of pre-emptor offers to take the property from the purchaser by paying him the sale-price without resorting to and with a view to avoid litigation, he cannot be said to have acquiesced in the sale and waived his right of pre-emption. The claim of the respondent has therefore been properly decreed, and I agree in dismissing this appeal with costs.

Appeal dismissed.

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16 A. 303 = 14 A.W.N. (1894) 94.

APPELLATE CIVIL.

Before Mr. Justice Tyrrell, and Mr. Justice Blair.

ABDULLAH KHAN AND ANOTHER (*Plaintiffs*) v. JANKI (*Defendant*).^{*}
[5th April, 1894.]

Registration—Lease—Suit to compel registration—Act No. III of 1877 (Indian Registration Act), s. 77.

Certain lessees, whose lessor had refused to be a party to registering the lease, without applying for registration to the sub-registrar or registrar, brought a suit within four months of the execution of the lease claiming that the lessor might be ordered to cause the lease to be registered; *Held* that such a suit would lie independently of the Indian Registration Act (Act No. III of 1877) and that s. 77 of the said Act would not apply so as to render the suit barred by limitation. *Ram Ghulam v. Chotey Lal* (1) followed; *Bhagwan Singh v. Khuda Bakhsh* (2) and *Edun v. Mahomed Siddhi* (3) distinguished.

[R., 4 L.B.R. 88 (91) = 14 Bur. L.R. 161]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Abdul Raoof*, for the appellants.

Pandit *Sundar Lal*, for the respondent.

JUDGMENT.

TYRRELL and BLAIR, JJ.—The plaintiffs are persons who claim a right to the lease-hold of certain property by a document of lease executed in their favour on behalf of the female defendant by her agent. After the execution the plaintiffs say that the lessor refused to be a party to the registration of the deed. The plaintiffs therefore, thinking it vain to go to the sub-registrar's office without the other contracting party, brought this suit on the 3rd of October, 1891, in the Court of a Munsif. The date of the alleged *patta* is the 17th of June 1891. Thus the suit was instituted within four [304] months of the execution of the *patta*. The plaintiffs claimed that the defendant be ordered to cause the registration of the *patta*. The female defendant denied the agreement of the lease, or the execution of the deed of lease, or that she had any right to lease the property, inasmuch as she had leased it to another. She also denied that the alleged attorney who is said to have made the lease for her was employed by her.

* Second Appeal No. 1342 of 1892, from a decree of E. J. Kitts, Esq., District Judge of Moradabad, dated the 10th September 1892, reversing a decree of Maulvi Muhammad Husain, Munsif of Nagina, dated the 19th December 1891.

(1) 2 A. 46.

(2) 3 A. 397.

(3) 9 C. 150.

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Upon the second issue the Munsif decided that the facts stated by the plaintiffs were true and that the female defendant's allegations were false, and therefore the Munsif gave the plaintiffs an order that the deed should be registered.

The Musammat appealed pleading that the suit was barred by the provisions of the Registration Act and also on the merits. The lower appellate Court decided the appeal in the Musammat's favour on the first ground, that is to say, the preliminary plea. The learned Judge found that the plaintiffs' suit was barred by s. 77 of the Registration Act (Act No. III of 1877).

We are amazed at this decision, for not a word of s. 77 can be made to have application to this case. Section 77 contains no provisions which could bar this suit or any other suit otherwise entertainable. It is on the contrary an enabling section, which, under peculiar given circumstances, provides a special suit to a person deeming himself entitled to have a document registered. The special conditions are that the registrar of deeds, and not the sub-registrar, shall have refused to order the document to be registered under s. 72 or s. 76 of the Act, and another condition is that the suit be brought within thirty days after the making of the order of refusal. It is plain that a section like this cannot possibly be held to bar this suit.

It has been decided in a case, all the circumstances of which are exactly similar to those of the present suit, that the refusal by a party to a deed to register the deed gives a cause of action outside the provisions of the Registration Act for a suit like this: see *Ram Ghulam v. Chotey Lal* (1).

[305] The Full Bench decision in *Bhagwan Singh v. Khuda Bakhsh* (2) is not in collusion with the case just mentioned. In this Full Bench case the deed had been presented to the sub-registrar who had refused to register; and, under these circumstances, the Court held that the party should have gone on with his remedies under the Act, and that he could not bring a suit on a refusal by the sub-registrar only. A case of the Calcutta High Court was cited, reported in I.L.R., 9 Calc. 151,* which also is not opposed to the view of the law taken in *Ram Ghulam v. Chotey Lal* (1). The latter case was dissented from by the learned Judges who decided the Calcutta case, but it seems to have escaped their notice that there had not been recourse to registration in the case reported in 2 Allahabad, whereas there had been recourse to registration and refusal to register by the sub-registrar in *Edun v. Mahomed Siddik* (3).

Mr. *Sundar Lal*, supporting the decision of Mr. Kitts, has strongly contended that the suit was rightly dismissed, inasmuch as registration could not be obtained now, as s. 13 of the Registration Act would bar the registration. This is a consideration outside the point before us, which is that the Registration Act contains nothing which makes the plaintiffs' suit unmaintainable. The Court has to consider in this appeal whether the conduct of the defendant did or did not justify the appellants in requiring her to register a document. The decree, if in favour of the appellants, will make a declaration to this effect. It cannot of course make an order binding on the Registration Department to register the document if, under statutory provisions of the Registration Act binding sub-registrars and registrars, the registration cannot now be made consistently with the provisions

[* 9 C. 151 begins at 9 C. 150.—Ed.]

(1) 2 A. 46.

(2) 3 A. 397.

(3) 9 C. 150.

of the Act. All that will be declared will be that the appellants have title as lessees under the *patta* in question to have registration of that deed if not barred by the Registration Act, a matter which will not now come under the judicial decision of the lower appellate Court in this case.

We set aside the decree below, and under s. 562 of the Code of Civil Procedure remand the appeal to be restored to the register of [306] first appeals in the Court below to be decided there according to law. Costs will abide the result.

Cause remanded.

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16 A. 303=
14 A.W.N.
(1894) 94.

16 A. 306=14 A.W.N. (1894) 97.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

MUBARAK HUSAIN (*Defendant*) v. BIHARI (*Plaintiff*).^{*}
[16th April, 1894.]

Civil Procedure Code, s. 566—Unnecessary reference—Power of Court to disregard the findings returned.

A single Judge of the High Court hearing a second appeal made an order of reference under s. 566 of the Code of Civil Procedure. On the return to the reference the appeal came before another Judge, who, holding that the reference was unnecessary, and that the original findings of fact in the Court below were sufficient to dispose of the appeal, disregarded the findings on the reference and dismissed the appeal. In appeal under s. 10 of the Letters Patent it was held that it was competent to the Judge before whom the appeal had subsequently come to disregard the findings on the order of reference.

[R., 15 Ind. Cas. 39 (41)=17 C.W.N. 462 (466).]

THIS was an appeal under s. 10 of the Letters Patent from a judgment of Aikman, J.—The facts of the case sufficiently appear from that judgment, which is as follows:—

AIKMAN, J.—The following are the facts of this case so far as it is necessary to set them forth for the decision of this appeal. On the 28th of October 1878, one Chunnu, a Muhammadan, executed a sale-deed in favour of his wife, Musammam Amiran, by which he conveyed to her certain property in lieu of the dower-debt due to her at the time the deed was executed. On the 20th of July 1885, Musammam Amiran executed a sale-deed by which she conveyed the property to one Rahim Ali. On the 5th of September 1886, Rahim Ali mortgaged the property to Bihari, the respondent in this appeal. On the 4th of December 1888, Bihari obtained a decree against Rahim Ali for sale of the hypothecated property. When he attempted to execute the decree, he was resisted by the appellant, Syed Mubarak Husain, on the ground that he held possession of the property under what he calls an oral will made in his favour anterior to the execution of the sale-deed, which will, it is contended, had the effect of making the property *waqf* and [307] therefore unsaleable. Mubarak Husain's objections having been sustained in the execution department, the present suit was instituted by Bihari for the purpose of setting aside the order in the execution department and obtaining a declaration that the property was liable to sale in execution of his decree against Rahim Ali. The Court of first instance decreed the claim in part. Both parties appealed to the Subordinate

^{*} Letters Patent Appeal No. 3 of 1893 from a judgment of the Hon'ble Mr. Justice Aikman, dated the 20th December 1892.

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Judge, who dismissed the plaintiff's appeal and partly decreed that of the defendant, holding that a portion of the property, which the Munsif had held to be capable of sale, was in reality endowed property and therefore not liable to be sold. Against this decree the defendant Syed Mubarak Husain has preferred the second appeal. His first ground of appeal is as follows:—"Because the appellant has pleaded that he was in possession of the property in dispute under the will of Chunnu and the learned Subordinate Judge has failed to decide this point." The second ground of appeal is:—"Because the property in dispute is a *waqf* and is not fit to be sold or transferred in any way."

The second ground may be disposed of at once. I am of opinion that the appellate judgment of the lower Court clearly holds that the portion of the property, in respect of which he has sustained the finding of the Munsif was not *waqf* property, but was declared by Chunnu to be his own and sold by him to his wife Musammat Amiran in lieu of dower-debt. This is a finding of fact behind which this Court cannot go. This ground of appeal therefore fails.

With regard to the first ground of appeal, even assuming that Chunnu did, as is asserted by the appellant, convey by what he calls an oral will the whole of his property to the appellant, the will would not take effect until the death of the testator, and it was open to the testator at any time before his death to make any other disposition of the property that he saw fit. That he did make such a disposition of his property, has been, as shown above, found by the lower appellate Court. This ground of appeal likewise fails.

My only difficulty in deciding this appeal has been caused by the fact that my predecessor, Mr. Justice Mahmood, for reasons set [308] forth by him in his order of the 8th of April last, remanded the case to the lower appellate Court for findings on certain issues therein framed. I regret that I am obliged to come to the conclusion that, for the purpose of deciding this appeal, it was unnecessary to frame those issues and to remand the case. Entertaining, as I do, the deepest respect for any opinion of my predecessor, it is with diffidence that I come to this conclusion. But in the view that I take of the law, and bearing in mind the observations of the Privy Council in regard to s. 584 of the Code of Civil Procedure, as set forth in their judgment in *Durga Chowdhri v. Jewahir Singh Chowdhri* (1) I am of opinion that I have no other course open to me than to decide, as I must do, namely, that this appeal fails and must be, and it hereby is, dismissed with costs.

On appeal by the defendant under s. 10 of the Letters Patent.

Messrs. *D. N. Banerji* and *Abdul Majid*, for the appellant.

Munshi Ram Prasad, for the respondent.

JUDGMENT.

EDGE, C.J., and BURKITT, J.—It was competent to Mr. Justice Aikman to disregard the order passed under s. 568 of the Code of Civil Procedure, as in his opinion, having regard to the findings on the record, the order was unnecessary. This is the only point taken in appeal. We dismiss the appeal with costs.

Appeal dismissed.

16 A. 308 (F.B.) = 14 A.W.N. (1894) 109.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji and Mr. Justice Burkitt.

MOTI SINGH AND ANOTHER (*Plaintiffs*) v. KAUNSILLA AND OTHERS
(*Defendants*).^{*} [21st April, 1894.]

Civil Procedure Code, ss. 278, 283—*Suit by claimant to attached property—Declaratory relief—Two declarations or one—Court-fee.*

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(F.B.) =
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Where a claimant whose objection under s. 278 of the Code of Civil Procedure has been disallowed brings a suit and makes the judgment-creditor who was trying [309] to execute the decree the sole defendant to the suit, a claim for a declaration that the property under attachment was the plaintiff's property and not liable to attachment in execution of the decree of the defendant is a claim for only one declaration, and for such purposes and in such a suit it is immaterial whether the claim is that the property is the plaintiff's and not liable to attachment, or that the property is the plaintiff's as against the defendant's right to attach and that the order of attachment should be cancelled.

But where the person objecting under s. 278 of the Code brings his suit and makes not only the execution creditor in the attachment proceedings but also the judgment-debtor in those proceedings parties to the suit, and asks for a declaration of the plaintiff's title to the property under attachment as against the judgment-debtor, and also asks for a declaration in denial of the judgment-creditor's right to bring that property to sale in execution of the judgment-creditor's decree, there there are two substantial declarations asked for.

[F., 18 M. 459; R., 17 A. 69 (72).]

THIS was a reference to the Full Bench made by Edge, C.J. and Banerji, J.—The facts of the case sufficiently appear from the judgment of the Court.

Munshi Gobind Prasad, for the appellants.

The Hon'ble Mr. Colvin, for the respondents.

The judgment of the Court (EDGE, C.J., TYRRELL, KNOX, BLAIR, BANERJI and BURKITT, JJ.) was delivered by EDGE, C.J. :—

JUDGMENT.

In the suit out of which this appeal has arisen, the plaintiffs asked for the following relief :—"By establishment of the plaintiffs' right to proprietorship the claim of the plaintiffs for cancellation of the order passed on the 30th of November, 1889, be decreed, and it be decided that Thakur Sarnam Singh or his heirs have no right in the 2½ biswas property in mauza Kasra, pargana Akraabad, which the defendants, party No. 2, have got attached as belonging to the heirs of Thakur Sarnam Singh."

One of the defendants, Salig Ram, in execution of a decree against the other two defendants attached certain property. The plaintiffs objected under s. 278 of the Code of Civil Procedure. Their objection was disallowed, and they brought this suit, making the judgment-debtors and the judgment-creditor in the execution proceedings, defendants in the suit. They paid on their plaint one Court-fee of Rs. 10. The first Court held that two declarations were [310] asked for, and, as a fee for only one had been paid, dismissed the suit. On appeal the District Judge held that two declarations were asked for in respect of each of which a fee was necessary, but he modified the decree of the first Court by changing it from a

* Second Appeal No. 515 of 1892, from a decree of W. Blennerhassett, Esq., District Judge of Aligarh, dated the 1st February, 1892, modifying a decree of Kuar Mohan Lal, Additional Subordinate Judge of Aligarh, dated the 15th May, 1891.

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BENCH.
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(F.B.)=
14 A.W.N.
(1894) 109.

decree dismissing the suit into an order rejecting the plaint. The plaintiffs have brought this appeal.

It appears to us that where a claimant whose objection under s. 278 of the Code of Civil Procedure has been disallowed brings a suit, and makes the judgment-creditor who was trying to execute the decree, the sole defendant to the suit, a claim for a declaration that the property under attachment was the plaintiff's property and not liable to attachment in execution of the decree of the defendant is a claim for only one declaration, and that for such purposes and in such a suit it is immaterial whether the claim is that the property is the plaintiff's and not liable to attachment, or that the property is the plaintiff's as against the defendant's right to attach and that the order in attachment should be cancelled. When the judgment-creditor is the sole defendant in the suit it appears to us that the claim worded in either of these ways must be regarded as a claim for only one declaration. Where, however, the person objecting under s. 278 of the Code brings his suit, and makes not only the execution-creditor in the attachment proceedings but also the judgment-debtor in those proceedings parties to the suit, and asks for a declaration of the plaintiff's title to the property under attachment as against the judgment-debtor and also asks for a declaration in denial of the judgment-creditor's right to bring that property to sale in execution of the judgment-creditor's decree, there there are two substantial declarations asked for.

One reason which has induced us to come to this latter conclusion is that in such a suit where the judgment-debtor is one defendant and the judgment-creditor is another defendant, the plaintiff might, as against the judgment-debtor, be entitled to a decree declaring his title to the property as against the judgment-debtor, and yet, by reason of some representation to the judgment-creditor, such plaintiff might be estopped from denying, as against [311] the judgment-creditor, that the property in question was the property of the judgment-debtor liable to be sold in execution of the decree of the judgment-creditor. In the last case the rights of the two separate sets of defendants would have to be adjudicated upon, and declarations, if the plaintiff's prayer was acceded to, given in denial of the right of each defendant, whereas in the first case the substantial and only question between the plaintiff and the judgment-creditor, sole defendant, would be the right or absence of right of that judgment-creditor to bring the property in dispute to sale in execution of his decree.

Where the execution-creditor, as the person against whom the adverse order in attachment proceedings was made, brings his suit he need only pay one 10 rupees fee if he confines himself to asking for a simple declaration that as between him and the objector he is entitled to bring the property in question to sale in execution of his decree. We do not suggest that such a declaration would in every case be sufficient without anything else. If, however, such execution-creditor, plaintiff, chooses to ask, for instance, not only for a decree that he is entitled to bring the property to sale, but also for a decree that a deed of transfer from the execution-debtor to the objector was void as against him, by reason of s. 53 of Act No. IV of 1882, he must pay for more than one declaration. A prayer, however, in such a suit for cancelment of an adverse order in the attachment proceedings and for a declaration that the plaintiff, execution-creditor, is entitled to bring the property in dispute to sale is, in our opinion, a claim for one and the same declaration; it is in fact only putting the same claim in a different way. That part of the judgment in *Balkaran Rai v. Gobind*

Nath Tiwari (1) beginning with the last paragraph of p. 160 of the report and including the succeeding paragraph gives an example of a case in which a prayer for a declaration of title and for a declaration that the property was not liable to attachment was a prayer for two distinct declarations and not for one.

[312] In the course of the argument we have been referred to several cases to which we shall shortly allude. In *Chunia v. Ram Dial* (2) it does not appear that there was a prayer of any description for two declarations. The next case is that of *Ram Prasad v. Sukh Dai* (3). In that case the learned Judges apparently overlooked the bearing of the fact, if not the fact itself, that the execution-creditor alone, and not the execution-creditor and judgment-debtor jointly, was defendant in the suit. It might be that, if in that case the execution-debtor and the execution-creditor had been both defendants, the ruling that two declarations were asked for would have been correct. We must dissent from the ruling in that case on a still more material point. It was held there that a claim for a declaration protecting the property from sale was a claim for consequential relief and as being such the plaintiff was liable to pay an *ad valorem* fee in respect thereof. In our opinion that prayer was for a declaration pure and simple and not for consequential relief. The relief against attachment and sale by the execution-creditor in that case would follow necessarily on the making of the decree in the suit establishing the plaintiff's title against the execution-creditor to the property in dispute. In the case of *Dildar Fatima v. Narain Das* (4) there were two defendants in the suit. The plaintiff was a person who had objected to the attachment and sale of the property, and it does not appear whether or not the defendants were simply the execution-creditors, or whether one was the execution-creditor and the other the judgment-debtor. Consequently on the facts, so far as they appear from the report, it is impossible to say that more than one declaration was not asked for. In *Gobind Nath Tiwari v. Gajraj Mati Taurayan* (5) a Bench of this Court on the report of the taxing officer that the relief claimed was that the property is the joint ancestral property of the plaintiff and not liable to attachment, apparently considered that one declaration only was asked for. It would be necessary to go into the record of that case, as it does not appear fully from the report, in order to come to a conclusion as to whether the [313] decision in that case was correct or not. We have also been referred to *Dayachand Nemchand v. Hemchand Dharamchand* (6) and *Vithal Krishna v. Balkrishna Janardan* (7). In these cases to some extent the learned Judges appear to have been influenced by considerations which since the passing of Act No. VI of 1892 could not arise in similar cases now.

In this case in our opinion there were two declarations sought for in respect of only one of which a fee was paid.

We consequently dismiss this appeal with costs.

Appeal dismissed.

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APRIL 21.

FULL
BENCH.

16 A. 308

(F.B.) =

14 A.W.N.

(1894) 109.

(1) 12 A. 129.

(5) 13 A. 389.

(2) 1 A. 360.

(6) 4 B. 515.

(3) 2 A. 720.

(7) 10 B. 610.

(4) 11 A. 365.

1894

JAN. 2.

APPEL-
LATE
CIVIL.

16 A. 313 = 14 A.W.N. (1894) 13.

APPELLATE CIVIL.

*Before Mr. Justice Tyrrell and Mr. Justice Blair.*MOTI RAM (*Defendant*) v. JETH MAL (*Plaintiff*).^{*}
[2nd January, 1894.]

16 A. 313 =

14 A.W.N.
(1894) 13.*Act IV of 1882 (Transfer of Property Act), s. 135 - Assignment of mortgagee's rights under his mortgage - Actionable claim.*

An assignment of a mortgagee's rights under a mortgage is not an assignment of an "actionable claim" within the meaning of s. 135 of Act No. IV of 1882.

[R., 16 A. 315 (317); 18 A. 265.]

THE plaintiff in this case sued the defendants Moti Ram and Piari Lal to recover a sum of Rs. 637 by sale of certain hypothecated property. The suit was based on the following allegations: that in 1887, the first defendant had executed a hypothecation bond in favour of the second defendant for Rs. 1,800, hypothecating a certain zamindari share as security for the advance: that the loan was to be repaid in five years with interest at 11 annas per cent. per mensem, and in default of payment of interest every six months the mortgagee might sue for the whole amount: that out of the Rs. 1,800 a sum of Rs. 1,350 was left with the mortgagee to be paid to the plaintiff, but it had not been paid; but a sum of Rs. 450 was paid by the mortgagee, first defendant, to the mortgagor, second defendant: that in 1891 the second defendant sold the said [314] bond to the plaintiff for Rs. 600 and the amount now due upon it was, with interest, Rs. 637-8-0.

The first defendant pleaded *inter alia* that the actual consideration paid by the plaintiff for the bond was only Rs. 150, and that the plaintiff was not entitled to recover any more. The second defendant admitted the sale of the bond to the plaintiff and stated that the consideration money was Rs. 600 which he had received.

The first Court (Munsif of Hathras) found that the actual consideration paid by the plaintiff was, with interest, Rs. 149-3-4, and, holding that section 135 of the Transfer of Property Act, 1882, precluded the plaintiff from recovering more than he had actually paid, gave him a decree for that amount.

The plaintiff appealed, urging that as s. 135 of the Transfer of Property Act, 1882, did not apply and evidence ought not to be admitted to show that the consideration was other than appeared on the face of sale-deed, the first Court should have decreed his claim in full.

The lower Appellate Court, without apparently considering whether section 135 of the Transfer of Property Act did or did not apply, found on the evidence that the actual sale consideration was Rs. 300, and allowing interest from the date of the bond gave the plaintiff a decree for Rs. 406-10-0.

The first defendant appealed to the High Court:—

Babu Rajendro Nath Mukerji, for the appellant.

Babu Jogindro Nath Chaudhri, for the respondent.

* Second Appeal No 533 of 1892, from a decree of Lala Baij Nath, Subordinate Judge of Aligarh, dated the 10th February 1892, modifying a decree of Babu Khetter Mohan Ghose, Munsif of Hathras, dated the 19th June 1891.

JUDGMENT.

TYRRELL AND BLAIR, JJ.—This appeal arises out of a suit brought by a mortgagee's assignee of his mortgage-estate. This assignee has obtained a decree for the entire sum found to be due to his assignor under the mortgage. It is contended in this appeal by the mortgagor that by the rule of s. 135 of the Transfer of Property Act, the assignee of the mortgagee can recover only a sum limited to the consideration which he paid for the assignment. In support of that contention we have been referred to a ruling of this Court in *Jani Begam v. Jahangir Khan* (1); but that ruling does [315] not bear on the question before us, inasmuch as in that case the subject-matter of assignment was unquestionably an actionable claim in the sense of Chapter VIII of the Transfer of Property Act, whereas the subject-matter of the assignment in the case before us is a mortgagee's interest in specific immoveable property. In our opinion such an interest in specific immoveable property is a legal estate vested and cannot properly be treated as an actionable claim. The assignor to the respondent here assigned a mortgage-estate. There is nothing on the record to show that in doing so he assigned a claim. Another case was cited from the Madras series of the Indian Law Reports, viz., *Nila Kanta v. Krishnasami* (2) wherein again the assignment dealt with a claim to arrears of maintenance, and not, as in the case before us, to an interest in immoveable estate. The appeal fails and is dismissed with costs. The objection filed under section 561 of the Code of Civil Procedure fails and is dismissed with costs.

Appeal dismissed.

16 A. 315 (F.B.) = 14 A.W.N. (1894) 100.

FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell,
Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji,
and Mr. Justice Burkitt.*

RANI AND ANOTHER (*Defendants*) v. AJUDHIA PRASAD (*Plaintiff*).
[24th April 1894.]

Act No. IV of 1882 (Transfer of Property Act), ss. 68, 135—Actionable claim—Rights of usufructuary mortgagee whose mortgagor has failed to put him in possession of the mortgaged property.

The transfer by a usufructuary mortgagee, whose mortgagor has failed to give him possession of the mortgaged property, of his rights as such mortgagee against his mortgagor is a transfer of an actionable claim within the meaning of s. 135 of Act No. IV of 1882.

[F., 20 A. 327 (334); R., 18 A. 265; 3 O.C. 215 (228).]

THIS was a reference to the Full Bench made by Edge, C. J., and Banerji, J. The facts of the case sufficiently appear from the judgment of the Court.

Pandit *Moti Lal*, for the appellants.

[316] Munshi *Gobind Prasad*, for the respondent.

The judgment of the Court (EDGE, C. J., TYRRELL, KNOX, BLAIR, BANERJI and BURKITT, JJ.) was delivered by EDGE, C.J.—

* Second Appeal No. 680 of 1892, from a decree of Rai Banwari Lal, Subordinate Judge of Shahjahanpur, dated the 13th April 1892, modifying a decree of Maulvi Fida Husain, Munsif of Pawayan, dated the 29th May 1891.

(1) 9 A. 476.

(2) 13 M. 225.

1894

APRIL 24.

FULL
BENCH.

16 A. 315

(F.B.)=

14 A.W.N.

(1894) 100.

JUDGMENT.

In the suit out of which this appeal has arisen the plaintiff sued to recover the amount which had been advanced on a usufructuary mortgage to the defendants by sale of the mortgaged property. The deed of mortgage contained a provision that until payment of the mortgage money the property should remain hypothecated. The mortgagor contracted that possession should be given to the mortgagee, and the contract of mortgage was that interest at the rate of Rs. 1-8 per cent. per mensem on the principal should be deducted from the usufruct and that the balance of the usufruct should be applied in liquidation of the principal and that the property should be redeemed by payment in six years. It was evidently contemplated that within six years the usufruct might not be sufficient to liquidate the principal and interest. The mortgage was made on the 21st of September 1879. The mortgagors failed to deliver possession to the mortgagee, and as a fact the mortgagee never obtained possession of the mortgaged property. The mortgagee assigned to the present plaintiff in 1891 all his interest under the mortgage for Rs. 400. The amount claimed in this suit was Rs. 844-2, which was composed of the sum of Rs. 300 principal and Rs. 637-8 interest, less a sum of Rs. 93-6 received on account of interest. The suit was brought on the 8th of May 1891, and on the 14th of May 1891, the defendants paid into Court Rs. 400 being the price paid by the present plaintiff to the original mortgagee for his interest. They further paid Rs. 3-9, interest from the date of purchase to the date of payment into Court, and Rs. 6-12, costs of the registration of the sale, and they asked the Court to apply s. 135 of Act No. IV of 1882.

The first Court, applying that section, decreed the suit for the amount paid into Court. On appeal by the plaintiff the lower appellate Court made a decree for the whole amount of the claim. The defendants have appealed here from that decree.

[317] In the course of the argument the following cases have been relied on by one side or the other:—*Jamal-ud-din Khan v. Baijnath* (1); *Kalka Prasad v. Chandan Singh* (2); *Moti Ram v. Jeth Mal* (3); *Rajani Kanth Nag Rai Chowdhuri v. Hari Mohan Guha* (4); *Lala Jugdeo Sahai v. Brij Behari Lal* (5); *Modun Mohun Dut v. Futtar-un-nissa* (6); *Rudra Perakash Misser v. Krishna Mohun Ghatuck* (7); *Subbammal v. Venkatarama* (8); *Rathnasami v. Subramanya* (9); *Singaracharlu v. Sivabai* (10); *Vilayat Ali v. Gullo* (11); and *Nilakanta v. Krishnasami* (12).

It appears to us that we must first look at s. 130 of Act No. IV of 1882 for the definition of an actionable claim. Under that definition, as we construe it, a claim is actionable which a civil Court recognizes as affording grounds for relief. Now there cannot be any doubt in this case that on the facts the original mortgagee had, when he sold to the present plaintiff his rights under the mortgage, a claim against the mortgagors which a civil Court would recognize as affording grounds for granting the relief contemplated by s. 68 of Act No. IV of 1882, plus the right to ask for the sale of the property in satisfaction of the debt as contracted for by the mortgagee. There cannot be any doubt that that actionable claim is the claim which the plaintiff, assignee, makes against the mortgagors-defendants in this suit, and consequently s. 135 of Act No. IV of 1882 applies. The actionable claim referred to in s. 135 must not only be the

(1) 10 A.W.N. (1890) 24.

(4) 12 O. 470.

(7) 14 C. 241.

(10) 11 M. 498.

(2) 10 A. 20.

(5) 12 C. 505.

(8) 10 M. 289.

(11) 5 A.W.N. (1885) 282.

(3) 16 A. 313.

(6) 13 O. 297.

(9) 11 M. 56.

(12) 13 M. 225.

actionable claim which was sold, but the actionable claim which was sought to be enforced against the person liable. To put a case which would not in our opinion come within s. 135, in order to make our meaning clear, we may say that where a person having an absolute title to immoveable property sells that immoveable property and the vendee is obliged to bring a suit against a person in possession, who was in possession at and before the time of the sale, that is not a case to which [318] s. 135 would apply, for this reason that what was sold was the right of ownership, and the claim which would be made by the vendee against a trespasser in an action of ejectment would not be a claim to obtain the title, but would be a claim to obtain possession from the defendants by ejectment on the title vested in the plaintiff. The claim to eject arose and existed on the title already vested in the assignee of that title, the plaintiff in the suit for ejectment to which we have referred by way of illustration.

We allow the appeal, and set aside the decree of the lower appellate Court, and restore the decree of the first Court with costs in this Court and the lower appellate Court.

Appcal decreed.

16 A. 318 (F.B.) = 14 A.W.N. (1894) 107.

FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell,
Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji and Mr. Justice
Burkitt.*

HIRA LAL AND OTHERS (*Plaintiffs*) v. GHASITU (*Defendant*).^{*}
[18th April, 1894.]

*Usufructuary mortgage—Lease of mortgaged premises by mortgagee to mortgagor—
Mortgagor holding over after expiry of lease—Rights of mortgagee—Act No. IV of
1882, s. 68.*

H. L. and others being mortgagees under a usufructuary mortgage executed in their favour by one G. (the usufruct being applicable in satisfaction of the interest of the debt) leased the mortgaged premises to the mortgagor. The lease was for a term certain with a covenant that the mortgagor might renew on compliance with certain conditions. The mortgagor on the expiry of the lease did not fulfil the conditions of the said covenant, but refused to give up possession of the mortgaged property to the mortgagees. *Held* that the mortgagees were entitled, either under cl. (b), (as held by Edge, C. J. and Tyrrell, J.) or under cl. (c), (as held by Knox, Banerji and Burkitt, JJ.) of s. 68 of Act No. IV of 1882 to a money decree for the amount due under the mortgage. *Shitab Dei v. Ajudhia Prasad* (1) and *Jhabbu Ram v. Girdhari Singh* (2) distinguished.

[F., 2 C.L.J. 493 ; Appr., 6 C.L.J. 143 = 11 C.W.N. 240 (N) ; 17 Ind. Cas. 362 = 21 P.L.R. 1913.]

THIS was a reference to the Full Bench made at the instance of Knox and Banerji, JJ. of the following question:—"Where a mortgagee, entitled under his mortgage-deed to possession of the mortgaged property, leases that property to his mortgagor as tenant [319] for a term of years, does the holding over of the mortgagor, tenant, against the consent of the

^{*} Second Appeal No. 847 of 1892, from a decree of Babu Sanwal Singh, Additional Subordinate Judge of Saharanpur, dated the 12th April 1892, reversing a decree of Munshi Bakhtawar Lal, Munsif of Shamli, dated the 21st December 1891.

(1) 7 A.W.N. (1887) 269.

(2) 6 A. 298.

1894
APRIL 24.
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FULL
BENCH.
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16 A. 318
(F.B.) =
14 A.W.N.
(1894) 100.

1894
APRIL 18.
—
FULL
BENCH.
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16 A. 318
(F.B.)=
14 A.W.N.
(1894) 107.

mortgagee after the lease determines amount to the "disturbance of possession" provided for in s. 68, cl. (c) of Act No. IV of 1882?

The facts out of which the reference arose were as follows:—

Under a deed of mortgage dated the 13th of January, 1886, the respondent, Ghasitu, mortgaged a zamindari share which he held in mauza Katra Bhan to the appellants. Under that deed the mortgagees were entitled to possession of the property until the mortgage money with interest had been repaid.

On the 14th of January 1886, the appellants granted a lease over the same property to the respondent for a term of five and a half years and received a counterpart of the lease from the respondent. The lease contained the following clause with reference to renewal:—"If in future I shall cultivate the land, I shall execute another qabuliat with the consent of the owners of the land." The respondent held over on the expiration of the lease, but did not execute a fresh qabuliat as provided for. He indeed tendered rent for some period subsequent to the expiry of the lease, but such tender was refused by the appellants. The appellants then sued for the recovery of their mortgage-money alleging that their possession had been disturbed.

The Court of first instance, for reasons which are here immaterial, decreed the plaintiffs' suit in part. The plaintiffs appealed and the Lower Appellate Court dismissed their appeal and suit *in toto*.

The plaintiffs then appealed to the High Court.

Mr. W. Wallach, for the appellants.

Munshi Madho Prasad, for the respondent.

JUDGMENT.

EDGE, C. J.—In the suit in which this reference to the Full Bench was made the plaintiffs were usufructuary mortgagees. The usufruct was to be applied in satisfaction of the interest due or to become due on the mortgage-debt. After the making of the mortgage the plaintiffs by deed let to the mortgagor, the defendant, respondent here, the mortgaged property for a specified term. The [320] lease contained a covenant by the mortgagor that on the expiration of the stipulated period he would quit the land without any objection. There was a provision in the lease that if the mortgagor desired to continue to cultivate after the expiration of the term he might do so after the execution of a *qabuliat* with the consent of the mortgagees. What has happened is this,—The term of the tenancy has expired: the defendant-mortgagor did not offer to execute a fresh *qabuliat*, nor does it appear that he was willing to execute one; but he refused to go out of possession and made a tender of a sum to the mortgagees as rent due by him after the termination of the period of tenancy. The plaintiffs have brought this suit for the recovery of the mortgage-money. They claimed to have that money recovered by the sale of the mortgaged property and other property of the mortgagor. If the plaintiffs are entitled to a decree, it appears to me that it is a decree for money which they are entitled to under s. 68 of Act No. IV of 1882, and that they are not entitled to a decree for sale under the Transfer of Property Act. If they are entitled to a decree for money no doubt they can enforce it in the ordinary way in which a decree for money can be enforced.

The plaintiffs contend that the case falls within cl. (b) or cl. (c) of s. 68 of Act No. IV of 1882. They say that on the determination of the period specified in the lease they were entitled to possession, and that the

defendant by holding over has deprived them by his own act of the security provided by the mortgage-deed. The security provided by the mortgage-deed was the possession of the mortgaged property for the purpose of the usufruct being applied by the mortgagees in satisfaction of the interest on the mortgage-money.

On behalf of the defendant it is contended that the tenancy created by the lease has not been determined, *i.e.*, that the mere effluxion of time did not determine the right of the defendant on the contract of lease to continue in possession, and that that right could only be determined by proceedings in ejectment under Act No. XII of 1881. In support of that contention a decision of [321] mine, in which my brother Tyrrell concurred, in *Shitab Dei v. Ajudhia Prasad* (1), has been relied upon. In that case what we were dealing with was the position of landlords and tenants under Act No. XII of 1881. For some reason the Legislature thought it advisable in cl. (c) of s. 39, to enact that a tenancy in respect of which a notice under s. 36 had been served should cease on the determination of a question which might be raised under s. 39 as to the right of the landlord to possession, or, where no such question had been raised under that section, on the expiration of thirty days from the notice to be served under s. 36. Possibly the Legislature so enacted in order to prevent landlords on the expiration of the contractual period of tenancy from taking forcible possession, and intended by the clause to which I have referred to compel a landlord who sought possession from his tenant on the expiration of the period of his tenancy to have recourse to Courts of Revenue. I am referring of course to agricultural tenancies. It appears to me that the provisions as to the ejectment of tenants on the expiration of the periods of their tenancy contained in Act No. XII of 1881, have no application to this case. The plaintiffs here are not suing for a decree of ejectment. They come into Court and say—

“By the contract of mortgage between us we were entitled, and are now entitled, to the possession of the mortgaged property, so as to get the full benefit of the usufruct in such way as we may desire.” They further say—“The lease which we granted to you, the defendant, was for a term certain. That term having expired, you were bound under the contract of mortgage not to deprive us or keep us out of possession of the mortgaged property.” It appears to me that it is no answer for the defendant to say—“You can proceed in a Court of Revenue and get me ejected and thus again obtain actual possession for yourselves of the mortgaged property.” In my opinion the moment that the lease determined by effluxion of time, the mortgagees, who were plaintiffs here, as against the mortgagor, who was defendant here, were entitled to have that contract carried out in its integrity by the defendant; and as the defendant has declined to put his mortgagees into possession on the [322] determination of the lease to him, I am of opinion that the plaintiffs are entitled to a money-decree for the mortgage-money. I do not think it necessary to consider whether this case comes within cl. (c) of s. 68 of Act No. IV of 1882, as it appears to me that it, at any rate, comes within cl. (b) of the section. There is another case to which we have been referred, namely, *Jhabbu Ram v. Girdhari Singh* (2). In that case apparently what was decided was that the act of dispossession by the assignee of the equity of redemption from a mortgagor did not bring the case within cl. (b) of s. 68, it being considered that in order to do so

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(F.B.)=

14 A.W.N.
(1894) 107.

(1) 7 A.W.N. (1887) 269.

(2) 6 A. 298.

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(F.B.) =
14 A.W.N.
(1894) 107.

it would have been necessary that cl. (b) should have been expressly made applicable to the wrongful act or default not only of the mortgagor but of any other person. With this answer, I would send the case back to the Bench which made the reference.

TYRRELL, J.—I entirely agree. By the contract of letting the defendant, the mortgagor, was disentitled as against the plaintiffs, the mortgagees, to retain possession after the expiry of the lease and the plaintiffs were entitled to regain possession, but the defendant chose to cling to the possession of the land, and in my opinion he thereby deprived and still deprives the plaintiffs of the possession of the mortgaged property; and it is irrelevant to this position that the plaintiffs might or might not have been able to recover possession, if indeed they wanted to recover possession, without resorting to a Court of Revenue for the formal ejectment of the defendant.

KNOX, J.—I would answer the question referred in the affirmative. The respondent was mortgagor and by the mortgage contract he bound himself to secure to the mortgagees full, complete and peaceable possession over the mortgaged property. It is true that by a subsidiary contract subsequent to the mortgage contract the mortgagor was permitted to enter upon the land mortgaged as a tenant of the mortgagees, but on an express stipulation that on the expiry of the period covenanted for in the lease he should no longer remain in possession, except with the consent of the mortgagees. His act in continuing to hold over without that consent obtained, [323] and in fact in opposition to the mortgagees, was a disturbance of that possession as contemplated in s. 68 (c) of Act No. IV of 1882.

BANERJI, J.—I also would answer the question referred to us in the affirmative. By the terms of the mortgage-deed the mortgagees were entitled to remain in possession until the repayment of the mortgage-money, and the mortgagor was liable, not only to deliver possession to the mortgagees but to secure to them quiet and undisturbed possession. For a breach of that obligation the remedy of the mortgagees was twofold. They could either sue the mortgagor to recover possession of the mortgaged property, or they could bring a suit to recover the mortgage-money. This last remedy is given to them by s. 68 of Act No. IV of 1882. Clause (c) of that section provides that in case of failure on the part of a mortgagor to deliver possession or to secure possession without disturbance the mortgagee is entitled to recover the mortgage-money. There is nothing in that clause to limit it to cases in which the mortgagor fails to secure undisturbed possession to the mortgagee in the first instance. With due deference to the learned Judges who decided the case of *Jhabbu Ram v. Girdhari Singh* (1), it seems to me that the construction there put upon that clause is somewhat too narrow. The clause, as it is worded, is wide enough to include every instance of failure by a mortgagor to secure a mortgagee in undisturbed possession at any time during the period for which the mortgagee was entitled to remain in possession. The subsequent dispossession of the mortgagee after possession was once delivered to him is in my judgment a failure on the part of the mortgagor to secure him in undisturbed possession. In this case the defendant, mortgagor, after the expiry of the term of his lease had no right to remain in possession, and, as has been shown by the learned Chief Justice such possession was not the less wrongful because the mortgagees could not eject him except

(1) 6 A. 298.

by proceedings in a Court of Revenue. Were we, therefore, to hold that he had no right to remain in possession and yet that his possession was equivalent to the possession of the mortgagees, we should be allowing the mort-[324]gagor to take advantage of his own wrongful conduct. Not having any right to remain in possession after the determination of his lease, he was bound, either to surrender the mortgaged property to the mortgagees, plaintiffs, or to pay them the mortgage-money. The continuance of the mortgagor in possession without right and against the consent of the mortgagees entitled the mortgagees to recover their mortgage-money under cl. (c) of s. 68 of Act No. IV of 1882.

BURKITT, J.—I also would answer this question in the affirmative. The effect of the subsidiary contract of lease between the parties was to postpone to a future date the actual delivery of possession to the mortgagees. When that date arrived the mortgagor failed to deliver possession, and, that being the case, I am of opinion that the mortgagor failed to secure possession to the mortgagees without disturbance within the meaning of cl. (c) of s. 68 of Act No. IV of 1882, and that therefore the mortgagees are entitled to sue for the mortgage-money. The position taken up by the defendant, mortgagor, is that, because the relationship of landlord and tenant had existed between him and his mortgagees during the currency of the lease, the mortgagees' only remedy against him after its expiration was by process of ejectment under the North-Western Provinces Rent Act of 1881. I am unable to accede to that contention. The mortgagor's right to retain possession of the land without the consent of the mortgagees, unless by executing a fresh *qabuliat* determined on the expiry of the five and a half years' term. Whether, therefore, the terms of the lease or of the contract of mortgage be looked at, the mortgagor lost all right to further possession on the expiry of that term and was bound to give up possession to his mortgagees. I do not at all see why the mortgagees should be compelled to have recourse to the Rent Court for the purpose of getting possession of land which they do not want, or why they should be refused the remedy which s. 68 of the Transfer of Property Act gives them.

16 A. 325 = 14 A.W.N. (1894) 98.

[325] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

MAHABIR KANDU AND ANOTHER (*Defendants*) v. SHEO PRASAD RAI AND OTHERS (*Plaintiffs*).^{*} [19th April, 1894.]

Jurisdiction, Civil and Revenue Courts — Suit by zamindars to eject as trespassers, persons who claimed to be mortgagors of an occupancy tenant, such tenant having died without heirs before suit.

S. P. and others, zamindars, sued M. K. and others as trespassers to eject them from certain land alleged to form part of the plaintiff's zamindari. The defendants pleaded that they were mortgagees, holding under a mortgage with possession given by one S. G. said to be a tenant at fixed rates of the land in suit. It was found that S. G. had been an occupancy tenant not at fixed rates, and that he had died without heirs prior to the institution of the suit. *Held* that the suit brought under the above circumstances was cognizable by a Civil Court. *Sakina Bibi v. Swarath Rai* (1) distinguished.

^{*} Second Appeal No. 231 of 1893, from a decree of Pandit Raj Nath, Additional Subordinate Judge of Ghazipur, dated the 29th November 1892, reversing a decree of Babu Girdhari Lal, Munsif of Ballia, dated the 9th August 1892.

(1) 15 A. 115,

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FULL
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16 A. 318

(F.B.) =

14 A.W.N.
(1894) 107.

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THE facts of this case sufficiently appear from the judgment of the Court.

Munshi Gobind Prasad, for the appellants.

Mr. Amir-ud-din, for the respondents.

JUDGMENT.

16 A. 325=
14 A.W.N.
(1894) 98.

EDGE, C. J. and BURKITT, J.—In the suit out of which the appeal has arisen the plaintiffs, who are zamindars, claimed a decree for possession as against the defendants. The title, such as it was, of the defendants was a mortgage with possession from one Sarsuti Gir. It was alleged by the plaintiffs in their plaint, and was not traversed by the defendants, that Sarsuti Gir died without leaving any lawful heir in the month of Baisakh, 1297 F. That was at a date prior to the institution of this suit. The suit was brought in a Civil Court. The defendants, appellants here, pleaded that Sarsuti Gir was a tenant at fixed rates of the lands in question and that he had granted to them a mortgage with possession. The first Court made a conditional decree. The Lower Appellate Court decreed the claim in full for possession. The defendants-mortgagees have [326] appealed. The lower Appellate Court found that Sarsuti Gir was not a tenant at fixed rates but that he was an occupancy tenant other than a tenant at fixed rates.

Mr. Gobind Prasad for the appellants has contended that this suit did not lie in a Civil Court. He relied upon the decision of this Court in *Sakina Bibi v. Swarath Rai* (1). The case to which reference has been made is not in point. That was a suit brought by the zamindars against one Kadma Kuar who admittedly was a tenant of some kind of theirs, and was living at the commencement of the suit. The other defendant in that suit was a person claiming as donee of a holding from Musammatt Kadma Kuar. The plaintiffs there claimed to have the deed of gift cancelled on the ground that Kadma Kuar was incapable of alienating more than her own life interest in the holding. The rights of the parties to that suit had to be determined as they were at the date when the suit was brought, and no decree could have been given in favour of the plaintiffs in that suit without a determination by the Court as to the status of Musammatt Kadma Kuar as a tenant of the plaintiffs. If she was a tenant at fixed rates, s. 9 of Act No. XII of 1881 did not prohibit a transfer by donation; if, on the other hand, she was an occupancy tenant to whom the second paragraph of s. 9 of Act No. XII of 1881 applied, the transfer by donation which was sought to be avoided was void, the transferee not being in that case a person to whom the transfer could be made under the Act. The case therefore involved the decision of the first and vital point, namely, what was the status as a tenant of Musammatt Kadma Kuar, defendant, in the suit at the date of the donation or at the date when the suit was brought. It was not quite clear for what good purpose that suit was brought, unless for the purpose of obtaining, if possible, from a Civil Court a determination as to the status of Musammatt Kadma Kuar as a tenant. We say this because if, as was the case for the plaintiffs in that suit, Kadma Kuar was an occupancy tenant to whom the second paragraph of s. 9 of Act No. XII of 1881, applied, there was no necessity for the plaintiffs at any time to [327] bring a suit for the cancellation of a deed of gift made by her in favour of a person to whom under the section she could not legally execute a transfer of the occupancy right. On her death without heirs, or at such

(1) 15 A. 115.

time as her tenancy might otherwise determine, the plaintiffs in that case might have brought their suit in the Civil Court to eject her donee or any other trespasser whom they might find in possession, without asking for the cancellation of a deed of gift which was not binding on them, they having been no parties to it and not claiming under the person who executed it. The decision in that case must be read as having reference to the suit which was then before this Court, and all that this Court decided in the appeal in that suit was that a Civil Court had no jurisdiction to entertain that suit for the reasons stated in its judgment.

The case is otherwise here. In this case Sarsuti Gir, through whom the defendants claim, had died without heirs before the commencement of the suit. Consequently s. 95, cl. (a) of Act No. XII of 1881 cannot apply here, as there was no tenant the nature or class of whose tenancy a Court of Revenue could determine. The tenant being dead before suit, this suit for ejectment is one which, not being between a landlord and a tenant, could be brought in a Civil Court. As the jurisdiction of the Civil Court is not excluded in a suit between a zamindar and a stranger to him in contract, a trespasser, the Civil Court has jurisdiction under s. 11 of the Code of Civil Procedure to hear and determine the suit. It so happens that for the purposes of determining the suit between the zamindar and the person said to be a trespasser, it is necessary for the Civil Court to determine whether the deceased person through whom the defendants claim title was or was not a person who could create the title under which the defendants claim. That is to a certain extent an incidental question in the suit, and, there being no means by which the Court of Revenue can now be asked to decide what was the status as a tenant of the deceased man Sarsuti Gir, it follows that the Civil Court must decide that question, its decision being necessary to the determination of the question whether the defendants are or are not trespassers.

[328] So as to avoid misconception we may state that in our opinion where a zamindar seeks to eject a transferee of his tenant at fixed rates, such transferee having become a tenant of the zamindar by a lawful transfer, the suit for ejectment could be maintainable only in a Court of Revenue. Where, on the other hand, a zamindar brings a suit for ejectment against a person whose title, if any, is that of a transferee from a tenant with a right of occupancy, other than a tenant at fixed rates, and where such transfer is in contravention of the second and third paragraphs of s. 9 of Act No. XII of 1881, and the tenancy of the transferor has not been determined by proceedings in a Court of Revenue the decision in *Gulzar Singh v. Kalyan Chand* (1) would apply. But where the transferee of an occupancy tenant has not become a tenant of the zamindar, and the transfer is not one permissible under s. 9 of Act No. XII of 1881, and the occupancy tenancy has been determined by the death of the occupancy tenant without heirs or by proceedings in a Court of Revenue, the suit for ejectment, it appears to us, would lie in a Civil Court. The facts of the present case bring it within the last of these three examples, as Sarsuti Gir being an occupancy tenant, but not at fixed rates, and having died without heirs prior to the suit, the occupancy tenancy determined on his death.

We dismiss this appeal with costs.

Appeal dismissed.

(1) 15 A. 399.

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(1894) 99.

16 A. 328 = 14 A.W.N. (1894) 99.

APPELLATE CIVIL.

Before Mr. Justice Banerji.

NAUNIHAL BHAGAT (*Plaintiff*) v. RAMESHAR BHAGAT AND ANOTHER
(*Defendants*).^{*} [19th April, 1894.]

Landlord and tenant—Additions made by tenant to property of landlord without permission—Landlord not bound to interfere or to compensate tenant—Estoppel by conduct.

Where the lessee of a dwelling-house being fully aware of his position as such lessee made certain additions to the leased premises without the permission of his lessor, but apparently with his knowledge and without any interference on his [329] part, and, subsequently, when the lessor sued to eject him for non-payment of rent, claimed compensation for such additions: *Held* that the lessor was entitled to recover possession from the lessee without paying him compensation. *Ramsden v. Dyson* (1) and *Willmott v. Barber* (2) referred to.

[R., 6 A.L.J. 57 (58) = A.W.N. (1908) 282; A.W.N. (1906) 174; P.L.R. (1900) p. 306.]

THE facts of this case sufficiently appear from the judgment of BANERJI, J.

Munsbi Madho Prasad, for the appellant.

Mr. H. C. Niblett, for the respondents.

JUDGMENT.

BANERJI, J.—This was an action to eject the defendants-respondents from a house of which they were alleged to be the tenants of the plaintiff-appellant, under a lease dated the 8th of August, 1878. The plaintiff stated that he had purchased the house from the grandfather of the defendants; that the defendants had rented it from him and had all along paid the stipulated rent, and that they had recently stopped payment and refused to vacate the house.

It has been found that each of the two defendants is occupying a separate portion of the house, which consists of two parts. It is with the portion in the occupation of Dwarka Prasad, defendant, that this appeal is concerned.

Dwarka Prasad denied that the plaintiff was the purchaser of that portion of the house. He also denied that he had rented it from the plaintiff, and he asserted that it was his own property and that he had re-built it at considerable expense.

The Lower Appellate Court has found in favour of the plaintiff upon the question of ownership and tenancy, but it has held that about three years ago Dwarka Prasad re-built the house and that the plaintiff looked on and did not raise any objections. The learned Judge was of opinion that the plaintiff's silence amounted to acquiescence and was equivalent to an authority to Dwarka Prasad to build on the plaintiff's land, and he has passed a decree in the following terms:—"It shall be at the plaintiff's option (a) to receive Rs. 50, the original price of the house from Dwarka Prasad; Dwarka Prasad's failing to pay the same within two [330] months after demand to convert this order into a decree for plaintiff for possession on payment of Rs. 200 compensation; or (b) to pay

^{*} Second Appeal No. 954 of 1893, from a decree of L. M. Thornton, Esq., Officiating District Judge of Jaunpur, dated the 9th June 1893, modifying a decree of Rai Anant Ram, Subordinate Judge of Jaunpur, dated the 19th December 1892.

(1) L.R. 1 Eng. & Ir. 129.

(2) L. R. 1880, 15 Ch. D. 96.

to Dwarka Prasad Rs. 350 compensation within four months; on proof of such payment this order to have effect as a decree for plaintiff for possession.

The correctness of this decree has been questioned in this appeal on various grounds to which it is not necessary to refer.

The position of Dwarka Prasad upon the findings of the Court below is this:—He took from the plaintiff for purposes of residence a house belonging to the plaintiff and agreed to pay rent for it. He paid him rent for a number of years till 1890, when he stopped payment and re-built the house without obtaining the plaintiff's permission to do so. The plaintiff, however, looked on and raised no objection. The question is whether under such circumstances Dwarka Prasad, whose position is only that of a lessee of the house, is entitled to obtain compensation from the plaintiff for unauthorized improvements made by him.

Ordinarily a lessee must not, according to the provisions of cl. (p), s. 108 of Act No. IV of 1882, "without the lessor's consent, erect on the property any permanent structure except for agricultural purposes." Dwarka Prasad's lease was for dwelling purposes and not for agricultural purposes. He was therefore not competent to place any permanent structure on the site of the house of which he was the lessee or to alter or re-build the house without the consent of his lessor, the plaintiff. In re-building it without obtaining the plaintiff's consent, he acted on his own responsibility and at his own risk. Was he relieved of that risk by the fact that the plaintiff did not raise any objection to his re-building the house but silently stood by? In other words, is the plaintiff stopped by his conduct from getting back his house with the improvements and additions made to it by his tenant without making compensation to him for these improvements and additions?

In the case of *Ramsden v. Dyson* (1) it was held that "if a tenant builds on his landlord's land he does not, in the absence [331] of special circumstances, acquire any right to prevent the landlord from taking possession of the land and buildings when the tenancy has determined." And Lord Wensleydale observed (at p. 168) — "If a stranger build knowingly upon my land there is no principle of equity which prevents me from insisting on having back my land with all the additional value which the occupier has imprudently added to it. If a tenant of mine does the same thing he cannot insist on refusing to give up the estate at the end of his term. It was his own folly to build," &c. In that case the doctrine of equitable acquiescence was considered, and it was held not to apply to the case of a tenant who, with a knowledge of the extent of his own rights, does an act which is at variance with and in excess of those rights. The principle upon which the doctrine of acquiescence is based is that a man who acts in such a way as would make it fraudulent for him to set up his legal rights will be deprived of those rights. But where his acquiescence or other conduct does not amount to a fraud actual or constructive, he cannot be deprived of his legal rights. The elements or requisites necessary to constitute fraud of that description were laid down by Fry, J., in *Willmott v. Barber* (2) in the following terms:—"In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily on the defendant's land) on the faith of his mistaken belief. Thirdly,

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(1) L. R. 1 Eng. & Ir. 129.

(2) L. R. 1880, 15 Ch. D. 96.

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the defendant, the possessor of the legal right, must know of the existence of his own right, which is inconsistent with the right claimed by the plaintiff. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done either directly or by abstaining from asserting his legal right. Where all these elements exist there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, [332] but in my judgment nothing short of this will do," (pp. 105 and 106). Upon the authority of that case it must be held that mere silence or even acquiescence on the part of a person possessing a legal right will not deprive him of that right unless all the above elements of fraud exist. Applying the principles laid down in the cases referred to above to the circumstances of this case, since Dwarka Prasad was not ignorant of his own rights, and did not spend money upon the plaintiff's property under a mistaken belief as to his own rights, he cannot defeat the legal right of the plaintiff. And there was no obligation in the plaintiff, who knew that Dwarka Prasad was building on his land at his own risk, to assert his own right. His silence therefore could not deprive him of his right to take back his property from his tenant with all the improvements imprudently made by the latter, and he is not liable to make compensation. In this view the decree of the Lower Appellate Court is erroneous. The case of *Uda Begam v. Imam-ud-din* (1) did not lay down anything inconsistent with that I have said above. It is not a case which is on all fours with this case, inasmuch as the buildings complained of in it were erected by a stranger and not by a tenant. The case, *Yeshwada Bai v. Ramachandra Tuka Rom* (2) relied upon by the learned pleader for the respondents is also distinguishable. In that case the buildings were in existence for a period of 20 years, and during that time the landlord had received rent from the tenant. The appeal is accordingly decreed and, the decree of the Lower Appellate Court being set aside, the appellant's claim is decreed with costs in all Courts.

Appeal decreed.

16 A. 333 (F.B.) = 14 A.W.N. (1894) 118.

[333] FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell,
Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji and Mr. Justice
Burkitt.*

ROHAN AND ANOTHER (*Defendants*) v. JWALA PRASAD (*Plaintiff*).^{*}
[24th April, 1894.]

Act XII of 1881, ss. 93 (b), 94.—Suit for a settlement of accounts—Suit for a share in the profits of a mahal—Limitation.

With reference to the periods of limitation prescribed by s. 94 of Act No. XII of 1881, a suit for a share of the profits of a *mahal* does not become a suit for a

^{*} Second Appeal No. 622 of 1892, from a decree of H. F. D. Pennington, Esq., District Judge of Shahjahanpur, dated the 17th March 1892, modifying a decree of Pandit Sri Lal, Assistant Collector of Shahjahanpur, dated the 30th September 1891.

(1) 1 A. 82.

(2) 18 B. 66.

settlement of accounts, because in order that a Court may give the plaintiff a decree it is necessary for the Court to settle disputed items of credit and debit: but where the main object of the suit is to obtain a settlement of accounts between the plaintiff, recorded co-sharer, and the lambardar, or between such plaintiff and one or more or all of the co-sharers in the village, although the ulterior object of obtaining such statement of accounts may be that the plaintiff may obtain a decree for a share, if any, of the profits due to him, then the suit must be regarded as a suit for a settlement of accounts to which a period of one year's limitation applies.

[F., 19 A. 244 = 17 A.W.N. (1897) 43; R., 22 A. 333; 1 O.C. 215 (218); D., 7 O.C. 84.]

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IN this case the plaintiff brought his suit on the 31st of July 1891, in the Court of an Assistant Collector of the first class for the recovery of a share in the profits of a certain village. The defendants were four other co-sharers in the same village. The terms of the plaint were as follows:—
“Claim to recover Rs. 375-2-9 principal and Rs. 120-7-0 interest, in all Rs. 495-9-9 on account of profits for the years 1295 and 1296 Fasli, on the basis of a *jama kharch* (account) prepared by himself under s. 93, cl. (b), Act XII of 1881, by means of adjustment of account. The cause of action accrued on the 1st of August 1889 and 1890.

“The statement of the claim is that in 1295 Fasli, the plaintiff was a mortgagee, zamindar and shareholder of half of 2 biswas, 8 biswansis, 6 kachwansis, 13½ tanwansis out of the *patti* of 6 biswas, 1 biswansi in mauza Chunura Niara, mahal Sharki, and the defendants were the shareholders of the other half. In 1296 Fasli, the plaintiff was the shareholder of a one-fourth share and the defendants were the shareholders of a three-fourths share.

[334] “In the years in question the plaintiff realized only Rs. 77-4-3 from the tenants, and the rest was realized by the defendants. As the parties pay the expenses and the Government revenue from their own pocket, the claim has been brought without deducting the expenses. Even in spite of the demands the defendants did not pay the profit of the plaintiff's share. He was therefore obliged to bring the suit. The plaintiff prays that a decree for the amount claimed together with costs of the Court and further interest may be passed against the defendants. As the defendants have realized the entire rent from the tenants and have not, artfully, caused it to be entered in the patwari's *siaha*, the suit has been brought according to the gross rental.”

(Then followed a statement of the account in detail).

The defendants filed a written statement in which they did not deny the plaintiff's title, but took exception to the accounts as stated by him.

The Court of first instance on the facts found the plaintiff entitled to a sum of Rs. 345-8-2 and gave him a decree for that amount with costs.

The defendants appealed to the District Judge with the result that the amount of the plaintiff's decree was somewhat reduced.

The defendants thereupon appealed to the High Court and there for the first time raised the plea that the suit was barred by limitation. On the appeal coming on for hearing before the Chief Justice and Banerji, J., it was by their order referred to the Full Bench of the whole Court.

Pandit *Sundar Lal*, for the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondent.

The judgment of the Court (Edge, C.J., Tyrrell, Knox, Blair, Banerji and Burkitt, JJ.) was delivered by Edge, C.J.:—

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JUDGMENT.

APRIL 24.

FULL
BENCH.

16 A. 333

(F.B.)=

14 A.W.N.

(1894) 118.

In the suit out of which this appeal has arisen the plaintiff sued the lambardar and certain co-sharers for his share of the profits of a *mahal* for two years, *viz.*, 1295 and 1296 F. The appeal before [335] us is an appeal by two of the defendants, the lambardar and one Kesri, from the decree of the lower Appellate Court.

The first point which we have to consider is what was the period of limitation which applied to this suit. In order to determine that, we have to ascertain, as far as we can, whether this was a suit falling within the first paragraph of s. 94 of Act No. XII of 1881, or whether it was a suit falling within the third paragraph of that section. It is contended on behalf of the appellant that the suit was one for a settlement of accounts, and consequently that s. 94, paragraph 3, applied. On the other hand, it is contended that the suit was one for a share of the profits of a *mahal*. The difficulty which we have had arose from the peculiar wording of clause (b) of s. 93 of Act No. XII of 1881. If the Legislature, instead of using the term "suits for a settlement of accounts" had used the term which lawyers and others are familiar with, *viz.*, "suits for an account," we should have had no difficulty. It is obvious to our minds that all suits under Act No. XII of 1881 in which it may be necessary for the Court to settle disputed items of account cannot have been intended to be included in the description "suits for a settlement of accounts," to which the one year's limitation applies. The suits to which the three years' limitation applies, and which are referred to in the first paragraph of s. 94 of Act No. XII of 1881, are suits in the great majority of which almost necessarily disputes would arise as to items of account, and in which the Court in order to give a decree would find it necessary to practically settle accounts between the parties. The occasion would be a rare one when, for instance, in a suit for a share of the profits of a *mahal*; or in a suit in respect of village expenses, there would not be disputes as to the correctness of the accounts on the one side or on the other. It could not have been the intention of the Legislature that the first paragraph of s. 94 should apply only to the cases of suits therein mentioned, in which an account stated had been agreed upon, and there was no dispute as to any item of account. In our opinion a suit for a share of the profits of a *mahal* does not become a suit for a settlement of accounts, because, in [336] order that a Court may give the plaintiff a decree, it is necessary for the Court to settle disputed items of credit or debit; but where the main object of the suit is to obtain a settlement of accounts between the plaintiff, recorded co-sharer, and the lambardar, or between such plaintiff and one or more or all of the co-sharers in the village, although the ulterior object of obtaining such statement of accounts may be that the plaintiff may obtain a decree for a share, if any, of the profits due to him, then the suit must be regarded as a suit for a settlement of accounts to which a period of one year's limitation applies. This suit, in our opinion, falls within the first category, and is for the purpose of limitation to be regarded as a suit for a share of the profits of a *mahal*. Consequently the suit being brought within three years is not barred by limitation.

The cases which have been cited to us during the argument all turned upon the peculiar circumstances of each individual case.

The District Judge gave the plaintiff a decree on the gross rental, after making some allowance for the costs of collection (*haq lambardari*). The plaintiff is entitled only to his share of the nett balance divisible after

allowing for the payment of Government revenue and all other legitimate expenses, getting credit of course for the quota of Government revenue, if any, paid by him. It appears, that, although it was the duty of the lambardar to collect the rents in the village, some of the co-sharers on their own behalf made collections in the years in question. We also infer, although we do not find it as a fact, that the full *Jamabandi* rent was not collected, either by the lambardar or the co-sharers, in the years to which this suit relates. The District Judge will have to determine whether on the evidence in the case it was owing to the gross negligence or misconduct of the lambardar that the uncollected portion of the *Jamabandi* rents, if any, was not collected. If he finds that a case under s. 209 of Act No. XII of 1881 is made out in respect of the uncollected rents, which, owing to his own gross negligence or misconduct the lambardar omitted to collect, he will take such uncollected rents into account. He will also, in ascertaining the share, if any, due to the plaintiff, take into account [337] the rents collected for the years in question whether collected by the defendant lambardar or by the co-sharers.

The District Judge obviously intended to dismiss the suit as against the appellant Kesri, but, probably through an oversight, the suit on the contrary was decreed in appeal against Kesri. Kesri claims in appeal here that the suit against him should be dismissed. Mr. *Becha Ram*, who represented the plaintiff-respondent here, expressed a desire that the suit as against Kesri should be dismissed. Accordingly, we allow the appeal so far as Kesri is concerned, and dismiss the suit against him with costs.

We refer under s. 566 of the Code of Civil Procedure to the Court of the District Judge the issue—What, if any, was the amount due to the plaintiff as his share of the profits of the years in question? Ten days will be allowed for filing objections on the return.

Cause remanded.

16 A. 337 (F.B.)=14 A.W.N. (1894) 110.

FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell,
Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji
and Mr. Justice Burkitt.*

MADHO BHARTHI (*Plaintiff*) v. BARTI SINGH AND OTHERS
(*Defendants*).^{*} [24th April, 1894.]

Act No. XII of 1881, s. 7—*Usufructuary mortgage of zamindari including sir—Losing or parting with proprietary right in a mahal—Ex-proprietary tenant.*

A zamindar who makes a usufructuary mortgage of his zamindari including his sir land does not so "lose or part with his proprietary rights" within the meaning of s. 7 of Act No. XII of 1881, as to become an ex-proprietary tenant of his sir land. *Bhagwan Singh v. Murli Singh* (1) and *Indar San v. Naubat Singh*, (2) referred to, and the judgments of the minority of the Court, in the latter case approved. *Khiali Ram v. Nathu Lal* (3) and *Jarao Bibi v. Kifayat Ali Khan* (4) also referred to.

[F., 31 A. 368 (370)=6 A.L.J. 437 (439)=2 Ind. Cas. 462 (463); 16 Ind. Cas. 44; Not Appl., 7 A.L.J. 370 (374)=5 Ind. Cas. 503 (504).]

^{*} Second Appeal No. 966 of 1892, from a decree of Pandit Bansidhar, Subordinate Judge of Ghazipur, dated the 25th July 1892, confirming a decree of Chandi Prasad, Munsif of Saidpur, dated the 31st March 1892.

(1) 1 A. 459. (2) 7 A. 553. (3) 15 A. 219. (4) 13 A.W.N. (1893) 177.

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14 A.W.N.
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THIS was a suit to obtain possession under a usufructuary mortgage of certain *sir* land of the mortgagors which was appurtenant to the zamindari shares mortgaged to the plaintiff. The defendants were the mortgagors and certain subsequent mortgagees from them.

[338] The facts of the case are thus stated in the judgment of the lower Appellate Court :—" On the 8th of June 1889, the defendants, second party, mortgaged a 1 anna 1 pie share out of their property to the plaintiff-appellant under a *zar-i-peshgi* lease. The specification of the mortgaged share was given in the document in the following way :—A 1 anna 1 pie share, which comprises certain *bikhas* of *sir* land.

" In the village papers some of the *sir* land is entered in the names of the mortgagors alone and some in their names jointly with their sharers and some in the names of their sharers alone. The plaintiff-appellant fixed the amount of the share of the defendants, mortgagors, in the *sir* land according to account, and after deducting out of it the unmortgaged property proportionately, he brought a claim for 16 *bighas*, 18 *biswas*, 9 *dhurs* of *sir* land against the mortgagors and their sharers and other persons on the allegation that when the plaintiff wanted to enter into possession on the 1st of July 1889, they offered obstruction to the plaintiff's possession. The said persons are the defendants, 1st party, who state that formerly they were in possession of the disputed land, partly by reason of the subsequent mortgage under the plaintiff's document, partly by reason of assignment and partly by reason of their possession prior to the document of the plaintiff.

" They further state that the plaintiff did not obtain possession of any land under his document and that all the lands in dispute were also not mortgaged to him. The aforesaid defendants further contend that the disputed lands are the *sir* lands of the defendants, second party, *i.e.*, the mortgagors to the plaintiff, in respect to which they acquired right to possession as an occupancy ex-proprietary tenant from the date of mortgage, and that therefore the plaintiff is not legally entitled to possession of the disputed lands.

" The defendants, second party, admitted the correctness of the plaintiff's claim. The first Court gave the plaintiff a decree for one-half of No. 429 and one-third of Nos. 334, 338 and 678 for the reason that the answering defendants took no objection in respect thereof, and dismissed the claim in respect of the remaining lands [339] on the ground that they had become occupancy holdings which the plaintiffs could not take possession of according to law, and objection had also been taken in respect thereof."

The Lower Appellate Court went on to dismiss the appeal and confirm the decree of the first Court on the ground indicated above, namely, that the *sir* land claimed had become an ex-proprietary holding and therefore possession of it could not be given to the plaintiff-mortgagee.

The plaintiff thereupon appealed to the High Court, and the appeal coming on for hearing before Edge, C.J., and Burkitt, J., the following question was referred to the Full Bench of the whole Court :—" Does a zamindar by granting a usufructuary mortgage with possession of all or part of his interest in a *mahal* thereby lose or part with his proprietary rights in the *mahal* within the meaning of s. 7 of Act No. XII of 1881 ?"

Munshi *Jwala Prasad*, for the appellant.

Pandit *Sundar Lal*, for the respondents.

The judgment of the Court (Edge, C.J., Tyrrell, Knox, Blair, Banerji and Burkitt, JJ.) was delivered by Edge, C.J. :—

JUDGMENT.

The plaintiff in the suit out of which this second appeal has arisen brought his suit for possession of certain *sir* land for damages. The damages were claimed in respect of the plaintiff being deprived of possession of the *sir* land. The plaintiff was a usufructuary mortgagee of the zamindari of the defendants other than Barti Singh, and in that usufructuary mortgage was included certain *sir* land attached to or part of the zamindari interest. The defendant Barti Singh was a subsequent mortgagee. The lower Appellate Court dismissed the suit on the ground that the claim was in contravention of s. 7 of Act No. XII of 1881. The plaintiff has brought this appeal.

The first case to which we have been referred is that of *Bhaqwan Singh v. Murli Singh* (1). In that case the zamindar granted a mortgage to the plaintiff, with possession of 32 bighas, 9 biswas [340] of land which were in the cultivation of the zamindars as proprietors. The zamindari interest in that case was represented by the lands mortgaged. The question there arose under s. 7 of Act No. XVIII of 1873, and this Court (Pearson and Spankie, JJ.) held that the section contemplated something more than a mere temporary transfer of the proprietary rights, and they also held that by the mortgage in that case the mortgagors had not lost or parted with their proprietary rights within the meaning of Act No. XVIII of 1873. The section of the Act of 1873 is similar to s. 7 of Act No. XII of 1881, with this exception that it did not contain what now forms the last paragraph of s. 7 of Act No. XII of 1881.

The next case to which we have been referred is *Indar Sen v. Naubat Singh* (2). That was a case which went before the Full Bench, and in that case the mortgage of the zamindari was a usufructuary mortgage which included the land occupied for the purpose of cultivation as the mortgagor's *sir*. Three of the learned Judges in that case held that on the granting of such a mortgage with possession, s. 7 of Act No. XII of 1881 applied, and the mortgagors became ex-proprietary tenants of the *sir* included in the mortgage. Two of the learned Judges were of a contrary opinion, holding that the mortgagors had not lost or parted with their proprietary rights by the granting of a usufructuary mortgage with possession; and consequently they held that s. 7 of Act XII of 1881 did not apply. Two of the learned Judges who held that s. 7 of Act No. XII of 1881 applied in that case, apparently considered that a usufructuary mortgage with possession was a parting with the proprietary rights. The third learned Judge who applied s. 7 in that case was of opinion that the granting of a usufructuary mortgage with possession was not a transfer of the proprietary rights of the mortgagor, although in his opinion it was a parting with some of the incidents of the proprietorship. He, however, agreed in applying s. 7 of Act No. XII of 1881.

In our opinion the two Judges constituting the minority of the Court in that Full Bench case rightly held that the granting of a usufructuary mortgage with possession was not a parting [341] with the proprietary rights of the mortgagor, and that s. 7 did not apply. It is obvious to our minds that s. 7 does not apply unless the proprietary rights are lost or parted with, and does not apply if some of the incidents only of proprietorship are dealt with. For instance, we think it could not be suggested that a zamindar by granting a lease of his zamindari

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(1) 1 A. 459.

(2) 7 A. 553.

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parted with his proprietary rights in the zamindari. It is those proprietary rights which would entitle the zamindar to obtain the relief under s. 93 (b) of Act No. XII of 1881, which would enable him to obtain ejectment on the determination of the tenancy or for non-payment of the rent reserved. By granting a lease he certainly would part, subject to his legal remedies for re-entry, which his right to the immediate physical possession of the zamindari, and that is an incident of the rights of a proprietor; but it is equally an incident of the rights of a proprietor that he should have the power to grant a lease of the subject of the proprietorship. What must have been meant by s. 7 of Act No. XII of 1881, construing the language which is used in the section, was that the proprietary rights, and not merely some of the incidents of proprietorship, should be lost or parted with before the ex-proprietary tenancy should arise. The last paragraph of s. 7 confirms the only construction which we think can be placed on the first paragraph. The words "the share which previously belonged to such ex-proprietary tenant" necessarily imply that the ex-proprietary tenant had no longer any proprietary right in the share.

It seemed to be inferred by one of the Judges in the Full Bench case to which we have referred, that when a mortgagor delivered possession to the mortgagee under the mortgage, the effect of that coupled with s. 58 of Act No. IV of 1882 was to divest the mortgagor of all proprietary rights and to make the mortgagee, for the time being at any rate, the exclusive proprietor. That proposition might be correct in the case of an English mortgage, *i.e.*, a mortgage falling within cl. (c) of s. 58 of Act No. IV of 1882; but in our opinion it certainly cannot be correct in the case of a usufructuary mortgage falling within cl. (d) of s. 58.

[342] The view which we take as above expressed is consistent with the principle of the ruling of the Full Bench of this Court in *Khiali Ram v. Nathu Lal* (1), and that principle was subsequently given effect to by a Division Bench of this Court as to a usufructuary mortgage in *Jarao Bibi v. Kifayat Ali Khan* (2).

In our opinion the plaintiff under the usufructuary mortgage was entitled to the possession of the *sir* included in the mortgage which was in the occupation and cultivation of the defendants-mortgagors, and that the defendant Barti Singh, subsequent mortgagee, has, as against the plaintiff, no title to the possession of that *sir*.

By consent it is agreed that this Full Bench can deal with the whole appeal instead of sending it back to the Bench which made the reference. Accordingly, we set aside the decree of the lower Appellate Court and remand the case under s. 562 of the Code of Civil Procedure to the lower Appellate Court. Costs here and hitherto will abide the result.

Cause remanded.

(1) 15 A. 219.

(2) 13 A.W.N. (1893) 177.

6 A. 342=14 A.W.N. (1894) 112.

APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.*MADHO SINGH (*Plaintiff*) v. KASHI SINGH AND OTHERS (*Defendants*).^{*}
[27th April, 1894.]*Civil Procedure Code, s. 584 (c)—Substantial error or defect in procedure—Court proceeding to hear an appeal without waiting for return to commission issued at the request of a party.*1894
APRIL 27.
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APPEL-
LATE
CIVIL.
—16 A. 342=
14 A.W.N.
(1894) 112.

The intention of the Code of Civil Procedure is that when a Court deems it necessary on the application of a party or otherwise that a commission for local investigation should be issued, the return to that commission should be before the Court before it should proceed to hear and determine the case.

[R., 17 A. 117 (120).]

THE facts of this case sufficiently appear from the judgment of the Court.

[343] Pandit Sundar Lal, for the appellant.

Babu Jogindro Nath Chowdhri, for the respondents.

JUDGMENT.

EDGE, C. J., and BURKITT, J.—The lower Appellate Court made an order for a commission and remanded the case to the Court of first instance in order that a local investigation should be made. The Court of first instance, although the appellant, who had obtained the order for the commission, apparently lived at a distance of some 40 miles from that Court, gave only three days for payment of the charges of the commission. The plaintiff paid these charges subsequently into the lower Appellate Court. The lower Appellate Court, its order for the commission still standing, proceeded to hear and determine the case without any return to the commission having been made. In proceeding to hear and determine the appeal whilst the order for the commission was still standing and that order had not been carried out, we are of opinion that the lower Appellate Court committed a substantial error or defect in procedure. The intention of the Code of Civil Procedure is that when a Court deems it necessary on the application of a party or otherwise that a commission for local investigation should be issued, the return to that commission should be before the Court before it should proceed to determine the case. If it were not so, we should have to assume that the Court idly and uselessly had made an order for the issue of a commission. That we cannot assume. There has consequently been no trial of the appeal in the Court below according to law. We set aside the decree of the lower Appellate Court and remand the case under section 562 of the Code of Civil Procedure to that Court for trial according to law. Costs here and hitherto incurred will abide the result.

* Second Appeal No. 672 of 1892, from a decree of Maulvi Muhammad Mazhar Hasan, Additional Subordinate Judge of Gorakhpur, dated the 16th March 1892, confirming a decree of Maulvi Muhammad Sakhawat Ali, Munsif of Bansi, dated the 18th August 1890.

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MAY 1.

FULL
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16 A. 344

(F.B.)=

14 A.W.N.

(1894) 101.

16 A. 344 (F.B.) = 14 A.W.N. (1894) 101.

[344] FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell,
Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji and
Mr. Justice Burkitt.*

BEGAM AND OTHERS (*Defendants*) v. MUHAMMAD YAKUB AND
ANOTHER (*Plaintiffs*).^{*} [1st May, 1894.]

Pre-emption—Muhammadan law—Claim for pre-emption based upon a transaction which was a good sale under the Muhammadan law, but not according to the Transfer of Property Act 1882—Act No. IV of 1882, s. 54—Act No. XII of 1887, s. 37.

Where a Sunni Muhammadan transferred certain immoveable property exceeding in value Rs. 100, under such circumstances that the price was paid and possession of the property delivered to the transferee, but no sale-deed was executed; on a suit for pre-emption based upon such transfer being brought, it was held by the Full Bench (BANERJI, J., dissenting) that the Muhammadan law was to be applied in considering whether or not a right of pre-emption arose, and that, inasmuch as the transaction in question was a complete sale under that law, a right of pre-emption did arise. Case law prior and subsequent to Act No. IV of 1882, considered.

Per BANERJI, J., contra:—"In the absence of fraud no claim for pre-emption under the Muhammadan law applicable to persons of the Hanifa sect can arise in respect of the sale of immoveable property of the value of one hundred rupees and upwards, unless such sale has been effected according to the provisions of s. 54 of Act No. IV of 1882."

[*Diss.*, 29 M. 336 = 16 M.L.J. 395 = 1 M.L.T. 153; F., 22 A. 343; 35 C. 575 (599); R., 21 M. 291; 10 A.L.J. 154 (155) = 16 Ind. Cas. 679 (680); 13 C.P.L.R. 163; 17 C.P.L.R. 21; 6 M.L.J. 33; D., 36 C. 920 (922) = 4 Ind. Cas. 414 (415); 7 O.O. 98.]

THIS appeal was referred to a Full Bench of the Court by Tyrrell and Blair, JJ., by their order of the 11th of August 1893. The facts of the case are sufficiently stated in the judgment of Edge, C.J.

Messrs. *Amir-ud-din* and *Abdul Majid*, for the appellants.

Maulvi Ghulam Muftaba for the respondents.

JUDGMENT.

EDGE, C.J.—In the suit in which this second appeal arose the plaintiffs, founding their claim upon the Muhammadan law of pre-emption, claimed a decree for the pre-emption of a house alleged by them to have been sold in November 1890.

According to the finding of the learned District Judge in first appeal, the defendant Musammat Begam, on her own behalf and [345] acting as the guardian of her minor son, the defendant Ibrahim, sold the house to the defendant Chitar for Rs. 300, received the purchase money, and gave possession of the house to the defendant Chitar. The District Judge found that—"there is ample evidence that a sale after verbal negotiations took place and possession passed;" and "there is no doubt that Musammat Begam and Chitar entered into a private sale without any registered document to defeat pre-emption. Their fraud does not protect them against pre-emptors asserting their rights." The District Judge gave the plaintiffs a decree for the pre-emption of the house. From the decree of the District Judge this appeal has been brought. The parties to the suit are Muhammadans of the Sunni sect. Mr. *Amir-ud-din*, for the defendants, who

^{*} Second Appeal No. 984 of 1891, from a decree of H. G. Pearse, Esq., District Judge of Agra, dated the 31st July 1891, reversing a decree of Muhammad Shafi, Munsif of Agra, dated the 15th April 1891.

are the appellants here, contended that the house in question being immoveable property of a value exceeding Rs. 100 and no sale-deed having been executed, or at any rate no registered instrument of sale having been proved, s. 54 of Act No. IV of 1882 applied, and consequently no transfer from the defendants Musammât Begam and Ibrahim to the defendant Chitar of the ownership in the house was shown to have taken place, and the fourth and fifth conditions of the Muhammadan law of pre-emption as stated at pages 476 and 477 of Baillie's Digest of Muhammadan law (Hanifeea) edition of 1875, were not shown to exist in the transaction between the defendants, and consequently that no sale which would support a claim for pre-emption according to Muhammadan law was proved to have taken place. Mr. *Amir-ud-din* relied upon the judgment of Mr. Justice Mahmood in *Janki v. Girjâdat* (1), *Papireddi v. Narasareddi* (2), *Goordyal Munder v. Rajah Tek Narin Singh* (3), *Musammât Sundar Koer v. Lala Raghoobar Dyal* (4), *Buksha Ali v. Tofer Ali* (5) *Mussumat Chundo v. Hukeem Alim-ood-deen* (6), *Dewanut-ulla v. Kazem-Molla* (7), s. 37 of Act No. XII of 1877, s. 54 of Act No. IV of 1882, and ss. 17 and 49 of Act No. III of 1877 (the Indian Registration Act, 1877).

[346] Mr. *Ghulam Muftaba* on behalf of the plaintiffs-respondents contended that on the findings of the District Judge a completed sale within the meaning of the Muhammadan law of pre-emption was proved, and that the fact that it was not proved that the sale had been effected by a registered instrument did not defeat the plaintiffs' right under the Muhammadan law to a decree for pre-emption. He relied upon Hamilton's *Hedaya*, edition of 1870; Baillie's Digest of Muhammadan law (Hanifeea) ed. of 1875, p. 775, and upon the judgments of the majority of this Court in *Janki v. Girjâdat* (1).

I propose in the first place to consider, so far as is material to the question before us, what, according to Muhammadan law, where the vendor is of the Sunni sect, are the conditions upon the happening of which a right of pre-emption arises, and then to consider whether Act No. IV of 1882 has altered or modified in any respect the Muhammadan law of pre-emption as it existed when that Act came into force.

Shortly put, the conditions to which we need refer, upon the happening of which a right of pre-emption according to Muhammadan law, where the vendor is of the Sunni sect, arises, are, according to Baillie's Digest of Muhammadan law (Hanifeea) edition of 1875, at pages 475, 476 and 477... (1) "There must be a contract of exchange, that is, a sale or something that comes into the place of sale"... (2) "There must be an exchange of property for property"... (3) "The thing sold must be *akar* or what comes within the meaning of it"... (4) "There must be a cessation of the seller's ownership in the subject of sale; and when that is not the case, as for instance, where an option has been stipulated for to the seller, there is no pre-emption, but then, when the option drops, the right of pre-emption arises. It is also due where the option is to the purchaser. But not so, when it is to both seller and purchaser"... (5) "There must be an entire cessation of all right on the part of the seller. There is therefore no right of pre-emption for an invalid sale." The conditions (4) and (5) must be read so as to be consistent with and not repugnant to each other. If we are to [347] regard the sale contemplated by condition (5) as a completed transfer of the ownership in the thing sold from the vendor to the vendee,

(1) 7 A. 482.

(2) 16 M. 464.

(3) 2 W.R.C.R. 215.

(4) 10 W.R.C.R. 246.

(5) 20 W.R.C.R. 216.

(6) 6 N.W.P.H.C.R. 28.

(7) 15 C. 184.

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MAY 1.

FULL

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the right of pre-emption could not arise, whether the vendee had an option given him to purchase or not, until he had exercised that option by finally purchasing. But according to condition (4) the right of pre-emption arises when, on what is referred to as a sale, no option is reserved to the vendor, but an option is reserved to the vendee. This leads me to the conclusion that what was considered in Muhammadan law to be a sale upon which a right of pre-emption would arise included an offer unconditional on the part of the vendor and made by him to the purchaser, or intending purchaser, to sell and accepted by the intending purchaser, although the offer and acceptance were subject to the exercise of an option by the intending purchaser, the exercise of which option was not a necessary condition to the right of pre-emption arising. What apparently was considered as giving a right of pre-emption was either an absolute out-and-out sale, as English lawyers understand the term, or a contract of sale subject to a right of option in the intending purchaser which deprived the intending vendor of any right to refuse to complete the sale, should the intending vendee exercise his option to purchase.

In Hamilton's Hedaya, edition of 1791 at p. 568. and at p. 550 of the edition of 1870, it is said:—"The privilege of Shaffa is established after the sale; for it cannot take place until it is manifest that the proprietor is no longer inclined to keep his house and this is manifested by a sale of it. It is therefore sufficient in order to prove the sale and establish the privilege of Shaffa that the seller acknowledge the sale, although the person said to be the buyer deny it."

In Elberling's treatise on Inheritance, Gift, Will, Sale and Mortgage, edition of 1856, at page 302, is said:—"The right of pre-emption commences after the sale, or rather when the proprietor has declared his willingness to part with the property. It is then the duty of the seller to inform the sharers or the neighbours. If he does not inform them they are entitled to make use of their [348] right, as soon as it becomes known to them that the property is sold."

In Hamilton's Hedaya, ed. of 1870, at page 241, sale is thus defined:—"Beeye or sale in the language of the law signifies an exchange of property for property with the mutual consent of the parties. Shiria, signifies purchase."

In Baillie's Digest of Muhammadan Law (Hanifeea) edition of 1875 in the Introduction to the supplement at page 775, it is said:—"Sale in its ordinary acceptation is a transfer of property in consideration of a price paid. In Muhammadan Law it has a more comprehensive meaning; being defined to be an exchange of property for property with mutual consent."

In the present case on the findings of the District Judge it is obvious that there was in fact an exchange of property for property with mutual consent, that is, the defendant Chitar paid to the other defendants Rs. 300, and in consideration of that payment they put Chitar in possession of the house as the owner of it.

I shall now consider the judicial authorities anterior to Act No. IV of 1882 to which we have been referred. In *Gurdial Munder v. Raja Tek Narain Singh* (1) the majority of the Court held that no right of pre-emption according to Muhammadan Law arose on a mere conditional sale or mortgage while any right of redemption remained in the mortgagor. That decision is consistent with condition (4) to which I have referred,

(1) 2 W.R.C. R. 215.

as I understand that condition. In *Musammatt Sunder Kuar v. Lalla Raghobar Dyal* (1) the mortgagor's rights to redeem were still existing at the commencement of the suit for pre-emption. In *Baksha Ali v. Tofer Ali* (2) it was found that the sale was made upon the condition that the vendor was to have an *itmam* of the land from the purchaser, which was not given, and the parties rescinded the contract, and it was held that on those facts no right of pre-emption arose. In *Mussumat Chundo v. Hakeem Alim-ood-deen* (3) Mr. Justice Jardine in effect stated, that a right of pre-emption according to [349] Muhammadan law arose "only after an actually completed sale." That, however, was not the question before the Court.

The judicial authorities anterior to Act No. IV of 1882, to which we have been referred, appear to me to throw no light upon the question before us.

In *Dewanut-ulla v. Kazem Molla* (4) it was decided that when a co-proprietor does not part with his entire interest in land by an absolute sale but merely grants a lease of it, even though it be a *mouroosi* lease, the doctrine of pre-emption will not apply. The question which we have to decide did not arise in that case.

Turning now to Act No. IV of 1882, it is plain that no sale, as sale is defined in s. 54 of that Act, coupled with the restriction on the transfer of ownership imposed by that section, has been proved to have taken place in this case. It is also beyond doubt that, by reason of s. 54 and the value of the house, a transfer of the ownership in the house could have been made only by a registered instrument, and there is no evidence that any such registered instrument existed. In fact it may be assumed that there was no registered instrument of transfer.

In *Janki v. Girjadat* (5) in which a right to pre-empt under a condition contained in a *wajib-ul-arz* was claimed, Sir C. Petheram, C. J., and Straight, Oldfield and Brodhurst, JJ., held that, as a sale in consideration of the price of Rs. 300 had in fact taken place and as possession had been given to the vendee, the right of pre-emption arose, although no instrument of transfer was executed or registered. On the other hand, Mahmood, J., held that, as by reason of s. 54 of Act No. IV of 1882, the proprietary title had not, owing to there having been no registered instrument of transfer, passed from the vendor to the vendee, no right of pre-emption arose. Mahmood, J., was apparently of opinion that the sale was by reason of s. 54 of Act No. IV of 1882, invalid. It was no doubt by reason of s. 54 of Act No. IV of 1882, ineffective as a transfer of the ownership. In that case it had been found by the lower appellate Court that the vendor and vendee had omitted to execute and register an [350] instrument of transfer with the fraudulent object of defeating any claim of pre-emption. We were much pressed with the decision of *Papireddi v. Narasareddi* (6). I infer from the judgment in that case that the learned Judges considered that the plaintiff was entitled to a decree in ejectment, whether or not the defendant could have successfully maintained against the plaintiff a suit for specific performance of the contract of sale. With all respect I think that view is open to serious question, although I consider that, as the defendant in that case had unsuccessfully brought a suit for specific performance and had in it set up a contract which differed from the actual contract, he was left without a defence to the suit for ejectment. In s. 55 of Act No. IV of 1882 it is enacted that, "In

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(1) 10 W.R.C.R. 246. (2) 20 W.R.C.R. 216. (3) 6 N.W.P. H.C.R. 28 (32).
(4) 15 C. 184. (5) 7 A. 482. (6) 16 M. 464.

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the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to the liabilities and have the rights mentioned in the rules next following or such of them as are applicable to the property sold." One of those rules is that the seller is bound "(d) on payment or tender of the amount due in respect of the price to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place." It appears to me that when a buyer of immoveable property of a value exceeding Rs. 100 is in a position successfully to maintain a suit for specific performance of the contract of sale he can defeat a suit for ejectment brought against him by the seller, if he proves that even after such suit brought, he has paid or tendered the amount of the price and has at a proper time and place tendered a proper conveyance of the property to the purchaser for execution by him. In such a case to give the seller a decree for the ejectment of the buyer, whom he had placed in possession would be, it appears to me, to give the seller a decree in fraud of his contract of sale.

In my opinion, in considering whether or not the Muhammadan law of pre-emption applies to a transaction, we must see whether the conditions existed upon which a right of pre-emption would arise, as those conditions were understood in the Muhammadan law [351] applicable to the sect to which the vendor belonged. To import into the Muhammadan law of pre-emption the definition of the word "sale" coupled with the restriction of the transfer of ownership contained in s. 54 of Act No. IV of 1882, would be materially to alter the Muhammadan law of pre-emption and to afford to fraudulent persons a means of avoiding successfully the obligation of that law, the object of which was to enable co-sharers and near neighbours, if they so desired, to exclude strangers from the enjoyment of immoveable property to which the Muhammadan law of pre-emption applied. The co-sharer or near neighbour is not given a right under Act No. IV of 1882 to compel a vendor to execute or the vendor or vendee to register an instrument of transfer. The decree of a successful pre-emptor is, under s. 214 of Act No. XIV of 1882, not a decree ordering the vendor or the vendee to execute any instrument transferring the ownership in the property, but is a decree for possession of the property on payment of the purchase money with the costs (if any). I cannot think that it was the intention of the Legislature in passing Act No. IV of 1882 to alter directly or indirectly the Muhammadan law of pre-emption as it existed and was understood for centuries prior to the passing of Act No. IV of 1882, by substituting for the sale referred to in that law, the "sale" coupled with the restriction of s. 54 of Act No. IV of 1882.

The procedure by which the benefits of the Muhammadan law of pre-emption are on sale under decrees obtained by a pre-emptor is provided for in Act No. XIV of 1882, in Act No. XIX of 1873 and in Act No. XII of 1881. The period within which a suit for pre-emption can be brought is prescribed in art. 10 of the sch. ii of Act No. XV of 1877. The last paragraph of s. 7 of Act No. XV of 1877 prevents the application of that section to suits to enforce rights of pre-emption. The last paragraph of s. 17 of that Act has a similar effect as to s. 17. I am not aware of any other legislative interference with any of the rules of the Muhammadan law of pre-emption. Sub-section (i) of s. 37 of Act No. XII of 1887 does not apply to the Muhammadan law of pre-emption. If I am correct [352] in my opinion that the application of the Muhammadan law of pre-emption is not provided for by s. 54 of Act

No. IV of 1882, then applying sub-s. (2) of s. 37 of Act No. XII of 1887, we should be acting according to justice, equity and good conscience in deciding that the plaintiffs are entitled to the decree for pre-emption, which they sought in this suit. The decree which was made in the Court of the District Judge is not in accordance with s. 214 of Act No. XIV of 1882. I would allow until the 15th of August next for the payment by the plaintiff to the defendants or into Court of the purchase-money amounting to Rs. 300, less the costs payable by the defendants to the plaintiffs in this appeal, in the appeal to the District Judge and in the Court of first instance, and would vary the decree of the Court of the District Judge so as to bring it into accordance with s. 214 of Act No. XIV of 1882, and the judgment of this Court, and I would dismiss this appeal with costs.

TYRRELL, J.—I concur with the learned Chief Justice.

KNOX, J.—I concur with the learned Chief Justice.

BLAIR, J.—I concur with the judgment of the Chief Justice.

BURKITT, J.—I concur with the learned Chief Justice.

BANERJI, J.—This was a suit to enforce the plaintiffs' right of pre-emption under the Muhammadan law. The circumstances under which the suit was brought, the questions which arise in this appeal, the rules of Muhammadan law which govern a claim for pre-emption, and the authorities which bear upon the case have been so fully set forth in the judgment of the learned Chief Justice that it is unnecessary for me to repeat them.

It being an admitted fact in this case that the value of the property claimed exceeds one hundred rupees and that no instrument of sale has been executed or registered, the first question which arises in this appeal is whether a right of pre-emption can be enforced in respect of such a transaction.

It is established upon the authorities of Muhammadan law to which the learned Chief Justice has referred, that the right of pre-emption can only arise, when the vendor is a Muham-[353]madan of the Sunni sect, where a completed, effective and valid sale has taken place and there has been, as Baillie says in his Digest of Muhammadan law, p. 477, "an entire cessation of all right on the part of the seller." The right of pre-emption being, as was justly remarked by Mr. Justice Mahmood in his judgment in the case of *Janki v. Girjadat* (1), a right of substitution, it presupposes not only a sale, but the complete transfer of all the right of the owner of the property to a purchaser, whose place the pre-emptor takes. That the pre-emptor is substituted for the purchaser and not for the seller is evident, not only from the fact that a right of pre-emption cannot arise until a sale has taken place, but also from the facts that the pre-emptor is bound to pay the pre-emptive price to the purchaser, if the purchaser has paid it, and not to the seller, and that the amount of that price is the sum actually paid by the purchaser, irrespective of the real value of the property. The conditions, therefore, which are precedent to the enforcement of the right of pre-emption under the Muhammadan law are, first, that a valid sale has taken place, and secondly, that the seller has been completely divested of all his rights in the property sold and the purchaser has been invested with such rights.

Since the passing of the Transfer of Property Act, 1882, a sale of the immoveable property of a Muhammadan, as of all other classes of persons, can only be effected in accordance with the rules laid down in s. 54

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of that Act. Under the provisions of that section in the case of immoveable property of the value of one hundred rupees and upwards no transfer of ownership can be made except by a registered instrument. That section has superseded the rules of Muhammadan law as to sales of immoveable property. According to that law "a sale is completed by declaration and acceptance" (Hedaya, Vol. II, p. 361). And where there is an unconditional proposal on the part of the seller and an acceptance of that proposal by the purchaser a valid sale takes place and the execution of an instrument of sale or the delivery of possession is not essential. A transaction, therefore, which under the Muhammadan [354] law would be a sale, is nothing more than what under s. 54 of the Transfer of Property Act, 1882, is a contract for sale, and cannot, having regard to the provisions of the last paragraph of that section, create any interest in the property to which the transaction relates, and transfer ownership. It thus follows that a sale of immoveable property of the value of one hundred rupees and upwards made according to the rules of Muhammadan law can no longer extinguish the right of the seller, and since a claim for pre-emption cannot arise under that law unless the right of the seller has become completely extinct, it seems to me that, consistently with the provisions of that law, such a claim can no longer be enforced in respect of a transaction which would be a sale under the Muhammadan law, but is not a sale according to the law now in force. It would in my judgment be defeating a fundamental rule of the Muhammadan law of pre-emption to allow the enforcement of a claim for pre-emption in respect of such a transaction, and serious anomalies would be the result. "The grand principle of Shaffa," according to the Hedaya (Vol. III, page 591) "is the conjunction of property, and its object to prevent the vexation arising from a disagreeable neighbour." If pre-emption can be claimed upon the occurrence of what would be a sale under the Muhammadan law, we shall have the anomaly of having a pre-emptor before a severance of property has taken place and before a disagreeable neighbour has come into existence. Take, again, the case of a person who has purchased the property in question for consideration and without notice of the contract for sale with the alleged first vendee. Under s. 40 of Act No. IV of 1882, the right of such a transferee will take effect against the so-called vendee, and if his purchase was of a date prior to that of the institution of the pre-emptor's suit his right cannot be defeated by the pre-emptor also. To allow a claim for pre-emption in such a case against the so-called vendee to whom the property has not passed at all, will, it seems to me, be an anomaly. When, again, are the preliminaries of immediate demand and affirmatory demand required by Muhammadan law to be performed? It is not incumbent on the pre-emptor to make those [355] demands when he has knowledge of a mere contract for sale. He is not bound to make them until he has been informed that a sale has actually taken place and has been completed. Indeed, according to Mr. Justice Ameer Ali (Muhammadan law, 2nd ed., page 597) if the demand be made "whilst negotiations are going on between the vendor and the vendee it is of no avail." Yet, upon the contention of the respondent, it will be obligatory on the pre-emptor to make the preliminary demand when he gets information of what, according to the law now in force, is nothing more than a contract for sale. In practice the distinction between what amounts to a sale under the Muhammadan law and what is a sale under the prevailing law of the country will rarely be known, and the result will be that in a great many cases the claim for

pre-emption will be defeated on the ground of non-compliance with the preliminary requirements of Muhammadan law.

The Muhammadan law of pre-emption has not, it is true, been altered or modified by Act No. IV of 1882 or any other Act of the Legislature. But I am not aware of any legislative enactment which has extended that law to transactions of sale among Muhammadans, and which requires the Courts in this country to administer it in its entirety. Sub-s. (1) of s. 37 of Act No. XII of 1887 does not certainly do so. It was held in *Mussumat Chundo v. Hakeem Alim-ood-deen* (1) that under s. 24 of Act No. VI of 1871 (which has now been replaced by s. 37 of Act No. XII of 1887), "Muhammadan law, is not applicable in suit for pre-emption between Muhammadans not based on custom or contract." It is only according to the rule of justice, equity and good conscience, which the Courts are bound to administer under sub-s. (1) of s. 37, that it has been held that Muhammadan law should be applied in cases of pre-emption. In my judgment whilst the principles of justice, equity and good conscience enjoin on the one hand that the Muhammadan law of pre-emption should be applied to sales among Muhammadans, the same principles of justice, equity and good conscience require, on the [356] other hand, that the spirit and not the letter of that law should be applied, and that it should be applied in such a way as to make it consistent with the prevailing law of the land. The Muhammadan law, as I have shown above, in terms requires that there should be a complete transfer of the right of a seller and an entire cessation of that right before the right of pre-emption can arise, and it would certainly be acting according to the spirit of that law were we to hold that no such right can arise unless the seller has been divested of his right and the purchaser invested with it in the manner prescribed by the law now in force. In my humble judgment it would be acting against the spirit of the Muhammadan law to apply it in its integrity to a state of things which is now in existence, but which was never in the contemplation of the framers of that law. I fail to see how the view for which Mr. *Amir-ud-din* has contended on behalf of the appellants will open a door to fraud. On the contrary it seems to me that in many instances persons who are entitled to claim pre-emption will be deprived of their just right, if, knowing that their neighbour has entered into a contract for sale with a stranger, they omit to make the preliminary demands required by Muhammadan law in the reasonable belief that under the prevailing law of the land no sale such as can pass the title of the seller to the purchaser has taken place, and that the time has not consequently arrived when, according to Muhammadan law, they should assert their privilege of pre-emption.

For the above reasons I am of opinion that, in the absence of fraud, no claim for pre-emption under the Muhammadan law applicable to persons of the Hanifa sect can arise in respect of the sale of immoveable property of the value of one hundred rupees and upwards, unless such sale has been effected according to the provisions of s. 54 of Act No. IV of 1882. I regret very much that in arriving at this conclusion I have the misfortune to differ from the learned Chief Justice and my other learned colleagues. But I am unable to come to any other conclusion consistently with the principles of justice, equity and good conscience which we are bound to administer. Fraud and the peculiar circumstances of each

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[357] individual case will, however, make considerable difference in the application of the rule, which I have stated above, as I shall presently show.

The next question, which arises in this appeal, is whether in the peculiar circumstances of this case, and on the findings of fact arrived at by the lower appellate Court, the plaintiffs are entitled to a decree. The learned Judge below has substantially found that a sale of the property in dispute has actually been effected, that consideration has passed and possession has been delivered, and that an instrument of sale has not been executed and registered simply to defeat pre-emption and defraud the pre-emptor. However unwarrantable these findings may be upon the evidence adduced by the parties, we are bound to accept them in second appeal when it is neither alleged nor shown that there is no legal evidence whatever to support them. Such being the nature of the transaction entered into by the defendants in this case, I am of opinion that they have no valid answer to the claim of the plaintiffs-pre-emptors, and that they cannot be allowed to set up their own fraud against the plaintiffs' claim to take the benefit of it. As consideration passed and possession was delivered to the purchaser, and as it has not been found by the lower appellate Court that the omission to execute an instrument of sale was a part of the original contract of sale, the purchaser was entitled to claim specific performance of that contract under cl. I (d) of s. 55 of Act No. IV of 1882 to obtain a conveyance of property executed by the seller. The principles upon which Courts of equity in England decree specific performance of contracts respecting lands where such contracts are within the provisions of the Statute of Frauds apply in my judgment with equal force to similar contracts in this country which fall within the provisions of s. 54 of Act No. IV of 1882. One of the cases in which a Court of equity will enforce specific performance in England is "where the parol agreement has been partly carried into execution." "The distinct ground upon which Courts of equity interfere in cases of this sort is that otherwise one party would be able to practice a fraud upon the other; and it [358] could never be the intention of the Statute to enable any party to commit such a fraud with impunity." (Story's Equity Jurisprudence, Grigsby's edition of 1892, p. 499.) According to the same learned author "a more general ground, and that which ought to be the governing rule in cases of this sort, is that nothing is to be considered as a part performance which does not put the party into a situation which is a fraud upon him unless the agreement is fully performed. Thus, for instance, if upon a parol agreement a man is admitted into possession, he is made a trespasser, and is liable to answer as a trespasser, if there be no agreement valid in law or equity. Now for the purpose of defending himself against a charge as a trespasser and against an action to account for the profits in such a case, the evidence of a parol agreement would seem to be admissible for his protection; and if admissible for such a purpose, there seems no reason why it should not be admissible throughout." (Story's Equity Jurisprudence, Grigsby's edition, page 501.) The Courts in this country being Courts both of law and equity are as much bound as the Courts of equity in England, to give effect to the principles enunciated in the passage quoted above. Upon a legitimate application of these principles not only is the purchaser who has obtained possession entitled to enforce specific performance of the contract for sale, but if an attempt be made by the seller to evict him by an action in ejectment he would have a valid answer to the action on the ground of fraud. The same ground would be available to him to entitle him to recover possession in the

event of his being ousted by the seller. To hold otherwise would be to enable a seller to perpetrate a fraud on the purchaser with impunity.

In the present case, as found by the lower appellate Court, the seller having received consideration from the buyer and put him in possession, a sale was effected in fact, although the execution of an instrument of sale was omitted fraudulently to evade the law of pre-emption. The seller could not in such a case question or defeat the title of the purchaser, and I cannot conceive of [359] an instance in which it could be defeated even by a third party deriving title from the seller. The right of the seller, therefore, became totally extinct as against the purchaser and vested in him validly and completely. Upon such a cessation of title a right of pre-emption arose and the plaintiffs became entitled to assert it and to maintain their suit.

For the above reasons I concur in the decree proposed by the learned Chief Justice.

Decree modified.

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APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Burkitt.

HARCHANDAR SINGH AND OTHERS (*Defendants*) v. LAL BAHADUR SINGH AND ANOTHER (*Plaintiffs*).^{*} [1st May, 1894.]

Civil Procedure Code, ss. 16, 19, 45—Jurisdiction—Joinder of cause of action—Suit for recovery of possession of immoveable property within the territorial jurisdiction of different Courts.

Where certain plaintiffs claimed possession of separate portions of land situated in two different districts on the same title against the same defendants alleging a dispossession on one day from part of the property claimed in district A and from the whole in district B, and on another day from the rest of the property in district A: *Held* that the plaintiffs could bring one suit for recovery of the whole property in both districts and that such suit was properly brought in a Court in district A. *Katija v. Ismail* (1) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi Jwala Prasad, for the appellants.

Munshi Ram Prasad for the respondents.

JUDGMENT.

EDGE, C. J., and BURKITT, J.—This is a second appeal by the defendants to the suit. The plaintiffs brought their suit in the Court of the Munsif of Sayidpur, which is within the district of Ghazipur, and is also a Court subordinate to the Judge of Ghazipur. They claimed possession of immoveable property part of which was [360] within the local jurisdiction of the Munsif of Sayidpur, and part of which was within the adjoining District of Jaunpur. The latter property was within the local area of the Court of a Munsif subordinate to the Judge of Jaunpur. The plaintiffs alleged a dispossession by the defendants of part of the property in Ghazipur which is in suit, and of the property in Jaunpur on a day in June 1891,

^{*} Second Appeal No. 961 of 1892, from a decree of Maulvi Muhammad Ismail Khan, Subordinate Judge of Ghazipur, dated the 30th June 1892, modifying a decree of Babu Chandi Prasad, Munsif of Sayidpur, dated the 22nd March 1892.

(1) 12 M. 380.

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and they alleged a dispossession of the remaining property in Ghazipur which is in suit on a day in August 1891. Their claim to the property is a claim on title. The plaintiffs also asked for damages on account of the alleged wrongful dispossession by the defendants.

The plaintiffs' case was this:—One Rang Bahadur Singh, who was a brother of the plaintiffs, had, on the 12th of February 1893, sold property in different villages to persons through whom the defendants claimed. By the deed Rang Bahadur Singh excepted from the sale the lands, the subject of this suit, to himself from generation to generation free from payment of the Government revenue. It was agreed by the sale-deed that the vendor should enjoy the profits of the excepted lands, but should not alienate those lands without the consent of the vendees, and by the terms of the deed the lands so excepted from the sale were to be held by the vendors as a *muafi* holding; the inference from which is that the vendees had to pay the Government revenue payable in respect of such excepted lands.

On behalf of the defendants it has been contended that, the vendor having died and the plaintiffs not being his lineal descendants, the defendants were entitled to the present enjoyment of the excepted lands as fully as they were entitled to the other lands of the villages conveyed to them.

In our opinion there is no foundation for such a contention. It is quite clear that the vendor reserved to himself and his successors in title the excepted lands, and it is also perfectly clear that he did not sell those excepted lands; or confer any title in respect of them on the vendees. The plaintiffs are legal representatives of the vendor. The defendants have absolutely no title to the excepted lands.

[361] The other contention on behalf of the defendants here was that there were two separate causes of action in the suit, and that there was no jurisdiction in the Court of the Munsif of Sayidpur to try the suit so far as it related to the lands in the district of Jaunpur. It is not necessary in our opinion to decide whether there are two causes of action or not by reason of the dispossession by the defendants of the plaintiff as to some of the lands having been on one day and as to the rest of the lands having been on another day. It would appear from the case of *Jumona Dasse Choudhranee v. Bamasoonderee Dasse Choudhranee* (1), that ousters on different dates from different portions of the same property would not form distinct causes of action, so long as they were committed by the same persons and as part of the same contest as to right, and that one suit to recover all the property from which the plaintiff was so ousted, the act of ouster having taken place before suit, was the proper remedy. That was a ruling which had reference to ss. 7 and 12 of Act No. VIII of 1859, and in that case the plaintiff had brought her suit in the Rajshaye Court for the partition of property lying within the jurisdiction of that Court, and she subsequently sued in the Nuddea Court for a partition of a portion of the property lying within the jurisdiction of that Court, and it was held that by reason of the suit in the Rajshaye Court and s. 12 of Act No. VIII of 1859, her suit in the Nuddea Court was barred. The next case is that of *Subba Rau v. Rama Rau* (2). In that case the Madras High Court held that where immovable property was partly within the jurisdiction of one Court and partly within the jurisdiction of another, a plaintiff claiming such property had the option of bringing one suit for the whole property in either Court or

(1) 2 W.R.C.R. 148.

(2) 3 M.H.C.R. 376.

a separate suit in each Court for the property within the jurisdiction of the Court. The Madras Court took that view from the particular wording of ss. 11 and 12, by which, if a plaintiff sued in one Court for property within the jurisdiction of that Court and for property within the jurisdiction of another Court, it was necessary to get the authority of a superior Court to enable the Court to proceed [362] with the hearing of the suit. Section 19 of Act No. XIV of 1882 contains no similar restriction.

The sections, which we have to consider here are ss. 16—19 and 45 of Act No. XIV of 1882. By s. 44 the plaintiff is, subject to orders as the Court may pass, enabled to unite in one suit several causes of action against the same defendants jointly. It is abundantly clear in this case that it was a reasonable and proper thing to do, if there were separate causes of action here, to join them in one suit, if that suit could be tried by the Court in which it was instituted, as the title to all the property to which the defence related was the same, and, although the lands claimed were in different districts and were not conterminous or even adjacent, as we understand, it was only reasonable that there should be one suit and one suit only. If s. 16 of the Code stood alone it would have been necessary to institute a suit in the Court of Sayidpur in respect of the property within the jurisdiction of that Court, and a separate suit in a Court in the district of Jaunpur in respect of the property within the jurisdiction of that Court. However, s. 19 of Act No. XIV of 1882, which corresponds generally with s. 52 of Act No. VIII of 1859, but under which there is no necessity to obtain the sanction of a superior Court for the trial of the suit, enacts that, if the suit be to obtain relief respecting or compensation for injury to immoveable property situate within the limits of different districts, the suit may be instituted in any Court competent to try it within whose jurisdiction any of the property is situate. The earlier part of the section provides a similar rule where the immoveable property is situate within the limits of a single district, but within the jurisdiction of different Courts. The only decision of which we are aware which is relevant to the case before us, is that of *Khatija v. Ismail* (1). There a suit for an undivided share of property, part of which was within the jurisdiction of the Court at Mangalore, in the Madras Presidency, and part of which was within the jurisdiction of a Court at Bhatkal, which apparently was in the Bombay Presidency, was brought in the Court of Mangalore. The [363] parties to the suit after it was brought, compromised the claim so far as it related to the property within the jurisdiction of the Court at Mangalore, and it was subsequently objected that, the claim as to that property having been withdrawn from the jurisdiction of the Court, the Court at Mangalore had no jurisdiction to proceed with the suit relating to the property within the jurisdiction of the Court at Bhatkal. The High Court at Madras held, and we think rightly, that the Court at Mangalore having been seized at the institution of the suit with jurisdiction to dispose of the whole suit, its jurisdiction to hear or determine the suit, so far as it related to that part of the property within the local limits of the jurisdiction of the Court at Bhatkal, did not determine on the withdrawal from the litigation of that part of the suit relating to the property within the local limits of the Mangalore Court. It is obvious that the High Court at Madras had jurisdiction to hear and determine the whole suit. The provisions of s. 19 of the Code of Civil Procedure

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are reasonable provisions intended for the benefit of litigants and to avoid multiplicity of suits with regard to immoveable property. It is to be observed that s. 19 says nothing as to one or more causes of action; it only refers to cases in which the suit is to obtain relief respecting or compensation for wrong to immoveable property. In our opinion the Munsif of Sayidpur had jurisdiction, and we dismiss this appeal with costs.

Appeal dismissed.

16 A. 363 (F.B.) = 14 A.W.N. (1894) 113.

FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell,
Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji and
Mr. Justice Burkitt.*

BABU NANDAN PRASAD (*Plaintiff*) v. CHANGUR (*Defendant*).
[1st May, 1894.]

Act XII of 1881 (N. W. P. Rent Act), ss. 93, 206, 207, 208—Act XII of 1887 (Bengal Civil Courts Act), s. 22, cl. 3—Transfer of appeal in a Rent Court suit from the District Judge to the Subordinate Judge—Powers exercisable by the Subordinate Judge.

Clause (3) of s. 22 of Act XII of 1887, makes ss. 206, 207 and 208 of Act No. XII of 1881 applicable to appeals in suits within s. 93 of Act No. XII of 1881 when such [364] appeals have been transferred under s. 22 of Act No. XII of 1887 by a District Judge to a Subordinate Judge and are being heard by such Subordinate Judge.

[R., 6 O.C. 104.]

THIS was a reference to the Full Bench made by EDGE, C.J., and BURKITT, J. The facts of the case sufficiently appear from the judgment of the Court.

Pandit Sundar Lal, for the appellant.

Munshi Gobind Prasad, for the respondent.

The judgment of the Court (EDGE, C.J., TYRRELL, KNOX, BLAIR, BANERJI and BURKITT, JJ.) was delivered by EDGE, C.J.:—

JUDGMENT.

The suit in which this second appeal arises is one for arrears of rent to which s. 93, cl. (a) of Act No. XII of 1881 applies, and is consequently one the cognizance of which, except in the way of appeal, is exclusively confined to Courts of Revenue.

The suit was instituted in the Court of the Munsif of Bansgaon. In that Court an objection was taken on behalf of the defendant that the suit was instituted in the wrong Court, in other words, that it was a suit which, by reason of s. 93 of Act No. XII of 1881, a Munsif had not jurisdiction to hear and determine. The Munsif held that the suit was not one to which that section applied, and, having heard the suit, gave the plaintiff a decree. From that decree the defendant appealed to the Court of the District Judge of Gorakhpur. The District Judge acting

* Second Appeal No. 1031 of 1892, from a decree of Maulvi Muhammad Mazhar Hasan Khan, Additional Subordinate Judge of Gorakhpur, dated 30th June 1892, reversing a decree of Maulvi Abdul Rahim, Munsif of Bansgaon, dated 24th January 1891.

under s. 22 of Act No. XII of 1887 transferred the appeal to the Additional Subordinate Judge of Gorakhpur, who was a Subordinate Judge under the administrative control of the District Judge of Gorakhpur. The Additional Subordinate Judge, holding that the suit was not a suit which was cognizable by a Civil Court, allowed the appeal and dismissed the suit. From the decree of the Additional Subordinate Judge the plaintiff has brought this appeal. The Additional Subordinate Judge was right in so far only as he held that the suit was one to which s. 93 of Act No. XII of 1881 applied.

The question which we have to decide is, does or does not cl. (3) of s. 22 of Act No. XII of 1887 make ss. 206, 207 and 208 of Act No. XII of 1881 applicable to appeals in suits within s. 93 of Act [365] No. XII of 1881, when such appeals have been transferred under s. 22 of Act No. XII of 1887 by a District Judge to a Subordinate Judge and are being heard by such Subordinate Judge.

It had, we believe, been invariably held by this Court prior to the passing of Act No. XII of 1887 that ss. 206, 207 and 208 of Act No. XII of 1881 and ss. 206, 207 and 208 of Act No. XVIII of 1873 were not applicable to appeals to District Judges in suits within s. 93 of either of those Acts, except when the appeals were being heard and determined by the District Judge, and were not applicable to such appeals when at hearing by a Subordinate Judge upon a transfer by the District Judge to the Subordinate Judge under s. 26 of Act No. VI of 1871.

Section 26 of Act No. VI of 1871, was as follows :—

“Every District Judge may, from time to time, subject to the orders of the High Court, refer to any Subordinate Judge under his control any appeals pending before him from the decisions of Munsifs, and such Subordinate Judge shall hear and dispose of such appeals accordingly. The District Judge may withdraw any appeals so referred and hear and dispose of appeals so withdrawn.”

Section 22 of Act No. XII of 1887, is as follows :—

“(1) A District Judge may transfer to any Subordinate Judge under his administrative control any appeals pending before him from the decrees or orders of Munsifs.

“(2) The District Judge may withdraw any appeal so transferred, and either hear and dispose of it himself or transfer it to a Court under his administrative control competent to dispose of it.

“(3) Appeals transferred under this section shall be disposed of subject to the rules applicable to like appeals when disposed of by the District Judge.”

In *in the matter of Shama Charan Dutt v. L. Payne and Co.*, (1), it was held, in reference to s. 26 of Act No. VI of 1871, and s. 576 of Act No. VIII of 1859, that “a District Judge has power to refer cases to the Subordinate Judge, who is to hear and dispose of them accordingly, that is, as a District Judge, [366] and therefore by implication the Subordinate Judge has the same power of reviewing the judgment as a District Judge has.” The suit in that case was one which apparently was not at any stage excluded from the jurisdiction of the Civil Courts. So far as we are aware this Court has never considered that upon a transfer by a District Judge to a Subordinate Judge, under either s. 26 of Act No. VI of 1871 or s. 22 of Act No. XII of 1887, of an appeal in a suit which in all its stages was within the jurisdiction of the Civil Courts, the

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Subordinate Judge could not in the hearing and determining of such appeal exercise all the jurisdiction and powers which the District Judge could have exercised if the appeal was at hearing before himself. It was, however, considered by this Court that the appellate Court referred to in ss. 206, 207 and 208 of Act No. XII of 1881, and in ss. 206, 207 and 208 of Act No. XVIII of 1873 was the District Judge or the High Court, as the case might be, and was not the Court of a Subordinate Judge upon a transfer of an appeal to which those sections related. One reason why that view of the law was entertained by this Court was that the provisions of ss. 206, 207 and 208 of Act No. XVIII of 1873 were first introduced into the Statute Book by that Act two years after the passing of Act No. VI of 1871; and that by Act No. XVIII of 1873, and subsequently by Act No. XII of 1881, in certain cases the Legislature made the District Judge or the High Court the Court of appeal from the Courts of Revenue in these Provinces, and had in no case allowed an appeal to lie in these Provinces from a Court of Revenue to a Subordinate Judge. It was assumed that the Legislature in enacting ss. 206, 207 and 208 of Act No. XVIII of 1873, and ss. 206, 207 and 208 of Act No. XII of 1881, intended those sections to apply only to the Courts of District Judges and to the High Court, which in certain cases had to exercise appellate jurisdiction in suits otherwise confined to the exclusive jurisdiction of Courts of Revenue. Whether that view was or was not correct, it was in many cases given effect to by this Court. We find that the Legislature in enacting Act No. XII of 1887 has departed considerably in s. 22 from the doctrine of s. 26 of Act No. VI of 1871, and by such departure has, whatever may have been the intention of the [367] Legislature, made ss. 206, 207 and 208 of Act No. XII of 1881 applicable to cases such as that before us.

Amongst the rules which would have been applicable to the appeal in this case to the District Judge and to like appeals, if the appeal to the District Judge or such like appeals had been disposed of by the District Judge, are the rules or provisions of Statute law contained in ss. 206, 207 and 208 respectively of Act No. XII of 1881. Many illustrations are to be found in Acts of the Governor-General in Council of the use of the word "rules" as including provisions of the Statute law. One such illustration is afforded by s. 55 of Act No. IV of 1882; another such illustration is to be found in s. 190 of Act No. XII of 1881.

It could not be contended whether the Legislature intended it or not, that the Legislature by enacting s. 22 of Act No. XII of 1887 without any reservation did not confer upon a District Judge the power to transfer to any Subordinate Judge within his administrative control any appeal pending before the District Judge from the decree or order of a Munsif. The appeal in this suit to the District Judge was such an appeal. It may well be that the consideration to which we shall presently refer influenced the Legislature to confer by clause (3) of s. 22 of Act No. XII of 1887 upon the Subordinate Judge to whom a transfer so authorised was made, all the powers which could or should be exercised by the District Judge in the appeal if he had not made the transfer.

If in such a case s. 206 of Act No. XII of 1881 was not made applicable upon the transfer to the hearing and determination by a Subordinate Judge of an appeal from a decree of a Munsif in a suit, which was, except in the way of appeal, by reason of s. 93 of Act No. XII of 1881, within the exclusive jurisdiction of a Court of Revenue, an anomaly would exist and an injustice might be caused. In an appeal to the District Judge

from the decree of a Munsif in such a suit, the District Judge, if he did not transfer the appeal under s. 22 of Act No. XII of 1887, would be bound by s. 206 of Act No. XII of 1881 to dispose of the appeal as if the suit had been instituted in the right Court, if the objection that the suit had been [368] instituted in the wrong Court had not been taken in the Court of the Munsif, whilst, on the other hand, if s. 206 of Act No. XII of 1881 was not applicable to the hearing and determining of such an appeal by a Subordinate Judge upon a transfer, the Subordinate Judge would be bound, without considering the merits or the other legal rights of the parties in the suit to give effect to the objection to the jurisdiction and dispose of the appeal by making an order under s. 57, cl. (a) of Act No. XIV of 1882 returning the plaint to be presented to the proper Court. That would be the anomaly to which we refer. The injustice might arise in this way. Assume that the plaintiff in such a suit was on the merits and in law entitled to a decree against the defendant if his suit had been instituted in a Court of Revenue instead of in the Court of a Munsif. Assume that, whether or not an objection to the jurisdiction was taken in the Court of the Munsif, the Munsif had given the plaintiff a decree, and the defendant appealed, and the District Judge acting under s. 22 of Act No. XII of 1887 transferred the appeal to a Subordinate Judge. Further assume that the Subordinate Judge acting according to law, ss. 206, 207 and 208 of Act No. XII of 1881 not applying in the assumed case, returned the plaint under s. 57, cl. (a) to be presented to the proper Court, and assume that by that time, as might frequently happen, the period of limitation within which such suit could be brought in a Court of Revenue had expired, the plaintiff would be left without a remedy. In such a case the plaintiff who had had a perfectly good cause of action against the defendant would, by reason of the transfer, which was authorised by the Legislature by s. 22 of Act No. XII of 1887, and which was made by the District Judge for purely administrative purposes to relieve the congestion of pending files in his own Court, and without any knowledge of the points arising in the appeal, be deprived of the decree which he had rightly obtained on the merits from the Munsif, and which the District Judge would have been bound to affirm had he himself tried the appeal, and would in such case be left without a remedy. We say that in such a case the plaintiff would be left without a remedy, because Act No. XII of 1881 provides by s. 94, so far as the institution of suits is concerned, its own [369] period of limitation and the Legislature has not made applicable to suits in a Court of Revenue, s. 14 of No. XV of 1877, and Act No. XII of 1881 contains no provisions similar to that contained in s. 14 of Act No. XV of 1877.

Notwithstanding the considerations to which we have referred, some of us doubt that the Legislature had present in its contemplation ss. 206, 207 and 208 of Act No. XII of 1881 when Act No. XII of 1887 was passed, but we all feel that we must apply s. 22 of Act No. XII of 1887, in accordance with its obvious construction.

We hold that in this case the Subordinate Judge should have proceeded under s. 207 or s. 208 of Act No. XII of 1881 as the case might be.

We would set aside the decree of the Subordinate Judge and remand the case under s. 562 of Act No. XIV of 1882. With this expression of opinion the appeal will go back to the Bench which made the reference for disposal.

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16 A. 369 = 14 A.W.N. (1894) 117.

APPELLATE CIVIL.

*Before Mr. Justice Tyrrell and Mr. Justice Banerji.*CHANDAR KISHORE (*Plaintiff*) v. DAMPAT KISHORE AND OTHERS
(*Defendants*).^{*} [2nd May, 1894.]

16 A. 369 =

14 A.W.N.

(1894) 117.

Hindu law—Joint Hindu family—Transfer by one member of his share in the joint family property to another member.

One member of a joint Hindu family cannot transfer his undivided share in the joint family property to another member of the family without the consent of the rest of the co-sharers.

[F., 1 Ind. Cas. 83; R., A.W.N. (1908) 163 = 6 A.L.J. 11 (13) = 5 M.L.T. 56 (57); A.W.N. (1908) 200.]

THE plaintiff in this case sued for the partition of certain house property belonging to himself and others as members of a joint and undivided Hindu family. As to some of the property he claimed that an one-third share should be allotted to him, but as to other portions he claimed a two-thirds share, alleging that he had acquired by purchases the share of one of the other members of the joint family previously to the suit.

[370] The Court of first instance held the purchase by the plaintiff of the share of his co-parcener to be proved and to be a valid transaction, and gave the plaintiff a decree.

On appeal by the defendant, Dampat Kishore, the lower appellate Court found that the sale-deed upon which the plaintiff's case was largely based had not been filed in time and therefore could not be used as evidence, and that in any case that the transaction which was sought to be proved thereby was invalid under the Hindu law, and, allowing the appeal, dismissed the plaintiff's suit. The plaintiff then appealed to the High Court.

Messrs. *T. Conlan* and *D. N. Banerji*, for the appellant.

Pandit Sundar Lal, and *Baboo Durga Charan Banerji*, for the respondents.

The judgment of the Court (TYRRELL and BANERJI, JJ.) was delivered by BANERJI, J:—

JUDGMENT.

In this case the only question which arises is whether a member of a joint Hindu family can validly alienate his interest in the joint family property to one of his co-sharers without the consent of his other co-sharers. It is settled law so far as these Provinces are concerned, that in cases governed by the Mitakshara law, one sharer has no authority without the consent of his co-sharers to dispose of his undivided share, except for the benefit of the joint family. No exception has been made in this rule as far as we are aware in favor of persons who transfer their undivided shares to one of the members of the co-parcenary body without the consent of the rest. If the alienation be regarded as a surrender of the interest of the person making the alienation, it is a surrender to the

* Second Appeal No. 353 of 1893, from a decree of H. G. Pearse, Esq., District Judge of Agra, dated the 9th March, 1893, modifying a decree of Babu Baijnath, Subordinate Judge of Agra, dated the 1st September 1892.

whole of the co-parcenary body and cannot enure to the peculiar benefit of one of them. No authority has been cited in support of the contention raised in this appeal. In the view we take of the case the decree of the lower appellate Court is perfectly sound. The appeal is dismissed with costs.

Appeal dismissed.

16 A. 371 = 14 A.W.N. (1894) 115.

[371] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

SHANKAR PRASAD (*Decree-holder*) v. JALPA PRASAD AND OTHERS
(*Judgment-debtors*).^{*} [2nd May, 1894.]

Execution of decree – Decree payable by instalments with proviso as to execution of entire decree on default in payment of instalment—Construction of decree – Limitation.

Where a decree for money is made payable by instalments with a proviso to the effect that on default being made in payment of the instalments the decree-holder is entitled to execute the decree for the whole amount due, such a decree is to be construed as much as possible in favour of the decree-holder, and unless the decree clearly leaves the decree-holder no option on the happening of a default but to execute the decree once and for all for the whole amount due under it, the decree-holder may execute it on the happening of the first, second or any subsequent default, and limitation will run against him in respect of each instalment separately from the time when such instalment may become due.

[*Diss.*, 14 Ind. Cas. 685 (688) = 8 N.L.R. 144; F., 30 A. 123 = 5 A.L.J. 72 = A.W.N. (1908) 36; 6 P.R. 1913; R., 27 B. 1; 11 A.L.J. 224 (229); 11 Ind. Cas. 526 (527); 14 O.C. 129 (132); 100 P.R. 1902 = 131 P.L.R. 1902; 16 Ind. Cas. 842 (843) = 172 P.L.R. 1912 = 271 P.W.R. 1912; 18 Ind. Cas. 731 (732); 8 N.L.R. 44 (49); D., 28 A. 249 = (1905) A.W.N. 268 = 2 A.L.J. 828; 24 C. 291 = 1 C.W. N. 229.]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit Sundar Lal, for the appellant.

Munshi Ram Prasad, for the respondents.

JUDGMENT.

EDGE, C.J. and BLAIR, J.—This is an appeal under the Letters Patent. In March 1882 a decree, apparently by consent, was passed on a hypothecation bond, the decree being for a principal sum of Rs. 1,879-11, with costs and interest, and future interest at 8 annas per cent. *per mensem*. The decree provided that the principal with the interest should be paid by eight instalments commencing from Jeth, 1289 F., and it contained the following provision:—"And in case of default and non-payment of any instalment the plaintiff has power to realize in one lump sum from the property hypothecated in this decree and from the defendants personally the entire decretal money payable up to that time by executing the decree." The first two instalments were duly paid. The third instalment, which became due in Jeth, 1291 F, *i.e.*, in May or June, 1884, was not paid, nor was any subsequent instalment paid.

The application for execution out of which this appeal arises was made on the 21st of November 1887. The application was dismissed in the Court of first instance on the ground that it was [372] time barred.

* Appeal No. 27 of 1891, under section 10 of the Letters Patent.

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In the lower appellate Court that order was confirmed, and on appeal a Judge of this Court dismissed the appeal, confirming the order of the Court below. It is contended on behalf of the judgment-debtors, respondents, that on the happening of the first default, viz., in May or June 1884, the decree-holder not only got the right, but was bound to execute the decree for all the decretal money not then paid, and that from the date of that default limitation began to run, and this application, being the first which was made, having been more than three years from the date of the first default, was time-barred.

The application was to execute the decree for all the decretal money not paid at the date of the application. The decree-holder gave credit for the first three instalments, although in fact the first two only had been paid. That manœuvre probably was adopted to get rid of any question about limitation. On behalf of the judgment-debtors, respondents, the first case which was cited to us was that of *Dulsook Rattan Chand v. Chugon Narrun* (1). In that case it had been decreed that "in case of default being made in the payment of any one instalment the whole amount of the decree should become payable at once." In considering what that decree was we must read "should" as "shall." The next case was *Shib Dat v. Kalka Prasad* (2). There the condition was that "in the event of default the decree shall be executed for the whole amount." Another case was *Asmutullah Dalal v. Kally Churn Mitter* (3). In that case the decree was that on failure to pay three successive instalments the entire amount shall be recoverable. In *Mon Mohun Roy v. Durga Churn Gooee* (4) the decree was that in default of payment of any one instalment the entire amount of the decree should be recoverable by proceedings in execution. We refer to these cases first. It appears to us that where it is evident from the wording of a decree that the intention is that on a default the decree *shall* be executed, and there is nothing to show that the judgment-creditor could exercise an option as to whether he should execute the decree in full on the happening of a default, or should [373] allow matters to go on, receiving his instalments, in such cases limitation would begin to run from the happening of a default. But it also appears to us that decrees for the payment of money by instalments should be construed as far as possible in favour of the judgment-creditor, whose right to get immediate payment of money due to him is interfered with and suspended by making the decree one for payment by instalments, and that when the wording of a decree can fairly be construed as giving the judgment-creditor an option to execute the whole decree on the happening of a default, or to allow the decree to run on and leave the remaining instalments to be paid in due time, the decree should be construed as giving such option. It is difficult to construe decrees which are not before us, and in looking into reported decisions one is not always enabled to tell what were the precise words used. Further, there is a great danger to be apprehended by construing one decree according to the construction of another which is not in precisely similar words. In the cases to which we have already referred it was apparently open to the Court to construe the decrees as leaving no option to the judgment-creditor, but compelling him to execute his decree onco for all on the happening of a default. On behalf of the respondents we were also referred to *Ugra Nath v. Lagan Mani* (5). In that case execution of a decree for money was suspended so long as instalments of an annuity were regularly paid. That is not a case

(1) 2 B. 356. (2) 2 A. 443. (3) 7 O. 56. (4) 15 C. 502. (5) 4 A. 83.

similar to the present, and we need express no opinion as to whether we agree with the decision in that case. The last case relied upon on behalf of the judgment-debtors, respondents, was that of *Bir Narain Panda v. Darpa Narain Prodhan* (1). In that case the decree apparently was based on a compromise and directed payment by instalments, with a proviso that if default was made in the payment of any instalment, then, without waiting for default in other instalments, it should be competent to take out execution and realise the whole amount of the *kistibandi* together with interest. The learned Judges in that case held that the decree-holder on the happening of a default was bound to execute the decree once and for all. If we had had that case to decide we should have been of [374] opinion that the decree-holder was in that case given an option, as the decree provided that in the event of a default "the decree-holder shall be competent to take out execution," which, in our judgment, is very different from a proviso that the decree-holder in case of default shall execute.

On the other side we have been referred to the case of *Ram Culpo Bhattacharji v. Ram Chunder Shome* (2) in which apparently, although the decree provided that in the event of default in payment of any of the instalments the whole of the decretal money should immediately fall due, the Court considered that the decree gave the decree-holder an option, and that it was not incumbent upon him to execute the decree once and for all on the happening of a default. The only other case to which we have been referred is that of *Muhammad Islam v. Muhammad Ahsan* (3). In that case the decree was for possession and provided that on a fixed sum for maintenance being paid periodically the decree should not be executed, but if default was made in the payment of any year's annuity, the decree-holder would be entitled to execute the decree for possession. In that case this Court held that the decree-holder had an option.

In the present case it appears to us that the intention was that the decree-holder on the happening of any default might, if he wished, execute the decree for all the decretal money then unpaid, but that it was not the intention that on the happening of a default the decree-holder should be bound to execute the decree once and for all. We consequently hold that the application for execution was not barred by limitation, as default had been made in the payment of an instalment within three years of the date of the application.

The greatest difficulty which we have had was as to the amount for which the decree-holder was at the date of his application entitled to execute the decree. He had the option of executing the decree for "the entire decretal-money payable up to that time," viz., the time of default. That was susceptible of two different constructions. One possible construction is that he could only execute his decree [375] for the instalment or instalments due at the time of the default which he relied upon, and for interest due at that time. The other and more reasonable construction is that on the happening of a default the decree-holder was entitled to execute his decree for so much of the full decretal money and so much of the interest due at the time as had not at that time been paid. The latter was apparently the construction put upon it by the parties to the suit.

As to the instalment which became due in Jeth, 1291 F., we need not decide now whether the decree could be executed for it, as it is not

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(2) 14 C. 352.

(3) 14 A.W.N. (1894) 61.

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claimed in this application for execution. We are of opinion that, with the exception of the instalments for which credit has been given, the decree-holder was entitled to execute the decree for the full balance of the decretal moneys, being that part of the decretal moneys which had not been paid at the date of the application arising on default and not given credit for, and for interest up to the time of realization.

We allow this appeal, and set aside the decrees of this Court and of the Courts below with costs in all Courts, and direct the first Court to reinstate on its file of pending cases the application for execution and to proceed to dispose of it according to law.

Appeal decreed.

[See also *Hurri Prasad Chowdhri v. Nasib Singh* (I.L.R., 21 Calc. 541) referred to in S.A. No. 81 of 1893, decided on the 10th of July 1894, in which the Court (Edge, C.J., and Banerji, J.), declined to reconsider the present case—Ed.]

16 A. 375 = 14 A.W.N. (1894) 120.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

PARTAP SINGH (*Defendant*) v. NARAIN DAS (*Plaintiff*)*
[7th May, 1894.]

Act No. XII of 1881 (N. W. P. Rent Act), ss. 190, 191—Civil Procedure Code, ss. 562, 588, cl. (28)—Appeal from Court of Revenue to District Judge—Remand by District Judge under s. 562 of the Civil Procedure Code—Appeal to High Court from order of remand.

Section 190 of Act No. XII of 1881 makes s. 562 of Act No. XIV of 1882, applicable to appeals from a Court of Revenue to a District Judge, and where in such a case a District Judge has made an order of remand under s. 562, an appeal will lie from such order to the High Court under s. 588, cl. (28) of Act No. XIV of 1882.

[376] THE facts of this case sufficiently appear from the judgment of the Court.

Mr. D. N. Banerji, for the appellant.

Babu Durga Charan Banerji, for the respondent.

EDGE, C. J., and BANERJI, J.—This is an appeal by the defendant in the suit from an order of remand made under s. 562 of Act No. XIV of 1882 by the District Judge of Meerut in appeal from a decision of a Court of Revenue. The plaintiff had brought his suit claiming a share of profits in a village, in respect of the years 1295, 1296 and 1297 F. In the year 1295 F. the plaintiff was the lambardar: in 1296 and 1297 F., he was not the lambardar, but merely a co-sharer. The Court of Revenue dismissed the suit, holding that the claim in respect of 1295 F. was barred by time. The ground upon which the claims for 1296 and 1297 were dismissed are immaterial in this appeal. The District Judge set aside the decree of the Court of Revenue and made the order of remand now under consideration. On behalf of the defendant it has been contended that the suit in respect of 1295 F. was barred by limitation. The rule of limitation applying in this case is that contained in the first paragraph of s. 94 of Act No. XII of 1881, which prescribes a period of three years from the day on which the arrears of rent or revenue

* First Appeal No. 110 of 1893, from an order of A. M. Markham, Esq., District Judge of Meerut, dated the 29th June 1893.

or share of the profits of a *mahal* or of village expenses and other dues became due. The claim in respect of 1295 F. was as follows :—

The plaintiff alleged that the defendant had collected more than his share of the rents of the *mahal* and that he, the plaintiff, had paid the Government revenue due by the defendant and certain other expenses, and according to the account made out by him on the balance of all these items, if the account was correct, the sum claimed as profits would be due assuming that limitation did not apply to any of the items. Now the Government revenue, which is alleged to have been paid by the plaintiff and which he has brought into account, was paid partly on the 20th of December 1887, and partly on the 25th of May 1888, the last payment being made on the latter date. In the Meerut district, in which the [377] *mahal* was, the land revenue was due and payable in respect of the Kharif instalment on the 20th of December and 20th of January, and that in respect of the Rabi instalment on the 25th of May. This suit was brought on the 30th of June, 1891, in a Court of Revenue. It is quite clear that if the plaintiff had claimed to recover arrears of revenue in respect of 1295 F., his suit in that respect was barred by limitation. We are of opinion that he cannot avoid limitation by mixing up in the account the arrears of Government revenue for that year as a debit against the defendant, and that, so far as he debits the defendant with those arrears, he is in effect claiming them or part of them as arrears of revenue, although nominally he claims merely a share of profits. It is not a question here of setting out for purposes of account arrears of revenue as a debit against the defendant and giving credit for equivalent payment in respect of those arrears on the other side of the account. There are no credits given in this account. It is wholly one-sided, and it is manifest that, if the arrears of Government revenue which had been brought into the account by the plaintiff were struck out of the account, the plaintiff would recover so much less in this suit, even if he proved all the other items of account. Consequently, whatever he chooses to call his suit, we must regard it, *qua* the items of Government revenue, as a claim for arrears of revenue. So much of the claim as relates to the arrears of revenue in this particular case in respect of 1295 F., is barred by limitation and the order of the Court below must in that respect be varied by dismissing the plaintiff's claim for arrears of revenue in regard to 1295 F.

It has been contended on behalf of the plaintiff that this appeal does not lie. The contention is based on the suit being a suit which except in appeal, is confined to a Court of Revenue and the appeal to the Civil Court being one specially granted by statute, namely, Act No. XII of 1881. This contention is the result of the peculiar wording of s. 190 and s. 191 of Act No. XII of 1881. To deal first with s. 190 : by that section the rules for the time being in force in regard to all proceedings which may be had in respect of [378] appeals from the decisions of Civil Courts shall be applicable to appeals to the District Judge or the High Court under that Act. The decisions of Civil Courts referred to in s. 190 may result either in a decree or in an order, and under the Code of Civil Procedure appeals are given from decrees and also from certain orders. It is to be noticed that in s. 190 the Legislature did not use the words 'orders' or 'decrees,' but used the words "decisions of Civil Courts." It appears to us that s. 562 of Act No. XIV of 1882 was by reason of s. 190 of Act No. XII of 1881 applicable to the appeal from the Court of Revenue to the District Judge, and we think it is not straining the law to hold that when s. 562 of Act No. XIV of 1882 can be applied by a District

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Judge in an appeal from a Court of Revenue, s. 588, cl. (23) gives an appeal from his order passed under s. 562, although the appeal before the District Judge was one from a Court of Revenue and not from a Civil Court. Section 191 of Act No. XII of 1881 is copied from s. 191 of Act No. XVIII of 1873, the only difference being that for "the Indian Limitation Act, 1871," in s. 191 of Act No. XVIII of 1873, in s. 191 of Act No. XII of 1881 the words "the Indian Limitation Act, 1877," are substituted. When Act No. XII of 1881 was passed there were no appeals called "special appeals" under the then Code of Civil Procedure. There were, however, under Act No. VIII of 1859, which was the Code of Civil Procedure in force when Act No. XVII of 1873 was passed, "special appeals." Those special appeals under Act No. VIII of 1859 were not confined to the appeals to which Chapter XLII of Act No. XIV of 1882 applies. They included in some cases what would now be called appeals from orders, *e.g.*, an appeal lay as a special appeal from an order made under s. 351 of Act No. VIII of 1859, that section corresponding with s. 562 of the present Code of Civil Procedure. The order which was made under s. 351 of Act No. VIII of 1859 was, as appears by the wording of the section, treated as a decree, and from that decree a special appeal lay. The Legislature in passing Act No. XII of 1881 possibly overlooked the fact that they were using in s. 191 language which was only applicable to a state of things which existed when Act No. VIII of 1859 was the Code of [379] Civil Procedure. We must give a reasonable interpretation to the words of the Legislature, and we must presume that when they were giving an appeal to the District Judge under s. 191 and making such appeals subject to the rules relating to special appeals under the Code of Civil Procedure, they were using the term "special appeal" as it had been used in Act No. VIII of 1859. They did not intend to pass a section which would be totally inapplicable having regard to the then existing state of things. Taking that view of s. 191 of Act No. XII of 1881, we are of opinion that this appeal lay under s. 588 of Act No. XIV of 1882.

We vary the order of remand by dismissing the plaintiff's suit so far only as it is a claim in fact for arrears of revenue in respect of 1295 F. In other respects we affirm the order of remand. Costs of this appeal will abide the result.

Order modified.

16 A. 379 = 14 A.W.N. (1894) 123.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

SHIMBHU NATH AND ANOTHER (*Plaintiffs*) v. GAYAN CHAND
(*Defendant*).^{*} [8th May, 1894.]

Hindu law—Jains—Widow—Power of widow to deal with deceased husband's property—Custom—Evidence of custom—Judicial decisions.

Held that amongst Agarwala Banias of the Saraogi sect of the Jain religion a widow has full power of alienation in respect of the non-ancestral property of her deceased husband; but that she has no such power in respect of the property which is ancestral. *Held* also that where a custom alleged to be followed by any particular class of people is in dispute, judicial decisions in which such

^{*} Second Appeal No. 480 of 1893, from a decree of T. Benson, Esq., District Judge of Saharanpur, dated the 4th January 1893, reversing a decree of Maulvi Jafar Husain, Officiating Subordinate Judge of Saharanpur, dated the 18th February 1891.

custom has been recognized as the custom of the class in question are good evidence of the existence of such custom. *Sheo Singh Rai v. Dakho* (1) referred to. *Chotay Lall v. Chunnoo Lall* (2) explained. *Hoolas Rae v. Bhowani* (3) and *Behari Lall v. Sookbasi Lall* (4) commented upon.

[R., 27 C. 379; 1 Ind. Cas. 937 (938); 3 S.L.R. 5 (6).]

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Ram Prasad*, for the appellants.

[380] Pandit *Sundar Lal* and Babu *Ratan Chand*, for the respondent.

JUDGMENT.

EDGE, C.J., and BANERJI, J.—The plaintiffs in the suit are appellants here. The suit is brought to obtain a decree for possession of and certain declarations in respect of certain property which was given by one Musammat Gulabi to the defendant. Gulabi died before the suit. Her husband had died before she made the gift. Her husband Sant Lal was a nephew of the plaintiff's. They claim to be entitled to this property as the next reversioners and allege that their right arose on the death of the widow. The parties are Jains, being Agarwala Banias of the Saraogi sect. They live in the district of Saharanpur. The property claimed is immovable property. The District Judge in appeal found that by the custom of this sect and caste of Jains a widow had an absolute power of disposal over the property left by her husband, whether that property was ancestral or self acquired by the husband. On behalf of the plaintiffs it is contended that there was no evidence on which a Court could come to the findings at which the District Judge arrived. That there was something which may be called evidence appears by the record and his judgment, but we apprehend that a Judge when trying a case by himself is bound to act in a similar way with regard to evidence as he would be bound to act if he were trying the case with a jury: for example, where it would be the duty of a Judge to direct a jury that the evidence before them was not evidence upon which they could find as to a certain issue, he would be bound, when trying the case by himself, to deal with that evidence as insufficient to enable him to come to a finding on that issue.

Now there was evidence given as to three transactions in this family with the object of showing that a Jain widow of the Agarwala Bania caste and the Saraogi sect had an absolute power to dispose of not only the self-acquired but also the ancestral property of her deceased husband to which she had succeeded. The first piece of that evidence was that a member of this family, one Musammat Parmeshri, the widow of one Sujji, had made an alienation; but it appeared that in making that alienation she had been [381] joined as alienors by all her deceased husband's brothers, who were the nearest reversionary heirs. That is no evidence of the custom. It is in fact, so far as it goes, evidence from which it might be inferred that the widow had no power to alienate by herself the property which she alienated in that case. The other two cases had reference to the transactions of one Musammat Hardevi. In one case she sold some property and handed over the proceeds to her son-in-law. In the other case, she made a deed of gift in his favour, but never gave him possession of the subject

(1) 6 N.W.P.H.C. R. 382 and 1 A. 688.

(2) 4 C. 744.

(3) S.D.A.N.W.P. (7th Nov. 1864) an unreported case cited in 6 N.W.P.H.C.R. 382, 396, 397.

(4) S.D.A.N.W.P. unreported (16th Nov. 1865) cited in 6 N.W.P.H.C.R. 382, 398.

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of the gift. The latter case of course proves nothing, except that the lady did not carry out her intention. The case in which the lady sold the property and handed over the proceeds to her son-in-law affords evidence of so flimsy a kind that it would be the duty of the Judge not to leave it to the jury on a question of custom, particularly when it appears, as was the case there, that the nearest reversionary heir was only seven years old at the time. In our opinion evidence such as that afforded by these three instances was not evidence which could in any sense be considered as sufficient to entitle either a Judge or a jury to find the alleged custom.

We now come to the other evidence in the case, which consisted of judicial decisions. It appears from the judgment of the District Judge that part of this property was ancestral and part was non-ancestral. Now we shall deal with the question of custom as to the part which was non-ancestral first. In the case of *Sheo Singh Rai v. Dakho and Murari* (1) their Lordships of the Privy Council held on the evidence in that case that there was a custom amongst Jain Agarwala Banias of the Saraogi sect according to which a widow had full power to alienate the self-acquired property of her deceased husband. In our opinion the property which was non-ancestral in the present case must be regarded for the purposes of this suit as subject to that custom.

It was contended by Mr. *Ram Prasad* for the appellant that the fact that this custom had been established in *Sheo Singh Rai's* case was not sufficient evidence to support the finding of the District [382] Judge on that part of the case. There was no evidence to the contrary, and the custom which was proved there was not proved as the custom of any particular family, but as the custom, in these Provinces certainly, of that sect of Jains, and in our opinion that ruling was very strong evidence of the custom. We hold that the judgment in question did afford evidence that Musammatt Gulabi had power to make a gift of the property which was not ancestral property. We do not regard what was said by their Lordships of the Privy Council in the case of *Chotay Lall v. Chunnoo Lall* (2) as meaning that in a case in which the question was merely whether an Agarwala Bania widow of the Saraogi sect could alienate property, the finding in *Sheo Singh Rai v. Dakho* would not afford sufficient evidence of a custom to support the alienation, but we regard the observations of their Lordships in that passage as an answer to the much wider application by Mr. *Cowell* in his argument of the judgment in *Sheo Singh Rai v. Dakho*.

The only judicial decisions to which we have been referred by Pandit *Sundar Lal* on behalf of the defendant-respondent in support of the proposition that in this sect and division of the Jains a widow can by custom alienate the ancestral property of her deceased husband were two cases referred to in the judgment of this Court in *Sheo Singh Rai v. Dakho* (1). The first was that of *Hoolas Rae v. Bhowani* (4). In that case the Sadr Diwani Adalat had set aside the judgment of the Court below on the ground that it had been arrived at on evidence not taken upon oath. The evidence consisted of the answers of certain bankers of the Saraogi sect resident at Delhi. The Sadr Court remanded the case with an intimation that fresh commissions should issue, not only to Delhi but to Benares and any other place in the North-Western Provinces in which Jains were known to

(1) 6 N.W.P.H.C.R. 382 and I A. 688.

(2) 4 C. 744 (752).

(4) S.D.A.N.W.P. (7th Nov. 1864), an unreported case cited in 6 N.W.P.H.C.R. 382, 396, 397.

reside. There was in fact no further judicial decision of the matter, as the parties referred their dispute to arbitration, and the arbitrators, on some ground of which we are not informed, decided in favour of the alienation made by the [383] Jain widow. That case does not in our opinion afford evidence upon which a Court would be entitled to depart from the ordinary rules of Hindu law on such an important matter as a widow's rights in dealing with the ancestral property of the family.

The other case was that of *Behari Lal v. Sookbasi Lal* (1). We have looked at the record in that case, and we find that there the Judges expressed a view that families of the Jain sect are not bound by the Hindu Shasters. We may remark that that view is only correct where a custom is proved clearly to exist amongst the Jains which is at variance with the Shasters, and that where no such custom is proved the rules of Hindu law apply to them. That was decided by the Privy Council in *Chotay Lal v. Chunnoo Lal* (2). We also find that those learned Judges held that the Saraogi widow in that case was entitled to alienate ancestral property, because in the case of *Hoolas Rae v. Bhowani*, to which we have referred, the persons whose opinions were taken on commission in that case stated that to be the custom. In our opinion there was in this case no evidence which a Judge could leave to a jury or on which he himself could find that there existed a custom in this sect by which Musammatt Gulabi was entitled to alienate the ancestral property which had been of her husband.

Under section 566 of the Code of Civil Procedure, we refer to the District Judge the issue as to what portion of the property in dispute was the ancestral property of Sant Lal and what portion of the property in dispute was non-ancestral. Ten days will be allowed for filing objections on the return to the reference.

Issue referred.

16 A. 383 = 14 A.W.N. (1894) 122.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Blair.

AKBAR HUSAIN (*Plaintiff*) v. ABDUL JALIL AND ANOTHER
(*Defendants*).^{*} [8th May, 1894.]

Muhammadian law—Pre-emption—Talab-i-ishtishhad—Talab-i-mawasibat.

In making *talab-i-ishtishhad* under the Muhammadian law it is essential to the validity of that proceeding that the person making the demand should in some form or [384] another distinctly state that he had prior thereto, made what is known as the immediate demand (*talab-i-mawasibat*). *Rujjub Ali Chopedar v. Chundi Churn Badra* (3) referred to.

[F., 20 A. 457; R., 20 A. 499.]

THE facts of this case were as follows :—

The plaintiff sued the defendants-respondents, the vendors, together with certain other persons, the vendees, for pre-emption of a certain house. They alleged that they came to know of the sale on the 8th of

^{*} Second Appeal No. 414 of 1893, from a decree of Babu Promoda Charan Banerji, Judge of the Small Cause Court, Allahabad, dated the 22nd December 1892, reversing a decree of H. David, Munsif of Allahabad, dated the 20th August 1892.

(1) S.D.A.N.W.P. unreported (16th Nov. 1865) cited in 6 N.W.P. H.C.R. 382, 398. (2) 4 C. 744. (3) 17 C. 543.

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January, 1891, and thereupon without delay took the necessary preliminary steps by making the immediate demand and the demand with invocation of witnesses, and they claimed possession of the house upon payment of Rs. 30.

The defendants, amongst other pleas, denied the plaintiff's right to pre-empt, and in particular that he had fulfilled the requirements of the Muhammadan law as to *talab-i-mawasibat* and *talab-i-ishtishhad*.

The Court of first instance (Munsif of Allahabad) declined to apply the Muhammadan law of pre-emption at all: and, holding that, according to "justice, equity and good conscience," the plaintiff was not entitled to pre-empt, dismissed the suit.

The plaintiff appealed, and the Subordinate Judge holding that as a matter of "justice, equity and good conscience," the Muhammadan law of pre-emption should be applied, remanded the suit under s. 562 of the Code of Civil Procedure.

On remand the Munsif decreed the plaintiff's claim, holding that the necessary formalities of the Muhammadan law had been complied with.

The defendants, vendors, appealed, and, the appeal coming before a different Subordinate Judge, the Court held that the plaintiff had not complied with the strict requirements of the Muhammadan law in the manner of making his *talab-i-ishtishhad*, inasmuch as no reference had been made therein to the previous *talab-i-mawasibat*, and accordingly the Court allowed the appeal and dismissed the plaintiff's suit.

[385] The plaintiff then appealed to the High Court.

Pandit Suraj Nath, for the appellant.

Mr. Abdul Majid, for the respondents.

JUDGMENT.

KNOX and BLAIR, JJ.—The sole question with which this second appeal is concerned may be briefly summed up as follows:—In making *talab-i-ishtishhad* under the Muhammadan law is it, or is it not, essential to the validity of that proceeding that the person making the demand should in some form or another distinctly state that he has, prior to this demand, made what is known as the immediate demand—*talab-i-mawasibat*? We are of opinion that this question must be answered in the affirmative. We do not lay down that the use of any precise formula, such as that set out in Hedaya, Book 38, Chapter 2, about the middle of the chapter, is the only formula that would prevail, for in the same book and chapter it is distinctly laid down that it is not material in what words a claim is preferred, it being sufficient that they imply a claim; but, so far as we have been referred to the texts on the subject, viz., the Fatawa Sirajiya, page 416, Calcutta edition, 1827, the Hedaya abovementioned and Baillie's Muhammadan law, they all of them appear to lay particular stress upon the fact that wherever a *talab-i-ishtishhad* is required mention must be made of the fact that a *talab-i-mawasibat* has been previously made. In the course of the argument, our attention was directed to the case of *Rujjub Ali Chopedar v. Chundi Churn Bhadra* (1) where the precise question which is before us in this second appeal was made the subject of a reference to the Full Bench, and it was there held of the *talab-i-ishtishhad* that it consists in the party going upon the land the right of pre-emption to which he claims, or to the seller or purchaser, and saying that

(1) 17 O. 543.

he is a claimant of pre-emption, that he has already asserted his claim and that he continues to do so, and at the same time invoking witnesses to the fact of his having made it. This view of law appears to us fully borne out by the original texts of the Muhammadan law to which we have been referred. Mr. *Suraj Nath* who appeared for the appellant exerted his utmost in the [386] contention that all that was necessary for the validity of a *talab-i-ishtishhad* was that there should be a claim for pre-emption on the spot and in the presence of the pre-emptor. He further contended that if we were not satisfied with this view of the law the case should be remanded for a finding as to whether or not any of the witnesses to the *talab-i-mawasibat* were present when the *talab-i-ishtishhad* was made. We are satisfied that the lower appellate Court did intend to find, and did find, that no witness had been proved to be present by the appellant, who should have put the matter into proof. There is therefore no need for a remand. The appeal fails and is dismissed with costs.

Appeal dismissed.

16 A. 386 = 14 A.W.N. (1894) 129.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Banerji.

LACHMI NARAIN (*Defendant*) v. JETHU MAL (*Plaintiff*).
[25th May, 1894.]

Mortgage—Mortgage of two portions of a house with a common party wall to two separate mortgagees—Interference with common wall by one of the mortgagees—Right of suit—Act IV of 1882 (Transfer of Property Act), s. 76.

The owner of a house, having built up a door which gave communication between one-half of the house and the other, mortgaged each half separately to separate mortgagees. One of such mortgagees re-opened the door communicating with the other mortgagee's portion of the house. *Held* that a good action would lie on behalf of the other mortgagee against the mortgagee who had opened the door to compel him to close it.

THE facts of this case sufficiently appear from the judgment of Knox, J. Mr. D. N. Banerji, for the appellant.

Munshi Madho Prasad, for the respondent.

JUDGMENT.

KNOX, J.—The subject-matter of the suit out of which this second appeal arises is a party wall in a house, part of which is in possession of the appellant and part in possession of the respondent. Appellant and respondent both hold the portions of which they are in possession as mortgagees from one common mortgagor. It is found by the lower appellate Court that the wall in question is a [387] wall, to the possession of which both appellant and respondent are jointly entitled. The appellant has opened in the party wall a door in such a manner that there is now communication between both portions of the house. It is admitted that the door which he has thus opened existed at a time prior

* Second Appeal No. 54 of 1893, from a decree of L. Porter, Esq., District Judge of Saharanpur, dated the 9th September 1892, confirming a decree of Maulvi Syed Muhammad, Subordinate Judge of Saharanpur, dated the 17th July 1890.

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to the mortgages in favour of the parties to this appeal. The respondent asks for a decree to have the door closed and restored to the condition in which it was and has been from the time he entered on the property as mortgagee until the recent re-opening of it by the appellant. Both the Courts below granted him a decree as prayed for. It is now contended in appeal before us that the respondent cannot institute a suit for this relief, inasmuch as he is only a mortgagee in possession and not the real owner of the property. It was also contended that the act of the appellant in re-opening the door did not amount to an ouster of the respondent from his possession. We were referred to *Stedman v. Smith* (1). We need not, however, consider this latter contention. We are of opinion that upon a proper construction of s. 76 of the Transfer of Property Act (Act No. IV of 1882), the respondent was not only bound himself not to commit any act which was destructive to the property, but also to restrain others from doing so. It was argued with considerable force by the learned counsel who appeared for the appellant that the re-opening of a door which had previously existed could not be considered an act destructive to the property. The answer to this is that the mortgagor when he mortgaged the property, for reasons which weighed with him, and which are sufficiently obvious, as he was mortgaging the property to two different persons, went to the expense of closing the door of communication, and the respondent is responsible for handing back the property to him as far as possible in the same condition in which he received it. An act like the opening of this door, altering as it does materially the condition of the property, unless it can be clearly shown to be an improvement, is destructive of the property, for we must take it that the owner in deliberately closing the door places it in the condition in which [388] he considered it to be of most value. The appeal is dismissed with costs.

BANERJI, J.—I agree in dismissing this appeal. I am of opinion that the respondent is entitled to maintain this action not only on the ground that, as mortgagee in possession, it is his duty to preserve the mortgaged property from destruction, but also on the ground that, as such mortgagee, he has a possessory title in the mortgaged premises, and on the strength of that title he has the right to restrain others from trespassing on it. The re-opening of a door of communication between the portion of the house mortgaged to him and the portion mortgaged to the appellant, which door had been closed before the mortgage, was an interference with his peaceful and comfortable enjoyment of the portion of the house mortgaged to him and an act of trespass which he was competent to prevent. Further, his position, in so far as the party wall between the two portions of the mortgaged house is concerned, is analogous to that of a tenant in common. Such a tenant is entitled to maintain an action of trespass against his co-tenant for an act destructive to the subject-matter of the tenancy in common, as "such act amounts in contemplation of law to an actual ouster" (Addison on Torts, 7th ed., p. 424). In the case to which the learned counsel for the appellant has referred it was held that where a building is placed against a wall "by one of two tenants in common of the wall, and the wall is heightened and carried up into a chimney, this is evidence of an ouster of the other tenant in common, as the altered wall and the old wall are not identical things, and the nature of the property is substantially changed." The principle laid down in that case seems to me to be applicable to this case.

(1) 26 L.J.Q.B. 314.

The act of the appellant in re-opening a door in the party wall substantially changed the nature of the property and amounted to an ouster of the respondent, thus affording him a cause of action for the present claim. The appeal is dismissed with costs.

Appeal dismissed.

16 A. 389 = 14 A.W.N. (1894) 135.

[389] REVISIONAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

QUEEN-EMPRESS v. SHEO DIAL MAL.* [25th May, 1894.]

Act XLV of 1860, Indian Penal Code, s. 107—Abetment—Instigation by means of letter—Place where offence may be tried.

Where one person instigates another to the commission of an offence by means of a letter sent through the post the offence of abetment by instigation is completed so soon as the contents of such letter become known to the addressee, and such offence is triable at the place where such letter is received.

[*Diss.*, 23 C. 39; *F.*, 2 C.W.N. 606; *R.*, 18 A.W.N. 33.]

THIS was an application by Government for revision of an order of the Sessions Judge of Gorakhpur of the 8th of September 1893, made in revision of an order of the Joint Magistrate of Gorakhpur, dated the 12th of July 1893. The facts of the case sufficiently appear from the judgment of the Court.

The Public Prosecutor (Mr. A. Strachey), for the Crown.

The Hon'ble Mr. Colvin and Mr. C. Ross Alston, for the opposite party.

JUDGMENT.

EDGE, C. J. and TYRRELL, J.—The question which we have to decide is whether the Joint Magistrate of Gorakhpur had jurisdiction in the following matter. It must not be assumed from what we shall say in this judgment that we are deciding any question of fact. The questions of fact will have to be gone into by the proper Court. It was alleged that one Sheo Dial, a resident of Calcutta, sent through the post from Calcutta to his agent at Gorakhpur a letter inciting that agent to procure the commission of a criminal offence in the Gorakhpur District. The Joint Magistrate was of opinion that as Sheo Dial was a resident of Calcutta and as the letter was posted at Calcutta, he, the Joint Magistrate at Gorakhpur, had no jurisdiction. The Sessions Judge, before whom the matter came in revision, was of opinion that the Joint Magistrate of Gorakhpur had jurisdiction, and also that a Magistrate in Calcutta would have jurisdiction, and, curiously enough, being of that opinion he dismissed the application for revision. [390] This is an application on behalf of Government for revision of these orders.

It appears to us that, if it be the fact that Sheo Dial posted or caused to be posted in Calcutta a letter to his agent at Gorakhpur inciting that agent to the commission of a criminal offence in Gorakhpur, he was guilty of the offence of abetment so soon as that letter was received by and the contents became known to the agent in Gorakhpur, and, whether or not Sheo Dial could have been tried for that offence in Calcutta, he

* No. 263 of 1894.

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(1894) 135.

certainly could be tried for it in Gorakhpur. The instigating of the agent to commit the criminal offence in Gorakhpur was completed the moment that the contents of that letter came to the knowledge of the agent through the action of Sheo Dial. In the case of the *Queen v. Ransford* (1) the Court for Crown Cases Reserved doubted that there could be an incitement by letter to the commission of an offence unless the contents of the letter came to the knowledge of the person whom it was intended to incite. They held in that case that there could be the misdemeanour of attempting to incite to the commission of a criminal offence, the facts being in that case that the person to whom the letter was sent, being a school-boy, handed over the letter unopened and unread to his master. We set aside the order of the Sessions Judge and the order of the Magistrate, and we direct that the Magistrate or his successor proceed with the case.

16 A. 390 = 14 A.W.N. (1894) 131.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

RAMU RAI AND OTHERS (*Judgment-debtors*) v. DAYAL SINGH
(*Decree-holder*).^{*} [28th May, 1894.]

Execution of decree—Limitation—Act XV of 1877 (Indian Limitation Act), s. 4—Procedure applicable to execution of decrees—Review—Civil Procedure Code, s. 623.

It is the duty of a Court to which an application to execute a decree is presented to satisfy itself whether or not such application is barred by limitation. If the [391] Court on such an application omits to decide the question of limitation, or decides it against the judgment-debtor and in his opinion wrongly, the judgment-debtor may either appeal or can apply under s. 623 of the Code of Civil Procedure for review of the Court's order, and this whether notice of the application for execution had been issued to him or not.

A Court in executing a decree should look to the substance rather than to the form of applications presented to it. Where an application was made by a judgment-debtor objecting to the execution of a decree against him on the ground that it was barred by limitation, previous objections to execution having been disallowed; it was held that the relief prayed for being one which could only be granted by way of review the application should be treated as one for that purpose.

THE facts of this case are fully stated in the judgment of the Court.

Mr. E. A. Howard, for the appellants.

Mr. Abdul Majid, for the respondent.

JUDGMENT.

EDGE, C. J. and BANERJI, J.—This is a second appeal arising out of proceedings in execution of a decree for money. The decree-holder made an application for execution of the decree, and thereupon the Court issued notice, under s. 248 of the Code of Civil Procedure, requiring the judgment-debtors to show cause on the 18th of December 1889, why the decree should not be executed against them. The judgment-debtors did not appear on the 18th of December 1889. The case was called on and the

^{*} Second Appeal No. 636 of 1893, from an order of Maulvi Abdul Ghafur, Additional Subordinate Judge of Ghazipur, dated the 23rd February 1893, confirming an order of Babu Girdhari Lal, Munsif of Ballia, dated the 21st November 1892.

Court ordered that the fee for attachment should be deposited on the 21st of January 1890. On the 21st of January 1890, the Court, apparently without any further notice to the judgment-debtors, ordered certain property to be attached in execution of the decree. On the 7th of February 1890, the property was attached. On 21st of March 1890, the judgment-debtors filed an objection alleging that the execution of the decree was barred by limitation. There appears to have been several adjournments, and, on the 20th of November 1890, the objection was dismissed for default of appearance. On the 19th of December 1890, the judgment-debtors presented an application asking to have their petition of objections restored under s. 99 of Act No. XIV of 1882. On the 22nd of September 1892, the Court dismissed that application, holding that by reason of Act [392] No. VI of 1892, s. 99 of Act No. XIV of 1882 was inapplicable to proceedings in execution of decree. On the same day, viz., on the 22nd of September 1892, the judgment-debtors filed a petition objecting to the executing of the decree on the ground of limitation. That objection was disallowed in the first Court and an appeal from that dismissal was dismissed in the Court of first appeal. From the decree of the Court of first appeal this appeal has been brought.

It has been contended here by Mr. *E. A. Howard* for the judgment-debtors, objectors, that the Court was bound under s. 4 of Act No. XV of 1877 to consider whether or not the application for execution was barred by limitation, and that it was bound to do so whether or not the objection that the execution was barred by limitation had been taken by the judgment-debtors. He also contended that the dismissal on the 22nd of September 1892, of the application made on the 19th of December 1890, did not under the circumstances bar the application in question in this appeal. He further contended that the application which was made on the 22nd of September 1892, ought to have been regarded by the Court as an application to the Court to exercise its jurisdiction under s. 623 of Act No. XIV of 1882. On the other hand, Mr. *Abdul Majid* for the decree-holder contended that the Court was not bound to consider any question of limitation, as the judgment-debtor had not appeared to show cause as required by the notice under s. 248 of Act No. XIV of 1882, and he relied upon s. 249 of that Code. He also contended that the dismissal on the 22nd of September 1892, of the application of the 19th of December 1890, barred the present application, and that the order which was passed on the 18th of December 1889, coupled with the order of the 21st of January 1890, operated as *res judicata* on the question of limitation. He further contended that the present application could not be considered as an application under s. 623 of Act No. XIV of 1882.

The following cases were cited to us in the course of the argument:—*Mungul Pershad Dichit v. Grija Kant Lahiri Chowdhry* (1), [393] *Nanda Rai v. Raghunandan Singh* (2), *Sher Singh v. Daya Ram* (3), *Maharaja Radha Parshad Singh v. Lal Sahab Rai* (4), and *Haridas Nandi v. Jadunath Dutt* (5), but in the view which we take of this case we do not think it necessary to refer to any of these cases.

It appears to us that s. 4 of Act No. XV of 1877 makes it obligatory on the Court to which an application for the execution of a decree is presented to consider and decide, so far as it can do so, whether the application is within time or is barred by limitation. In our opinion it is

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(1894) 131.

(1) 8 I.A. 123.

(4) 17 I.A. 150.

(2) 7 A. 282.

(5) 5 B.L.R. App. 66.

(3) 13 A. 564.

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(1894) 131.

particularly necessary that a Court should be careful to ascertain for itself, so far as the record enables it, whether or not an application for execution of a decree is in time or is time-barred. On many of such applications the Court can make an order for the execution of the decree without issuing any notice under s. 248 of Act XIV of 1882. There are many cases to which that section does not apply, and where that section does not apply the Court makes the order *ex parte* and without notice to the judgment-debtor. An application for execution of a decree ought, if it truly sets out the particulars required by s. 235 of Act No. XIV of 1882, to enable the Court reasonably to satisfy itself whether or not the application is time-barred. There are possibly some few cases to which Art. 179 of Sch. ii of Act No. XV of 1877 does not apply, and in which it is possible that the particulars noted in s. 235 of Act No. XIV of 1882, or even the record of the case, might not afford the information to enable the Court to decide whether the application for execution of the decree would or would not be time-barred. In our opinion a Court, if it has not got before it the information necessary to decide the question of limitation, ought to compel the applicant for execution of a decree to furnish that information. What we have said in our opinion applies to the duty of a Court to which an application to execute a decree is made. We have now to consider what are the courses open to a judgment-debtor where an order has been made for execution of the decree, either upon notice to him under s. 248 or without notice to him of [394] the application in cases to which s. 248 does not apply. The principle of the judgment of the Full Bench of this Court in *Dhonkal Singh v. Phakkar Singh*, (1) shows that neither s. 99 nor s. 158 of Act No. XIV of 1882 can be applied to execution-proceedings. It appears to us that there are only two courses open to a judgment-debtor who desires, after an order for execution has been made after notice and in his absence, or without notice to him, to raise a question of limitation. One course is that of appeal. We do not think, however, that he is limited to an appeal. We think that, certainly where the question to be raised is one of limitation, and most probably in all other cases, such a judgment-debtor might take the course of applying under s. 623 of Act No. XIV of 1882 for a review of the order for execution. If the record showed that the execution of the decree was time-barred, the order for execution would be an order which was erroneous on the face of the record, and in any case if the Court had not considered the question of limitation the fact would be "sufficient reason" for the presentation of the application under s. 623. Again, if an order for execution was passed without any notice to the judgment-debtor, he could not have produced any evidence at the time when the order was made to show why the order should not be made. We further think that in execution-proceedings the Court should look to the substance of such an application as that in the present case rather than to the form in which the application was made. Now the application or petition of the 22nd of September 1892 which raised the question of limitation was certainly not in form an application for review of the order for execution of the decree; but the only object of such petition or application was to obtain redress, and that could only be granted by the Court by review of its order for execution. Consequently, we think that the Court in the present case should have treated the petition or application of the 22nd of September 1892, as a petition asking for redress which could only be granted by the

(1) 15 A. 84.

Court reviewing its order. The order which it was asked to review was the order for attachment and sale. In the view which we take of the petition of the 22nd of September 1892, it is not [395] necessary to decide whether the order of the 18th of December 1889, and that of 21st of January 1890, would operate by way of *res judicata* if those orders, or the operative one of them, were not successfully assailed in appeal or review. As to the dismissal on the 22nd of September 1892 of the application of the 19th of December 1890, we do not think that it affects the question. The application of the 19th of December 1890 was dismissed not for want of merits, but because Act No. VI of 1892 deprived the Court of the machinery by which effect might otherwise have been given to the petition of the 19th of December 1890.

We set aside the decree under appeal and remand this case under s. 562 of the Code of Civil Procedure, as the application of the 22nd of September 1892 was dismissed on a preliminary point. Costs in this Court and hitherto will abide the result.

Cause remanded.

16 A. 395 = 14 A.W.N. (1894) 133.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

BHAGWAN SINGH (*Judgment-debtor*) v. RATAN (*Decree-holder*).^{*}
[29th May, 1894.]

Civil Procedure Code, s. 247—Costs—Cross-claims under same decree—Costs under same decree recoverable in different ways.

Section 247 of the Code of Civil Procedure is not limited in its application to cases in which the remedy of each party against the other is of precisely the same nature. Thus where one party to a suit was entitled to recover certain costs by means of the sale of hypothecated property, and the other party under the same decree was entitled to recover a smaller sum as costs from his opponent personally, it was held that s. 247 of the Code applied, and that the costs recoverable personally could be set-off against the costs recoverable by sale of the hypothecated property. *Kalka Prasad v. Ram Din* (1) dissented from.

[F., 23 M. 121 (123) ; R., 16 C.P.L.R. 73.]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. E. A. Howard, for the appellant.

Pandit Moti Lal, for the respondent.

JUDGMENT.

[396] EDGE, C.J. and BANERJI, J. — This second appeal has arisen out of the execution of a decree passed under s. 92 of Act No. IV of 1882. In the suit in which that decree was made the mortgagor, who is respondent in this appeal, obtained a decree for redemption on payment into Court of the money due to the mortgagee, who is the appellant here, for the mortgage-money and for costs of the suit upon a date fixed by the decree. The mortgage-money including interest *plus* this appellant's, mortgagee's, costs of Rs. 31-1-6, amounted to Rs. 1,004-7, on the date when payment

^{*} Second Appeal No. 315 of 1893, from an order of Babu Bepin Behari Mukerji, Additional Subordinate Judge of Meerut, dated the 23rd December 1892, confirming an order of Pandit Mohun Lal Hukm, dated the 16th June, 1892.

(1) 5 A. 272.

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14 A.W.N.
(1894) 131.

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16 A. 395 =
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(1894) 133.

was to be made. The plaintiff in that suit, respondent here, was awarded by the decree Rs. 6-10 for costs as against the defendant, appellant here. The plaintiff, respondent here, within the time limited by the decree paid into Court Rs. 1,003-11-6. The mortgagee objected to deliver the mortgaged property to the mortgagor on the ground that the mortgage-money and costs had not been fully paid. *i.e.*, that there was a deficiency of as. 11, p. 6. He contended that, the decree being one for foreclosure in the event of non-payment, the mortgagor was not entitled to possession. The first Court disallowed his objection. The mortgagee appealed, and the lower appellate Court dismissed his appeal. Still being of the mind of Shylock of old, he pursued his enemy by an appeal to this Court, all about as. 11, p. 6.

In this Court, it has been contended that the mortgagor was bound within the time limited by the decree to make payment of the mortgage-money and interest according to the account, and of the Rs. 31-1-6, the mortgagee's costs in the suit, and that the mortgagor could not deduct from the sum of Rs. 31-1-6, the Rs. 6-10, or any part of it awarded to him in that suit as costs against the mortgagee. For that contention the decision of this Court in *Kalka Prasad v. Ram Din* (1) was cited to us. We certainly do not agree with the view expressed in that case as to the bearing of s. 247 of Act No. XIV of 1882. There is nothing in that section which limits its application to a case in which the remedy of each party against the other is of precisely the same nature. It appears [397] to us that where one party is entitled to recover, for example, under s. 88 of Act No. IV of 1882, the amount of a mortgage-debt due by the other side by sale of the other side's property and the other side is entitled to recover under the same decree costs against the plaintiff personally, s. 247 applies, for the reason that there are two parties who are entitled under the same decree to recover from each other sums of different or the same amounts; and that it makes no difference that one of those parties is obliged to recover from the other the money due by executing a decree against the hypothecated property of the other, whilst his opponent is only entitled to recover the money decreed for costs personally from the other side. The object of s. 247 is to prevent each side executing a decree in respect of amounts due, whether for costs or otherwise, under the same decree. In this particular case if the mortgagor was not entitled to set off the Rs. 6-10, costs due to him under the decree, against an equivalent amount of costs due by him under the decree, he would be left without a remedy for his costs, because he, being the person entitled to the smaller sum, is prohibited by s. 247 from executing his decree for that smaller sum. A difficulty might have arisen here if the mortgagee had not been awarded costs against the mortgagor under the decree, because, the decree being one for foreclosure in default of redemption, there might have been no sum against which the mortgagor could have set off the costs due to him, if it had not been that the mortgagee had been awarded a larger sum for costs.

In our opinion, s. 247 applies in this case and the mortgagor was entitled to deduct Rs. 6-10, from the Rs. 31-1-6 costs awarded to the mortgagee in calculating the amount to be paid by him into Court. The result is that instead of there having been a deficiency there was an excess. We dismiss this appeal with costs.

Appeal dismissed.

(1) 5 A. 272.

16 A. 398 = 14 A.W.N. (1894), 130.

[398] APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.*SUKRU (*Defendant*) v. TAFAZZUL HUSAIN KHAN (*Plaintiff*).^{*}
[29th May, 1894.]1894
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CIVIL.*Act XII of 1881 (N.W.P. Rent Act), s. 9—Occupancy-tenant—Simple mortgage by occupancy-tenant—Surrender of holding by heirs of mortgagor—Suit on mortgage, sale, and purchase by mortgagee—Subsequent suit by zamindar for recovery of occupancy-holding.*16 A. 398 =
14 A.W.N.
(1894) 130.

A, an occupancy-tenant, to whom the second and third paragraphs of s. 9 of Act No. XII of 1881 applied, gave a simple mortgage of his occupancy-holding to one S. During the continuance of the mortgage, A died, and his sons surrendered the occupancy-holding to the zamindar. S then brought a suit for sale on his mortgage, obtained a decree, had the mortgaged property sold and purchased it himself. On suit by the zamindar, who had not been made a party to any of the previous proceedings, against S for recovery of the holding, it was held that S took nothing by his purchase under the decree obtained as above described and that the zamindar was entitled to recover.

[R., 20 B. 82; 11 C.P.L.R. 5; D., 18 A. 354; 24 A. 538; 9 C.P.L.R. 101 (106).]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *E. A. Howard*, for the appellant.Pandit *Moti Lal*, for the respondent.

JUDGMENT.

EDGE, C. J. and BANERJI, J.—The suit out of which this appeal has arisen was one in which the plaintiff claimed possession of 4 bighas 15 biswas of land bearing a jama of Rs. 57 and of the trees standing on the land. He also claimed to have it declared that an auction-sale, held on the 11th of March, 1892, was null and void. The facts were these:—The plaintiff is a zamindar. One Alopi Kachi, who died in 1890, was an occupancy-tenant of the land in question. He, in July, 1885, granted to Sukru, the principal defendant, a simple mortgage of the land with the trees standing on it. On Alopi's death his sons, who were also defendants in this suit, relinquished the occupancy-holding to the plaintiff under s. 31 of Act No. XII of 1881. The defendant Sukru had brought a suit on his mortgage of the 9th of July 1891, and obtained under s. 88 of Act No. IV of 1882 a decree for sale of the mortgaged property. Under that decree the property in question was put up for sale and was sold [399] and purchased by the defendant Sukru and he obtained possession. The present plaintiff was not a party to the suit in which that decree was obtained. The defendant Sukru claims that he is entitled to the possession of the land with the trees on it by virtue of the sale held under the decree in the suit brought on his mortgage. The lower appellate Court has found that the relinquishment by Alopi's sons to the plaintiff was not fraudulent. In the view which we take of this case that finding is immaterial. The right of occupancy of Alopi and his sons was a right of occupancy to which the second and third paragraphs of s. 9 of Act No. XII of 1881 applied. We should mention that under s. 5 of the

^{*} Second Appeal No. 301 of 1893, from a decree of Muhammad Sirajuddin, Subordinate Judge of Allahabad, dated the 6th December 1892, reversing a decree of H. David, Esq., Munsif of Allahabad, dated the 17th August 1892.

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wajib-ul-arz of the village in question, which was made in 1875, it was provided that planters of trees in the village should have the right to cut or sell or mortgage them. Now, if it had not been for the restriction of s. 9 of Act No. XII of 1881, the question might have arisen here, quite independently of any finding of fraud, as to whether the relinquishment by the sons of Alopī could have prejudiced the right of the mortgagee from Alopī, the plaintiff surrenderee having had a notice of the mortgage granted by Alopī. It would appear from *Clements v. Matthews* (1) *Beadon v. Pyke* (2) and *Pleasant v. Benson* (3) that where a lessee or tenant for life or other person having an estate has charged or mortgaged it and subsequently surrenders it to the reversioner, remainderman or lessor, as the case may be, while the charge or mortgage is continuing, the estate of such tenant for life or lessee must be taken to continue, so far as may be necessary, for the protection of the person entitled to the charge or mortgage. It appears certain that such is the law, whether the surrenderee has notice of the charge or not. If it were not for s. 9 of Act No. XII of 1881, we should have held that the relinquishment by the sons of Alopī to the plaintiff who had notice of Sukru's interest would not operate to defeat Sukru's interest in the title under his mortgage.

The provisions of s. 9 of Act No. XII of 1881 are clear, and, the lands in question being a portion of an occupancy-holding to [400] which the second and third paragraphs of that section apply, the right of occupancy did not pass under the sale at which the defendant purchased, and he got no title to the right of occupancy, and the right of occupancy having been relinquished, he had no title whatever to possession. Between the defendant Sukru and Alopī and Alopī's representatives in title, Sukru by his decree and the purchase at the sale under it may have obtained title, but he obtained under that decree no title as against the zamindar, who was no party to the suit in which that decree was made.

Mr. *E. A. Howard* has pressed every point which was possible on behalf of his client Sukru. He has contended that, even if Sukru obtained no title against the plaintiff by the purchase under his decree, he would be entitled to fall back upon and protect himself under the mortgage of 1885. It is not necessary to consider whether, having brought a suit on that mortgage and obtained a decree, he could now fall back on such rights as he may have had under the mortgage. We say it is not necessary to consider that question because the mortgage gave him no right to the possession of any portion of the holding, consequently, whether the defendant Sukru takes his stand on his mortgage of 1885, or on the sale to him in 1891, he has shown no title to possession as against the plaintiff.

Mr. *Howard* has pressed upon us the hardship of his client who has lost his money. That hardship could not have fallen on his client if he had not attempted to act contrary to the express provisions of s. 9 of Act No. XII of 1881. Mr. *Howard* has also contended that, so long as the trees are standing, his client Sukru has a right to occupy the land for the purpose of enjoying them or cutting them down and carrying them away. That is not the right which Sukru claimed as a defendant. He claimed no right to the land, as appurtenant to the trees, but he claimed a right to the land, and his claim in respect of the trees was to the trees as appurtenant to the land. In any case, even if he had a right to cut down the trees, as to which we express no opinion, that was a right, which, if

(1) L. R. 11 Q.B.D. 608.

(2) 5 M. and S. 146.

(3) 14 East 294.

it existed here, he was bound to exercise prior to or im-[401]mediately after the relinquishment by the sons of Alopī of the right of occupancy. However, as we have said, the defendant's case is that he is entitled to the possession of the land and the trees growing on the land, and that is the basis upon which this case has been fought in the Courts below. We dismiss this appeal with costs.

Appeal dismissed.

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(1894) 130.

16 A. 401 = 14 A.W.N. (1894) 124.

APPELLATE CIVIL.

Before Mr. Justice Burkitt.

REFERENCE UNDER THE COURT FEES ACT, 1870, s. 5.*
[14th May, 1894.]

Act VII of 1870, ss. 5, 17—Court fee—Suit for possession and for mesne profits or damages—Suit not embracing two distinct subjects.

A suit upon one and the same cause of action for possession of immoveable property and for mesne profits or damages for the wrongful retention of such property is not a suit embracing two or more distinct subjects within the meaning of s. 17 of Act No. VII of 1870. *Chamaili Rani v. Ram Dai* (1), *Mul Chand v. Shib Charan Lal* (2), *Chedi Lal v. Kirath Chand* (3), and *Kishori Lal Roy v. Sharut Chunder Mozumdar* (4) discussed.

[F., 27 A. 186 = A.W.N. (1904) 210; R., 4 Ind. Cas. 289 (291) = 5 L.B.R. 94 (98); 7 O.C. 152.]

THIS was a reference under s. 5 of Act No. VII of 1870 made by the Taxing officer of the High Court to the Judge appointed under the said section for the final decision of questions appertaining to Court-fees. The circumstances which gave rise to the reference appear from the Taxing Officer's order, which is as follows:—

"For the Hon'ble Judge appointed under s. 5 of the Court-fees Act (VII of 1870).

The question which as Taxing Officer I wish to refer for the decision of the Hon'ble Judge is:—

'Whether a suit for possession and for mesne profits or damages as well in respect of the land, houses, &c., of which possession is claimed is a suit embracing two distinct subjects within the meaning of s. 17 of the Court-fees Act?'

If so, the Court-fee payable on the plaint or memorandum of appeal should consist of the aggregate of the amounts payable on each of the claims separately.

[402] In *Chamaili Rani v. Ram Dai* (1) a claim for possession and a claim for damages were held to be "distinct subjects," Spankie, J. dissenting. So in *Chedi Lal v. Kirath Chand* (3) a claim for possession and a claim for compensation were held to be "distinct subjects," Spankie, J., again dissenting. *Amar Nath v. Thakur Das* (5) has also been referred to. I do not think it is a case much in point, as in it s. 17 was held not to apply, because the suit was in the alternative either for recovery of various articles or for their equivalent money value. The point of the

* Reference in S.A. No. 772 of 1894, decided on the 6th November 1894.

(1) 1 A. 552. (2) 2 A. 676. (3) 2 A. 682. (4) 8 C. 593. (5) 3 A. 131.

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16 A. 401 =
14 A.W.N.
(1894) 124.

different nature of the articles the plaintiff sued to recover is not touched on in the judgment.

The Calcutta High Court in *Kishori Lal Roy v. Sharut Chunder Mozumdar* (1) held in Full Bench a view opposed to that of the Allahabad Court in Full Bench expressed in the two early cases I have referred to. In this case it was held that, for the purpose of determining the Court-fee in a suit for possession and for *mesne* profits, the claim for possession and for *mesne* profits is to be taken as one entire claim. Since the time of the Calcutta ruling, so far as I can ascertain, it has been followed in the practice of this Court. Recently, however, Mr. Justice Knox and Mr. Justice Banerji in S. A. No. 1094 of 1892 followed the earlier Allahabad rulings, and again in S. A. No. 1009 of 1892, by their order of the 28th of March 1894, after the point had been referred to me for report. Following these recent rulings the office has altered the former practice and charged Court-fee on the claim for possession and for *mesne* profits or damages as distinct subjects. In the-present case Pandit *Sundar Lal* for the appellants objects to this procedure, and I therefore refer the point for orders."

Upon this reference the following order was made by BURKITT, J. :—

ORDER.

This case has been referred to me as the Judge appointed for the final decision of such questions by the Chief Justice under s. 5 [403] of the Court Fees Act (No. VII of 1870). The question which the Taxing Officer has referred is as follows :—

"Whether a suit for possession and for *mesne* profits or damages as well in respect of the land, houses, &c., of which possession is claimed is a suit embracing two distinct subjects within the meaning of s. 17 of the Court-fees Act?"

I have had the great advantage of the presence of my brother Knox at the hearing of this case, he at my request having done me the favour of sitting with me to hear the argument, and I am authorized by him to say that he concurs in the decision which I am about to pronounce.

I propose first to discuss the various cases in this Court, and also a case in the Calcutta Court mentioned by the Taxing Officer in his reference.

The first case is that of *Chamaili Rani v. Ram Dai* (2). In that case Stuart, C. J., said :—"Two or more 'distinct subjects' are to be so chargeable as being distinct *causes of action* * * * * and it is not enough that the 'distinct subjects' should be merely separate and distinct matters embraced in the claim." He then goes on to say that because each of the separate and distinct subjects mentioned in the report of the Taxing Officer *might* be separate causes of action in separate suits—whether viewed in that light, or merely as distinct and separate matters of claim—they would be chargeable separately under s. 17. In this case the "distinct subjects" in the suit were—(1) possession of land, (2) possession of houses, (3) *mesne* profits, and (4) damages.

The effect of this ruling seems to be that the words "two or more distinct subjects," in s. 17 mean "two or more distinct causes of action," but that if one cause of action includes matters which may be made the subject of separate suits they must be charged separately under s. 17.

In the same case Turner, J., said :—

(1) 8 C. 598.

(2) 1 A. 552.

"I am inclined to think that 'distinct subjects' mean '*distinct causes of action or distinct kinds of relief*'; e.g., if a suit is brought [404] for the recovery of an inheritance, although the inheritance might consist of distinct properties and properties differing in kind, the fee would be computed on the aggregate value of the *one subject of the suit*." He then gives illustrations of (1) an inheritance, (2) an injunction, (3) a bill of exchange, and says that "each of these three subjects would be distinct, and the fee chargeable would be the aggregate of the fees chargeable in respect of each subject if sued for in a separate suit." He added that the office report was not sufficient to enable him to determine proper fee.

Turner, J., thus holds with the Chief Justice that "distinct matter" is equivalent to distinct "cause of action," but adds also "distinct kind of relief," which is hardly the same thing as cause of action. But he disagrees with the Chief Justice in applying this interpretation, and would have held Nos. 1, 2 and 3 at least of the four subjects mentioned above to be included in one "cause of action."

Pearson, J., concurred with Turner, J.; Spankie, J., refused to hold that the words "two or more distinct subjects" were equivalent to "two or more distinct causes of action." He regarded those words as meaning—"every separate matter distinctly forming a subject of the claim," and concurred with the Taxing Officer in holding that a fee was chargeable separately on each of the four matters mentioned above.

The result of this case, then, is that the Chief Justice and Spankie, J., though differing in their interpretations of the words "distinct subjects" in s. 17 of the Court-fees Act, yet concur as to the fee chargeable in the case before them; the Chief Justice, because those subjects (though apparently included in one and the same cause of action) might be made separate causes of action in separate suits, and Spankie, J., because each of them formed a distinct subject of the claim. Turner and Pearson, JJ., apparently would have regarded all four subjects (or three of them at least) as included in one cause of action, and therefore not chargeable under s. 17 of the Court-fees Act.

[405] This case is, at any rate, an authority for the proposition that the words "two or more distinct subjects" are equivalent to "two or more distinct causes of action," though the majority of the Court do not agree as to its application to the case before them.

The next case is that of *Mul Chand v. Shib Charan Lal* (1). In this case Stuart, C. J., affirms his ruling in *Chamaili Rani v. Ram Dai* (2), and holds that s. 17 of the Court-fees Act "plainly relates to 'multifarious suits' which are allowable by s. 45 of the Code of Civil Procedure." "This," he adds, "supplies us at once with the principle by means of which we may solve the difficulty showing that 'distinct subjects' must, for the purpose of the Court-fees Act, be distinct and separate claims or causes of action in single and separate suits, but which for the purpose of jurisdiction or the convenience of the procedure may be united in one suit," and he adds that in s. 17 "distinct subjects" are described as "distinct subjects in *suits* embracing *separately* each of *such* subjects," which, in other words, he understands to mean distinct and separate causes of action in distinct and separate suits. Therefore in the case before him he held that there were two distinct subjects of suit or causes of action, and that fees should be charged separately on each.

In this judgment Straight, J., concurred.

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16 A. 401=
14 A.W.N.
(1894) 124.

(2) 1 A. 676.

2 (1) A. 552.

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16 A. 401=
14 A.W.N.
(1894) 124.

Now in that case it seems to me that the *order* of the Chief Justice is not easily reconcileable with the opinion set forth in his judgment. The plaintiff, no doubt, sued for possession of both moveable and immoveable property; but his cause of action was his title under his father's will (and apparently in the alternative under Hindu law), coupled with refusal of possession by the defendant. There seems to have been only *one cause of action*. Section 43 of the Code of Civil Procedure would probably have forbidden separate suits for the immoveable and for the moveable property, and, there being only one cause of action, s. 44 probably would not have been applicable.

Spankie, J., apparently modified the position he had taken up in *Chamaili Rani v. Ram Dai* (1). Admitting that s. 17 of the Court-[406] fees Act refers to multifarious suits and reading s. 17 with s. 45 of the Code of Civil Procedure, he held, "regarding the two or more 'distinct subjects of a suit,' that they are the 'subject-matters of a suit' in which several 'causes of action' have been united under the provisions of s. 45, subject to the rules contained in s. 44 of Act No. X of 1877, and therefore in such a suit the plaint or memorandum of appeal is chargeable with the aggregate amount of the fees to which each plaint or memorandum of appeal would be chargeable under the Act" * * * "There must therefore be several causes of action, and these several causes of action must be united in the same suit, and the subject matters, or 'two or more distinct subjects' of each cause of action united in the same suit, must be charged as if each cause had not been so united in the same suit, but had been taken into Court by a separate plaint or memorandum of appeal." It is not stated what order Spankie, J., passed on the report of the Taxing Officer; but, as there was only one cause of action and not a union of two or more causes of action, s. 17 of the Court-fees Act would, according to the view he expressed, not apply. Oldfield, J., after remarking on the use of the words "multifarious suits" in the margin of s. 17 of the Court-fees Act, and with reference to s. 19 of Act No. VIII of 1859 (corresponding to clause 2 of s. 45 of Act No. X of 1877) held that "s. 7 of the Court-fees Act has reference to a suit which embraces two or more distinct subjects under separate causes of action, which might or ought to have been made subject of separate suits; in fact, when the suit is multifarious and the nature of those referred to in s. 9 of Act No. VIII of 1859 and of s. 45 of Act No. X of 1877." He accordingly held that the suit was not one of the nature of those to which s. 17 refers.

Now the result of this case is that the Court unanimously held that s. 17 of the Court-fees Act refers to "multifarious suits," i.e., to suits in which separate and distinct causes of action had been joined under s. 45 of Act No. X of 1877, and not to a suit in which there was only one cause of action. The Judges differed as to the application of the rule to the circumstances of the case before them; the Chief Justice and Straight, J., holding that there were [407] two causes of action in the suit, while Oldfield, J., held that there was but one. The report does not show what the opinion of Spankie, J., was on this point.

I next come to the case of *Chedi Lal v. Kirath Chand* (2). In this suit the plaintiff as conditional mortgagee of a house under a mortgage which had been foreclosed in his favour, sued for possession of the house, which the defendant refused to surrender, and for rent for the use and occupation

of the house up to the date of the suit and for subsequent rent. Court-fees had been paid by the plaintiff on the aggregate value of the house and of the rent sued for. The Taxing Officer reported that fees should have been paid separately on each amount.

In that case Stuart, C. J., said that, according to the principle of the decision in *Mul Chand v. Ship Charan* (1), the office report was right and that the additional fees should be paid. Straight, J., was of the same opinion. Spankie, J., was of opinion, on the other hand, that the suit was not multifarious within the terms of s. 17 of the Court-fees Act; it being one for immoveable property with a claim for arrears of rent in respect of the same property. Oldfield, J., was of opinion that the suit embraced distinct subjects of the nature of those referred to in s. 17 of the Court-fees Act, as the claim for possession of the house and the claim for arrears of rent by way of damages arose out of different causes of action and might have been made the subjects of the separate suits.

The same test was applied in this case by the Court as in the previous one, *viz.*, whether the suit was or was not multifarious. The Court unanimously adhered to the principle enunciated in *Mul Chand's* case, but differed as to its application. It may, however, be doubted whether Spankie, J., was not right in holding that the suit was not multifarious, and whether s. 43 of Act No. X of 1877 would not have precluded a separate suit for the rent, or at least for so much of it as was due at the date of the suit.

The last case to be considered is that of *Kishori Lal Roy v. Sharut Chunder Mozumdar* (2). In that case Garth, C. J., deliver[408]ing the judgment of the Full Bench of the Calcutta High Court, held that in a suit for possession and for *mesne* profits the claim for possession and for *mesne* profits is to be taken as one entire claim.

There are also two cases in this Court decided recently, *viz.*, S. A. No. 1094 of 1892 and S. A. No. 1009 of 1892; but as to these cases I am informed by my brother Knox that the Bench which heard them decided them on the principle that the decision of the Taxing officer was final.

Now on the authorities in this Court, I think I may hold that the terms "two or more distinct subjects" in s. 17 of the Court-fees Act are equivalent to "two or more distinct causes of action," that s. 17 refers to "multifarious suits" and that it is applicable only to suits in which two or more distinct causes of action have been joined under s. 45 of the Code of Civil Procedure.

The question which I have to decide is—does s. 17 of the Court-fees Act apply to a suit for the possession of immoveable property to which is added a claim for *mesne* profits accrued due in respect of that property? Is such a suit to be considered a "multifarious suit?" I think my answer be in the negative. Taking the instance of the present suit, I find it is one by a legatee suing under the will of the testator to recover property bequeathed to her by the will. Her cause of action is the bequest in the will, coupled with the defendant's refusal to surrender possession and to repay the profits which he has wrongfully received from the estate. In such a suit I consider there is one—and only one—cause of action, not only for the immoveable property but also for the *mesne* profits which latter I hold to be a claim flowing from the one cause of action, just as much as a claim for each individual portion of the immoveable property would be. It is significant that the provisions of s. 10 of Act No. VIII

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(1) 2 A. 676.

(2) 8 C. 593.

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of 1859 have not been re-enacted in the present Code. I am therefore not obliged by statute to hold that a claim for *mesne* profits is a cause of action distinct from that for recovery of the land to which it relates. As to s. 44 (a) of the Code of Civil Procedure (Act No. XIV of 1882), I do not think it is in point, as it does no more than provide an exception to the general [409] rule laid down in the main section. I do not consider it to be an authority for holding that a claim for *mesne* profits is a cause of action separate and distinct from the cause of action for the recovery of the immovable property to which the *mesne* profits relate. For the above reasons, and also bearing in mind the weighty consideration set forth in the Full Bench judgment of the Calcutta High Court mentioned above, I hold that the claim for the *mesne* profits in the case before me takes its origin in and flows from the same cause of action as that for the recovery of the immovable property. The suit is not a multifarious one and is therefore not one to which s. 17 of the Court-fees Act applies. The fee paid by the applicant is sufficient.

16 A. 409 = 14 A.W.N. (1894) 150.

APPELLATE CRIMINAL.

Before Mr. Justice Burkitt.

QUEEN-EMPRESS v. KALYAN SINGH AND ANOTHER.*
[25th May, 1894.]

Act XLV of 1860, ss. 467, 511—Attempt—Facts necessary to constitute an attempt.

One Chaturi, calling himself Kehri, the son of Bhupal, Kachhi, went to a stamp-vendor, accompanied by a man named Kalyan Singh, and purchased from him in the name of Kehri a stamp paper of the value of 4 annas. The two men then went to a petition-writer and, Chaturi again giving his name as Kehri, they asked the petition-writer to write for them a bond for Rs. 50 payable by Kehri to Kalyan Singh. The petition-writer commenced to write the bond, but, his suspicions being aroused, did not finish it, but took Chaturi and Kalyan Singh to the nearest thana.

Held that under the above circumstances Kalyan Singh was rightly convicted of an attempt to commit the offence defined in s. 467 of the Indian Penal Code, and Chaturi of abetment of the said attempt. *The Queen v. Ram Sarun Chowbey* (1) referred to.

[R., 25 B. 90 (97).]

THE facts of this case sufficiently appear from the judgment of the Court.

The Hon'ble Mr. Colvin, for the appellants.

The Government Pleader (Munshi Ram Prasad), for the Crown.

JUDGMENT.

BURKITT, J.—The facts as alleged in this case for the prosecution show that the two appellants purchased from a stamp-vendor at Bhongawn tahsil a stamp paper of the value of four annas. This [410] stamp paper was sold to a person who called himself Kehri, son of Bhupal, Kachhi, and who has been identified by the stamp-vendor as being the appellant Chaturi. The person who purchased the stamp was accompanied by another man, *viz.*, the appellant Kalyan Singh, Brahmin, who has also

* Criminal Appeal, No. 227 of 1894.

(1) N.W.P. H.C.R. (1872) 46.

been convicted. The evidence shows that after purchasing the stamp-paper the two appellants took it to one Din Dial, Kayasth, a petition-writer, who plies his occupation near the gate of the tahsil. There the two appellants, Chaturi still calling himself Kehri, Kachhi, asked the petition-writer to write a bond for Rs. 50 payable by Kehri to Kalyan. The petition-writer commenced writing the bond and had written some lines of it, when for some reason or other his suspicions were aroused and he refused to go on with the document. The appellants tried to wrest it from him, but he tore it in two pieces, and then, the gate of the police station being only a few paces distant, he insisted on their going to the thana with him. Of this fact there is no doubt; the evidence of Din Dial and of Imam Rasul, constable on duty at the thana at the time, is conclusive. On these facts, and on proof that Chaturi was not Kehri, Kachhi, the learned Sessions Judge has convicted Kalyan Singh of offences punishable under ss. 511 and 467 of the Indian Penal Code, and sentenced him to three years' imprisonment, and Chaturi under the same sections, coupled with s. 109, to 1½ years' imprisonment.

The contention raised by Mr. Colvin for the appellants is that no offence was committed by them. The contention of the learned counsel is that, admitting the truth of all the facts alleged against his clients, the acts committed by them amount to no more than a preparation for an attempt to commit the offence and did not in themselves constitute an attempt. In fact, the argument amounted to this, that the appellants had still a *locus penitentie* and had not done any act towards the commission of the offence. A very similar point to this was taken before a Bench of this Court in the case of an application by one McCrea for leave to appeal to the Privy Council. In that case it was laid down, and apparently with the subsequent approbation of the Privy Council (L. R. 20 I.A. 90), that the law as to attempts in India differed from that in England, there [411] being a wide difference between the meaning of "attempt" as understood by English lawyers and the phrase "attempt" as defined in the Indian Penal Code. Nowhere in this case we find the appellant Chaturi personating Kheri, Kachhi, to the stamp-vendor and purchasing from the latter a stamp paper with Kehri's name endorsed on it as the purchaser. We next find that the two men, Chaturi still personating Kehri, instructed a petition-writer to engross on the stamp paper a bond by which Kheri acknowledged that he had borrowed Rs. 50 from Kalyan and undertook to re-pay it. In the portion of the deed which was actually written the name of Kehri with parentage, and also of Kalyan, were set out, and, had not the petition-writer's suspicions been aroused, there can be little doubt that the offence of forgery would in a very short time have been completed by Chaturi writing Kehri's name on the deed. All these acts to my mind amount to much more than a preparation, and I cannot but hold that, to use the words of s. 511 of the Indian Penal Code, they were acts done "towards the commission of the offence," namely, the offence of forgery. A case somewhat similar had been before Turner, J., viz., *The Queen v. Ram Sarun Chowbey* (1). In that case the accused had gone no further than to purchase the stamp paper in the name of the person whose name they afterwards intended to forge, but had done nothing more. In that case the learned Judge held that the endorsement by the stamp-vendor did not constitute any part of the document which the appellant intended to forge; but Turner, J., added that if

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(1) N.W.P.H.C.R. (1872) 46.

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CRIMINAL. reasons I hold that the facts stated amount to much more than a mere preparation, and did actually constitute an attempt as defined in s. 511 of the Indian Penal Code. On the facts of the case there is no ground for argument. It is perfectly clear on the evidence that the appellants were the parties who purchased the stamp paper [412] in Kehri, Kachhi's name; that they were the parties who tried to have a bond nominally executed by Kehri engrossed on the stamp paper; and that they were the men who were there and then taken to the police station. The evidence of Din Dial, Lalman and Imam Rasul is conclusive on these matters. The offence committed is a serious one, and I agree with the Sessions Judge that the guilty parties deserve a severe penalty. I dismiss this appeal and I see no reason whatever for reducing the punishment.

16 A. 412=14 A.W.N. (1894) 134.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Banerji.

DAKHNI DIN (*Defendant*) v. RAHIM-UN-NISSA AND ANOTHER
(*Plaintiffs*).^{*} [4th June, 1894.]

Pre-emption—Wajib-ul-arz—“Co sharer”—“Proprietor”—Transferee of lands in a village who has not obtained mutation of names in his favour—Dedication—Cessation of private ownership.

In a suit for pre-emption under a *wajib-ul-arz* which gave a right of pre-emption to “co-sharers” in the village; held that the word “co-sharer” included a person who had acquired lands in the village, which were not merely *sir* of a co-sharer and were not grove lands held by a licensee from a zamindar, but lands belonging to a zamindar and in his occupation, notwithstanding the fact that he had not yet obtained mutation of names in respect thereof.

Held also that the mere fact of the owner of land having erected a temple and planted a grove thereon did not of itself, without any further evidence, indicate a dedication to the god and a cessation of the rights of private ownership in respect of such land.

[F., 28 A. 124=A.W.N. (1905) 219=2 A.L.J. 612; 6 N.L.R. 86 (87)=6 Ind. Cas. 930 (931); R., 23 A. 246=A.W.N. (1905) 264=2 A.L.J. 788; 3 Ind. Cas. 461; 6 Ind. Cas. 169 (170); 129 P.R. 1906=84 P.L.R. 1907; 10 O.C. 225 (229).]

THE plaintiffs in this case sued for pre-emption of a certain share in a village known as Shaha or Pipalgaon, *thok* Manjha, pargana Chail, on the sale of the said share by the second and third defendants Iftikar Husain and Ali Akbar to the first defendant Dakhni Din and his brother Anandi Din (since deceased). The suit was based upon the *wajib-ul-arz* of the village. The defendant Dakhni Din resisted the suit and pleaded in particular that he was a share-[413] holder in the village and *thok* in question and that therefore the plaintiffs had no right of pre-emption as against him.

^{*} Second Appeal, No. 531 of 1893, from a decree of F. E. Elliot, Esq., District Judge of Allahabad, dated the 1st April 1893, confirming a decree of Maulvi Muhammad Siraj-ud-din, Subordinate Judge of Allahabad, dated the 20th December 1892.

The Court of first instance (Subordinate Judge of Allahabad) held that the answering defendant was not a shareholder within the meaning of the *wajib-ul-arz*, because in regard to some of the land in respect of which he claimed to be considered as a shareholder his name had not been recorded in the Government papers until after the sale in dispute took place and the land in question had subsequently been transferred to another *thok*, and in regard to another portion he had no proprietary right therein by reason of a temple having been built upon it. The Subordinate Judge then went on to find in favour of the plaintiffs' right of pre-emption and gave them a decree.

On appeal by the defendant Dakhni Din, the lower appellate Court dismissed the appeal upon practically the same grounds as those upon which the Court of first instance had disposed of the defence to the suit, viz., that the defendant, vendee, was not a shareholder in the *thok* in question.

The defendant, vendee, then appealed to the High Court.

Munshi *Ram Prasad*, Munshi *Gobind Prasad* and Babu *Datti Lal*, for the appellant.

Mr. *Fateh Chand*, for the respondents.

JUDGMENT.

EDGE, C. J., and BANERJI, J.—This is a suit for pre-emption. The real question is—is the defendant vendee, a co-sharer in *thok* Manjha? It is said that he is not, because he did not himself pay any land revenue in respect of the portions of land in that *thok* which he purchased by exchange. It is also said that he is not a co-sharer, it being alleged that he has made the lands which he has obtained in *thok* Manjha endowed property, i.e., that he has by dedicating these lands to the god and to the public divested himself of personal proprietary rights in the land.

As to the first point, we are of opinion that the defendant, vendee, having obtained lands in the *mahal* which were not merely the *sir* of a co-sharer and which were not grove-lands held by a license from [414] the zamindar, but lands belonging to a zamindar and in his occupation, became a proprietor in the *mahal*. He became a person in our opinion who was responsible under s. 146 of Act No. XIX of 1873 for the revenue for the time being assessed upon the *mahal*, although he had never obtained mutation of names in his favour. He became a person who would be a defaulter within the meaning of Chapter V of Act No. XIX of 1873, if the land revenue in respect of the lands held by him was not paid, and that notwithstanding that he had not obtained mutation of names. We regard the "co-sharer" in the clauses of the *wajib-ul-arz* as synonymous with "proprietor" as used in s. 146 of Act No. XIX of 1873 before it was amended by Act No. VIII of 1879. If the proprietary body in the *thok* or in the *mahal* had chosen to limit the right of sale to recorded co-sharers they could have done so in the *wajib-ul-arz* by using appropriate terms. They could have provided that a shareholder desirous of selling should first offer his share to a recorded co-sharer, and that a recorded co-sharer should have priority in case of a sale, but they have not done so. In Act No. XIX of 1873 when the Government was desirous of making the proprietors in a *mahal* jointly and severally responsible for the land revenue the Legislature used the word "proprietors;" but when the Legislature intended that only a portion of such proprietors should

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enjoy the right of partition or the right of pre-emption on a forced sale under the Act they used the more limited term "recorded co-sharers." In our opinion the defendant, vendee, here, became a proprietor in the *mahal* and was a co-sharer, though not a recorded co-sharer, in the *mahal*.

The other point we are at present unable to decide. It is contended that from the fact of the defendant, vendee, having erected a temple and planted a grove, he has turned the land into endowed land and divested himself of his private proprietary interest in it, and it is said that there is evidence on the record that there was such a dedication by the defendant, vendee. In our opinion it is for those who allege that the defendant has divested himself of his private proprietary rights by making the land endowed land to prove such a dedication. The *onus* is on them, [415] because the presumption is that the person who obtained the proprietorship of land or of a chattel retains it, until it is shown that he has parted with or been deprived by process of law of his proprietary title. The mere fact that a temple has been built and a grove made upon the land is not sufficient in our opinion to raise the presumption that the defendant, vendee, has parted with his proprietary rights in the land. We make an order under s. 566 of Act No. XIV of 1882 for the trial of the issue—did the defendant, vendee, before he purchased the share the subject of this suit for pre-emption, make the land which he had acquired in *thok* Manjha endowed land and part with his private proprietary interest in it? This issue will be determined by the Court below on the evidence already on the record. If there is no evidence of such parting with the proprietary rights and of such a dedication the Judge below will say so. Ten days will be allowed for filing objections on the return to the reference.

Issue referred.

16 A. 415 = 14 A.W.N. (1894) 140.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Blair.

AZIM-ULLAH (*Plaintiff*) v. NAJM-UN-NISSA AND ANOTHER (*Defendants*)*
[5th June, 1894.]

Act No. IV of 1882, ss. 67, 99—Usufructuary mortgage—Lease by mortgagee to mortgagor of mortgaged premises—Suit for recovery of rent—Attempt to sell mortgaged property in execution of decree for rent.

Held that a usufructuary mortgagee who had leased the mortgaged premises to his mortgagor could not in execution of a simple money decree for rent against the mortgagor attach and sell the mortgaged premises, but must bring a suit as provided by s. 67 of Act No. IV of 1882.

[F., 17 A. 520 (522); 26 A. 223 = (1904) A.W.N. 2; 10 C.P.L.R. 21; 7 O.C. 315; R., 22 C. 859; 35 C. 61 = 11 C.W.N. 1011 = 6 C.L.J. 320; 29 M. 424 = 16 M.L.J. 285; 12 C.P.L.R. 26; 6 N.L.R. 20 (26).]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Amir-ud-din*, for the appellant.

* Second Appeal, No. 864 of 1893, from a decree of H. P. Mulock, Esq., District Judge of Moradabad, dated the 8th June 1893, reversing a decree of Maulvi Muhammad Husein, Munsif of Nagina, dated the 9th February 1893.

Maulvi Ghulam Mujtaba, for the respondents.

KNOX and BLAIR, JJ.—Muhammad Azim-ullah, the appellant in this second appeal, is the holder of two deeds of mortgage executed in his favour by the respondent. The deeds in question were in the [416] course of the findings held to be deeds of usufructuary mortgage. Apparently it was rightly so held, for in the plaint out of which this second appeal arises we read that immediately upon the execution of each of the mortgages the respondents executed agreements in favor of the appellant promising to pay rent for the houses which were the subject of the mortgage-deed. The respondents failed to pay the rent agreed upon, and the appellant then instituted a suit and obtained a money-decree for the recovery of the rent which had fallen due. Armed with this decree he proceeded to attach the houses and to bring them to sale in execution of his decree, but at this stage he was met by the respondents, who objected and contended that, under the provisions of s. 99 of Act No. IV of 1882, the property could not be brought to sale except after a suit instituted under s. 67 of Act No. IV of 1882. Their objection prevailed and the order for attachment was raised. The appellant then took the decree that he had obtained, and, making it the basis of a suit brought a suit asking for an order for the sale of the property and calling it a suit under s. 67 of the Transfer of Property Act. The lower Appellate Court has refused him a decree on the ground that the suit under s. 67 must be a suit for sale or for foreclosure under a mortgage-deed, and in form 109 of sch. iv of the Code of Civil Procedure. The contention in appeal before us is that the lower Appellate Court has erred in the view which it has taken of the requirements of the Transfer of Property Act. It has been contended before us with great earnestness by the learned counsel for the appellant that in bringing the suit in the form in which he has brought it he has simply carried out the instructions of the Court, and has done all that is by law required of him. The interpretation which he asked us to place upon s. 99 of the Transfer of Property Act is that a person who happens to fill the relationship of a mortgagee to his judgment-debtor, and who, in execution of a decree for the satisfaction of a claim, whether arising out of a mortgage-deed or not, attaches the property, must, before he can bring that property to sale, since the law so requires it, institute a suit asking for an order for sale of the property of which he is a mortgagee. Such a suit, he maintains, would be a suit under s. 67 of the Transfer of [417] Property Act. There is therefore no question, even according to him, under the law, but that the property of which he is a mortgagee can only be brought to sale by a suit instituted under s. 67. In order to see what a suit under s. 67 is, it is necessary to consider the terms of that section. Now a suit under s. 67 is a suit that can be brought by no person who is not a mortgagee of property. It is a suit which can only be brought after the principal money and interest of which payment is secured for the time being by the mortgage-deed has become payable, and it can only be a suit in which it is possible that the order which follows will be an order for foreclosure or an order for sale of the property mortgaged. This suit which has been instituted by the appellant is not a suit brought in his capacity as mortgagee; it is not a suit brought after the mortgage-money has become payable, and it is not a suit admitting in any case of an alternative order of foreclosure. Thus it satisfies none of the conditions under which, and under which only, a suit under s. 67 can be brought. It is clearly not a suit for foreclosure of the property which he holds as mortgagee. In *Jadub Lall Shaw Chowdhry v.*

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Madhub Lall Shaw Chowdhry (1) the question was considered whether the suit to be instituted under the pressure of s. 99 was a suit on the mortgage-deed or one on the charge created by the attachment. The learned Judges there were of opinion that it could only be one of the two suits. We have already expressed our opinion that a suit instituted under the pressure of s. 99 and under s. 67 must be a suit on the mortgage. We are not concerned here as to whether such a suit should or should not embrace other claims. Even if we held that the suit should have been a suit on the charge created by attachment, the appellant before us is in this difficulty, that he is met by an order of attachment raised, from which he has not appealed, so far as the raising of the attachment is concerned, and which has *quoad hoc* now become final. The appeal fails and is dismissed with costs.

Appeal dismissed.

16 A. 418 = 14 A.W.N. (1894) 142.

[418] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Banerji.

RAM CHARAN BHAGAT (*Decree-holder*) v. SHEOBARATRAI
AND ANOTHER (*Judgment-debtors*).^{*} [9th June, 1894.]

Civil Procedure Code, s. 230—Decree for payment of money—Decree for sale of hypothecated property in a suit on a mortgage.

A decree for sale of hypothecated property made in a suit for sale upon a mortgage-bond is not a "decree for the payment of money" within the meaning of s. 230 of Act No. XIV of 1882. *Fateh Chand v. Muhammad Bakhsh* (2), distinguished.

[Not F., 121 P.L.R. 1908; F., 25 A. 541; 25 C. 580 = 2 C.W.N. 118; 27 C. 285; R., 28 A. 771 = A.W.N. (1906) 237 = 3 A.L.J. 585 = 1 M.L.T. 247; 18 A.W.N. 118; 4 N.L.R. 78 = 8 Cr.L.J. 18; 5 Ind. Cas. 302 (304) = 11 C.L.J. 78; 12 Ind. Cas. 70 (72) = 14 C.L.J. 639 (643) = 16 C.W.N. 132 (135); D., 20 M. 107; L.B. R. (1893-1900) 588 (589).]

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi Gobind Prasad, for the appellant.

Mr. Abdul Majid, for the respondents.

JUDGMENT.

EDGE, C.J., and BANERJI, J.—On the 23rd of March 1879, a decree for sale on a hypothecation-bond was made. That decree was partially executed. The application for execution preceding the present one was made since Act No. XIV of 1882 came into force. The present application for execution which is under appeal here was resisted by the judgment-debtors on the ground that it was barred by the twelve years' rule of s. 230 of Act No. XIV of 1882. The first Court disallowed the objection and granted the application. The lower Appellate Court allowed the judgment-debtor's appeal and dismissed the Application. The judgment-creditor appealed to this Court, and our brother Tyrrell dismissed

^{*} Letters Patent Appeal, No. 39 of 1893, from a judgment of Mr. Justice Tyrrell, dated the 18th May 1893.

(1) 21 C. 34.

(2) 14 A.W.N. (1894) 74.

his appeal. This is an appeal under s. 10 of the Letters Patent from the decree passed by our brother Tyrrell.

The question on which this appeal depends is whether a decree for sale of hypothecated property passed on a mortgage-bond is a decree for the payment of money within the meaning of the third paragraph of s. 230 of Act No. XIV of 1882. It has been contended on behalf of the judgment-debtors that it was held in the recent Full Bench ruling in *Fateh Chand v. Muhammad Bakhsh*, (1) that such a decree is a decree for the payment of money. The Full Bench in the case referred to held nothing of the kind. What it did [419] hold, so far as this point is concerned, was that a decree under s. 88 of Act No. IV of 1882 is one form of a decree for the payment of a debt. In that case it was not necessary to consider the meaning of the term "decree for the payment of money," as that term is used in s. 230 of Act No. XIV of 1882. It was also contended that the intention of the Legislature in enacting s. 230 of Act No. X of 1877 and re-enacting the same section in Act No. XIV of 1882 was to prevent the possibility of the judgment-creditor keeping open indefinitely proceedings for the execution of a decree of any kind. It is probable that such was the intention of the Legislature. We come to the conclusion that that probably was the intention of the Legislature, because we think that it is only reasonable that some definite time should be fixed within which all decrees should be executed, if they are to be executed at all. If that was the intention of the Legislature, we must see whether that intention was given effect to by the language used by the Legislature in enacting s. 230 of Act No. XIV of 1882. Apparently the first paragraph of s. 230 would apply to the execution of any description of decree. The second paragraph of s. 230 necessarily has a limited application, there are many descriptions of decrees to which it could not possibly refer. In the third paragraph of s. 230 there are no general words used such as in our opinion would include decrees of all descriptions; but instead of general words, we have, so far as this question is concerned specific words used, which undoubtedly, when used elsewhere in the Code, are of specific and not general application. For example, in s. 210 of Act No. XIV of 1882 we have the following term used—"decree for the payment of money." Now it has been decided, and we think rightly, in more cases than one that the decrees referred to in s. 210 are what are generally known as money-decrees in contradistinction to decrees directing the sale of specific property. We must give the same construction to the same words when found in different parts of a Code or Act. Further, we find that when the Legislature intentionally chose to draw a distinction between money-decrees or decrees for the payment of money, and decrees ordering the sale of property, it drew that distinction in apt words. For instance, in s. 295 the first paragraph deals with [420] decrees for money, which, in our opinion, means decrees for the payment of money as that term is used in s. 230; and when dealing with decrees, such as a decree under s. 88 of Act No. IV of 1882, the Legislature uses the expression "a decree ordering its sale" (i.e., the sale of immoveable property), as appears from the proviso (c) to s. 295. Again, in s. 322 the distinction between a decree for money and a decree ordering the sale of immoveable property in pursuance of a contract specifically affecting the same is clearly expressed. The same question came before

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(1) 14 A.W.N. (1894) 74.

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(1894) 142.

this Court in the case of *Jogul Kishore v. Cheda Lal* (1), where it was held that s. 230 of Act No. XIV of 1882 did not apply to a decree which purported to have been made under s. 88 of Act No. IV of 1882. It is true that the decree in the present case was passed prior to the coming into force of Act No. IV of 1882, but decrees for sale had long been known as distinguished from simple decrees for money.

We set aside the decree of this Court and of the lower appellate Court and restore the decree or order of the first Court with costs in all Courts, and direct the first Court to proceed with the execution of the decree, subject to any just exception that there may be to its execution.

Appeal decreed.

16 A 420 = 14 A.W.N. (1894) 154.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Blair.

YUSUF BEG (*Defendant*) v. THE BOARD OF FOREIGN MISSIONS OF THE PRESBYTERIAN CHURCH OF NEW YORK IN AMERICA THROUGH THE REV. W. F. JOHNSON, PRINCIPAL OFFICER (*Plaintiff*).^{*}
[11th June, 1894.]

Civil Procedure Code, s. 435—Corporation—Suit by agent of an unincorporated society—Ejectment—Possessory title.

A suit in ejectment as against a trespasser was brought by a person signing the plaint as "for and as Superintendent and Principal Officer of the Estate of the Board of Foreign Missions of the Presbyterian Church of New York." The plaintiff was not shown to be a member of the Board nor did he set up any possessory title of his own. Held that inasmuch as the Board of Foreign Missions of the Presby-[421]terian, Church of New York was not a corporation or company authorised to sue and be sued in the name of an officer or trustee within the meaning of s. 435 of the Code of Civil Procedure, and also as the person signing the plaint in the manner above described did not profess to be suing on his own possessory title to the land in respect of which ejectment was claimed the suit must be dismissed. *Jaiqopal v. Kauleshar Rai* (2), *Muhammad Yusuf v. Sukhnath* (3), and *Asher v. Whitlock* (4) distinguished.

[F., 20 A. 167 ; R., 30 C. 103 (105).]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellant.

Munshi *Ram Prasad*, for the respondent.

JUDGMENT.

KNOX and BLAIR, JJ.—The appellant before us was defendant in the Court of first instance. The persons suing him are described as the Board of Foreign Missions of the Presbyterian Church of New York in America through the Rev. W. F. Johnson, Principal Officer. The suit was brought for the ejectment of the appellant from a certain portion of land and for the removal of certain buildings constructed on that land. The claim as brought was decreed by the lower appellate Court, and the

^{*} Second Appeal No. 848 of 1893, from a decree of Babu Promoda Charan Banerji, Small Cause Court Judge, Allahabad, dated the 5th May 1893, confirming a decree of Babu Shiva Sahai, Munsif of Allahabad, dated the 26th January 1893.

(1) 13 A.W.N. (1893) 184.

(3) 7 A.W.N. (1887) 55.

(2) 2 A.W.N. (1882) 132.

(4) L.R. 1 Q.B. 1.

contention raised before us in appeal is that the Board of Foreign Missions of the Presbyterian Church of New York in America is not a corporation authorized to sue and be sued in the name of an officer within the meaning of s. 435 of the Code of Civil Procedure, and that in fact we have no plaintiff before us.

The question raised is one not entirely free from difficulty and the case on behalf of the respondent has been argued with great ability and care. His contention was twofold: first, that there was sufficient evidence on the record to satisfy the Court that the Board of Foreign Missions of the Presbyterian Church of New York in America is a corporation such as is authorised under s. 435 of the Civil Procedure Code to sue and be sued in the name of a Director, Secretary or other Principal Officer. His second contention was that, if this has not been established, still, as the appellant has [422] been found to be a trespasser, the respondent can fall back upon his possessory title and claim to have the appellant ejected.

With regard to the first plea the learned pleader maintained that the Board of Foreign Missions of the Presbyterian Church of New York in America is a corporation, and when pressed to show upon what title the aforesaid Board based its claim to be deemed a corporation he asked us to consider it as a corporation, the origin of which is lost in antiquity and which must be deemed to be established by prescription. He told us that he could assert creation neither by Letters Patent nor by Act of Parliament and was thus compelled to fall back upon corporations by prescriptions. Now according to the definition contained of such bodies in Wharton's Law Lexicon, p. 652, we find corporations by prescription are those corporations "which have existed beyond the memory of man and therefore are looked upon in law to be well created, such as the city of London." The Board of Foreign Missions of the Presbyterian Church of New York in America certainly cannot claim to fall under this category. The creation of the Board must be a matter of recent history and well known to those who constitute the body. There is not one word in the evidence of the Revd. W. F. Johnson which sets up even such a claim, and we are therefore compelled to hold that there is nothing before us to warrant us to assume that the Board of Foreign Missions of the Presbyterian Church of New York in America is a corporation such as is intended by s. 435 of the Code of Civil Procedure.

Now to turn to the second plea. The plaint is subscribed by "Revd. W. F. Johnson, for and as Superintendent and Principal Officer of the Estate of the Board of Foreign Missions of the Presbyterian Church of New York." There is nothing in the plaint to show that the Revd. W. F. Johnson is a member of that Board, and there is nothing to show that he sets up a possessory title on his own behalf. We have no doubt whatever that the plaint has been drawn up with a strict and proper regard to accuracy. As the plaint states, the persons who are proprietors of the Board are the members, whoever they may be, of the Board of [423] Foreign Missions of the Presbyterian Church of New York in America. That being the case, the precedents cited to us, *Jaigopal Singh v. Kauleshar Rai* (1), *Muhammad Yusuf v. Sukhnath* (2), and *Asher and wife v. Whitlock* (3), are not cases in point. They are all cases in which the plaintiff was a person who came forward with an allegation and sued upon an allegation that he in his own proper person had

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(1894) 154.

(1) 2 A.W.N. (1882) 132.

(2) 7 A.W.N. (1887) 55.

(3) L.R. 1 Q.B. 1.

1894 a possessory title to the property sued for. This case may appear to be a
JUNE 11. hard one, but there are also numerous difficulties, obvious to every one,
 — connected with the fact of persons not registered and not incorporated and
APPEL- possessing only a floating existence, which cannot be overlooked. Bodies
LATE of this nature wishing to claim the privileges and protection which the law
CIVIL. assigns to corporations should take care to have themselves incorporated
 — and registered in such a way that those who deal with them or are
16 A. 420= brought in contact with them can know whom they are suing and
14 A.W.N. by whom they are being sued. The appeal prevails. The suit as
(1894) 154. brought by the respondent fails and is dismissed with costs in all
 Courts.

Appeal decreed.

16 A. 423=14 A.W.N. (1894) 161.

APPELLATE CIVIL.

Before Mr. Justice Tyrrell and Mr. Justice Burkitt.

SHIB LAL AND OTHERS (*Defendants*) v. THE COLLECTOR OF BAREILLY,
 (*Plaintiff*).^{*} [19th June, 1894.]

Act No. I of 1877, s. 22—Compromise—Specific relief granted in respect of an agreement concerning which both parties had at the time of making it equal means of knowledge, though their relative legal positions were subsequently discovered to be different from what they had supposed at the time.

Naubat Ram, a large landed proprietor, died without issue in 1867. His widow Ganesh Kuar, held possession of the estates down to her death in 1878. Then, after some disputes as to the succession, one Naraini Kuar, claiming as widow of an alleged adopted son of Naubat Ram, was put into possession by the Revenue authorities. Against Naraini Kuar two suits were brought for the property left by Naubat Ram. The first suit was brought in April 1879, by one Chandi Din claiming as sister's son of Naubat Ram. Chandi Din being a pauper, sold a portion of the property in suit to one Nawab Mashuq Mahal for Rs. 20,000, and made Mashuq Mahal a co-plaintiff in [424] the suit. The second suit against Naraini Kuar was instituted in May 1879 by Shib Lal and others, the defendants-appellants in this present suit, who claimed title as the nearest sapindas of the deceased Naubat Ram. In each of these two suits the plaintiff or plaintiffs were successful. In each the defendant appealed. In the case of Chandi Din the defendant was successful and the plaintiff's suit was dismissed by the High Court on the 7th of December 1886; in the other case, the parties on the 25th of July 1885, settled their dispute by a compromise.

While the two suits above-mentioned were pending, Shib Lal and his co-plaintiffs instituted a suit on the 2nd of July 1883, against Chandi Din and Mashuq Mahal, asking for a declaration that they were entitled to succeed to the property of the deceased Naubat Ram. In January 1884, the female defendant having died, the Collector of Bareilly was brought on to the record of this suit as guardian of her minor children: and on the 19th of January 1885 a compromise was entered into between the Collector, on behalf of the minor children of Mashuq Mahal and one adult daughter of Mashuq Mahal on the one hand, and the plaintiffs on the other, whereby the representatives of Mashuq Mahal relinquished the suit and consented to a decree being passed in favour of the plaintiffs, and the plaintiffs agreed that when they got possession of the property they would make over certain villages and a certain sum of money to the representatives of Mashuq Mahal.

As has been mentioned, Chandi Din's claim to the property was finally disallowed by the High Court in December 1886. On the 6th of January, 1888,

^{*} First Appeal No. 141 of 1892, from a decree of Maulvi Jafar Husain, Additional Subordinate Judge of Bareilly, dated the 28th March 1892.

the Collector of Bareilly instituted a suit for specific performance of the compromise of the 19th January 1885.

The Court of first instance decreed the plaintiffs' claim. On appeal by the defendants to the High Court it was *held* that there was nothing in s. 22 of the Specific Relief Act which would stand in the way of a decree for specific performance of the compromise. The compromise when entered into in 1885 was not without consideration, and the subsequent course of litigation could not affect the position of the parties as regards the present suit based thereon.

[R., 6 Bom.L.R. 1013 (1022); D., 10 A.L.J. 498 (501)=17 Ind. Cas. 732 (733).]

THE facts of this case are very fully stated in the judgment of the Court.

Mr. D. Banerji and Babu Jogindro Nath Chaudhri, for the appellants.

Mr. A. Strachey, for the respondent.

JUDGMENT.

TYRRELL and BURKITT, JJ.—This is an appeal by Chaudhri Shib Lal and others, defendants in the Court below, against an order of the Subordinate Judge of Bareilly, decreeing specific performance of an agreement by way of compromise alleged to have been entered into in January 1885 by the appellants on the one side, and by the Collector of Bareilly for the Court of Wards on the other [425] side, on behalf of certain minors under the guardianship of the Court of Wards. In order properly to understand the nature of this suit and the position of the parties it is necessary to set out at some length a few facts bearing on it.

One Chaudhri Naubat Ram, a wealthy landed proprietor in the Bareilly district, died childless in February 1867. He was succeeded in his estate by his widow, Rani Ganesh Kuar, who survived him for some ten years and died in August 1878. On her decease disputes arose as to the succession, and eventually one Rani Naraini Kuar, who claimed title as widow of an alleged adopted son of Chaudhri Naubat Ram, was put into possession by the Revenue authorities. Two suits were, however, before long instituted to contest her title. The first suit was brought in April 1879 by one Chandi Din who, as sister's son of Chaudhri Naubat Ram, claimed that he was by Hindu law entitled to the inheritance. As, however, he was "a pauper destitute of means" (*vide* para. 9 of his plaint, record No. 203, an exhibit filed by the defendants-appellants) he sold a portion of the property in dispute for Rs. 20,000 to a lady named Nawab Mashuq Mahal, wife of Nawab Muhammad Kazim Ali Khan, in order to procure funds for carrying on the intended litigation, and made her a co-plaintiff to his suit. The second suit against Rani Naraini Kuar was instituted in May 1879. The plaintiffs were the defendants-appellants in the suit now before us. The title they set out was that they were the true heirs by Hindu law, as being the nearest *sapindas* of Chaudhri Naubat Ram. The plaintiffs, in each of the two suits above-mentioned, were successful. The District Judge of Bareilly gave to each set of plaintiffs a decree against Rani Naraini Kuar for possession of one and the same property. But he stayed execution until the two sets of plaintiffs had fought out the matter between themselves. Naturally the defeated defendant Rani Naraini Kuar appealed to the High Court. The result was that the first suit (Chandi Din's) was dismissed on December 7th, 1886, the Judge's decision being reversed; and in the second (the *sapindas*) suit the parties on July 25th, 1885, came to a compromise by which they divided among themselves the property in dispute.

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[426] But while the above litigation was still in progress, the *sapindas* (the present defendants-appellants) acting at the suggestion of the Judge of Bareilly, on July 2nd, 1883, instituted in the Bareilly Court a suit (No. 69 of 1883) against Chandi Din and Nawab Mashuq Mahal, by which they asked for a declaration that they were entitled to inherit the property left by Chaudhri Naubat Ram and by Rani Ganesh Kuar, after him. Subsequently, in January 1884, on the death of the female defendant, the Collector of Bareilly was brought on the record as guardian of the infant children of the deceased. On the 19th of January 1885, a compromise—which forms the subject of the present suit—was entered into by the Collector on behalf of his wards and by the *sapindas*, the plaintiffs in that suit; and that compromise, after having been sanctioned by the Board of Revenue as the Court of Wards, and, having been duly stamped and registered, was on the 1st September, 1885 presented to the Subordinate Judge with a petition (No. 48 of the record) praying that the suit might be decided according to its terms. From that time *the Collector took no further steps* in the suit. To conclude this part of the case, it may be added that the suit was on January 20th, 1887, struck off the file of pending cases by the Subordinate Judge, but with permission to the plaintiffs under s. 373 of the Code of Civil Procedure to bring a fresh suit. The reason for this order will be found in the *sapindas'* (plaintiffs') petition to the Court (No. 52 of this record), dated January 19th, 1887, in which they state that by the dismissal of Chandi Din's claim their cause of action *had become extinct*, and they therefore withdrew from the suit, but asked leave to sue again in case a fresh cause of action should accrue to them. The reason why the plaintiffs withdrew their suit was because of the decree of the High Court of December 7th, 1886, which put an end to Chandi Din's claim, as mentioned above.

The only other point respecting that suit which requires notice is, that the Collector of Bareilly, very improperly we think, considering the terms of the compromise, took out execution for costs and got them.

[427] We now turn to the compromise on which this suit is founded. It is No. 187 of the record, and will be found at page 12 of the appellants' first book. It is dated January 19th, 1885, and is drawn up in the shape of a joint petition addressed to the Court by the Collector on behalf of his minor wards, by Musammât Malka Begam, an adult daughter of Nawab Mashuq Mahal, and by the plaintiffs, who are the present defendants-appellants. By its terms the Collector and Malka Begam "hereby withdraw from the defence of the suit and admit the plaintiff's rights to the estate left by Chaudhri Naubat Ram, deceased," and they consent to the plaintiff's suit being decreed against "the defendants, the heirs of Nawab Mashuq Mahal" (*i.e.*, themselves) with certain exceptions. The plaintiffs (present defendants-appellants) on their part agreed that "in consideration of this relinquishment and admission of claim" they would, on getting possession of the property in dispute, transfer certain villages comprised in it to the heirs of Nawab Mashuq Mahal with full proprietary rights, and would also pay them a sum of money. There are also other stipulations which it is not necessary to notice.

The present suit was instituted on the 6th of January 1888, by the Collector of Bareilly as guardian of the minor children of Nawab Mashuq Mahal. The now appellants were impleaded as defendants. In the plaint the Collector, after reciting the facts mentioned above as to the execution of the compromise of January 19th, 1885, went on to allege that he had performed his part of the agreement by withdrawing from the defence in

the suit (No. 69 of 1883) and by admitting the claim made by the plaintiffs in that suit, but that the latter had, on demand made, refused to carry out their promise. He therefore asked that the defendants should be directed to surrender possession of the villages named in the compromise, and to pay Rs. 6,152 with interest and costs. The principal defendants pleaded that they had not entered into "any enforceable agreement with the Collector such that a suit for specific performance would lie in respect of it." The meaning of this plea is clear from the 2nd and 3rd paragraphs of the written [428] statement and was that "no completed agreement" had been made between the parties, but only a proposal which the defendants afterwards revoked. At the hearing, however, in the first Court many other matters were put in issue touching the enforceability of the compromise, and in this Court, during the appeal, it was faintly contended that the compromise was not a completed agreement and was no more than a proposal for an agreement. To clear the ground, we may add that certain questions, as to the stamping and registration of the compromise which had been raised in the first Court were not taken in the memorandum of appeal to this Court.

The learned counsel, who appeared for the appellants before us, did not attempt to deny that his clients had signed the paper bearing date January 19th, 1885. But he contended (1) that it did not in itself constitute a complete agreement between the parties, and was no more than a rough draft of a possible future agreement to be entered into if the Collector could procure Chandi Din's assent, (2) that if it were a completed agreement it was void as a *nudum pactum* for which no consideration had been given, and (3) that the agreement was of such a nature that the Court below in the exercise of its judicial discretion ought to have refused to enforce it.

As to the first question, whether the paper of January 19th, 1885, was or was not a completed agreement between the signatories, we are of opinion that the evidence of Mr. Neale, who was Collector of Bareilly in 1885, is conclusive. That gentleman positively swears that the agreement was a completed agreement and not a mere proposal for an agreement *in futuro*. In this matter he is strongly corroborated by the evidence of Mr. Benson, who was a pleader engaged for the other side; and we notice that not one question was put by the defendants to Mr. Neale in cross-examination which even suggested that the completion of the agreement was to be contingent on the Collector's obtaining Chandi Din's assent to it, while Mr. Benson says:—"The agreement itself was intended to be the effective compromise, and [429] no further agreement was necessary or stipulated." The evidence of these witnesses is further borne out by the fact that on the same day (January 19, 1885) an application (No. 45 of the record) signed by the Government Pleader on behalf of the Collector and by Mr. Benson on behalf of the present defendants-appellants (then plaintiffs) was presented to the Subordinate Judge, in which it was stated that the matter had been settled between the plaintiff and the defendants, the heirs of Nawab Mashuq Mahal, and that a deed of compromise had been executed and signed by the plaintiffs, the heirs of Nawab Mashuq Mahal, and by the Collector. But, as the sanction of the Board of Revenue was necessary before such compromise could be filed in Court, the petitioners prayed that "as against the heirs of Mashuq Mahal and the Collector" the further hearing of the suit might be postponed. Now in this petition we do not find one word as to the consent of Chandi Din being a condition precedent to the validity of the agreement. On the contrary, it totally ignores Chandi Din, and that it was

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intended to be understood to have that effect is shown by the order made on it by the Court and by Chandi Din's petition (No. 199 of the record), presented on the same day to the Court. The only witnesses for the appellants to whose depositions our attention was called were Babu Preonath Banerji, the then plaintiffs' vakil, and Lalji Mal, one of the plaintiffs. As to the former, it need only be remarked that he was not present when the agreement was executed, and as to the latter, we find ourselves unable to believe his statement in the face of the depositions of Mr. Neale and of Mr. Benson and of the subsequent conduct of the parties. We find this issue in favour of the respondent.

The second question raised for the appellants is that the compromise is *null and void* for want of consideration. Their learned counsel contends that that which the Collector professed to give as a consideration for the agreement was merely an illusory consideration and of no value whatever. His argument is that without Chandi Din the Collector's wards were nobody in the suit, and that, as Chandi Din himself had no title, the Collector, by withdrawing from the defence and admitting the plaintiffs' title, really [430] gave nothing in exchange for the valuable property which the other side undertook to transfer.

Before discussing this question, it is advisable here to point out that the Collector faithfully did everything he had undertaken to do. He notified to his co-defendant, Chandi Din, that he no longer would defend the suit (*vide* No. 199 of the record), and he at once, in conjunction with the plaintiffs, intimated to the Court the execution of the compromise and asked for an adjournment of the hearing to enable him to obtain the sanction of the Board of Revenue, and finally, when all necessary preliminaries were completed, he filed the compromise in Court on September 1st, 1885. From that time up to its final disposal it is admitted that the Collector appeared no further as a party in the suit. Any further proceedings were taken by Chandi Din alone. On the Collector's petition of September 1st, 1885, the Court might have passed a decree in favour of the plaintiffs so far as the heirs of Nawab Mashuq Mahal were concerned. But it is contended that the Collector, by suing out execution for the costs decreed in the suit No. 69 of 1883, violated the agreement of January 19th, 1885. We think there is no force in this argument, firstly, because the Collector was practically no longer a party to that suit when it was struck off the file of pending cases in January 1887. The order for costs was not made on the Collector's application, but apparently by the Court "*suo motu*," as a routine order. And secondly, it appears from the application for execution (record No. 125) that that application was not made till July 1889, or about 1½ years after the present suit was instituted, and after the appellants had refused to perform their part of the agreement.

Now as to the question whether that which the Collector undertook to do under the compromise and actually did do, was no consideration, we must look at the state of things as they existed in January 1885, and must leave subsequent events out of our consideration.

Now in January 1885, the heirs of Nawab Mashuq Mahal had a large interest (said to be one-third) in the estate of Chaudhri [431] Naubat Ram, contingent of course on Chandi Din, their vendor, being able to prove the title he set up. Further, those heirs and Chandi Din held a decree adjudging them possession of that estate as against the person actually in possession. Further, it is clear that it was Nawab Mashuq Mahal who had financed Chandi Din's suit in consideration of

a sale to her for Rs. 20,000 of some 39 villages out of the disputed property. The other party (the present applicants) also held a decree for possession of the estate, and both those decrees were under appeal before the High Court. At that time (January 1885) it was impossible to say what the result of those appeals would be. Meanwhile, in the suit in which Chandī Din and the *sapindas* were face to face, it was also impossible to say what the result would be. Under these circumstances negotiations for a compromise were opened between the Collector and the present appellants (*see* No. 44 of the record). It is easy to understand that the appellants would have been glad to get rid of so powerful an adversary as the Collector, from the funds of whose wards the defence was financed, and they would have been willing to buy off his opposition even at a large price. They certainly believed that the Collector had something to sell, and they were willing to purchase it, no doubt in the hope that the withdrawal of the Collector from the defence would cripple Chandī Din by depriving him of the funds on which he had relied for the conduct of his defence. We have no doubt that both the Collector and the present appellants may well, each of them, in January, 1885, have believed that Chandī Din had a good fightable case, and we have also no doubt that in buying off the opposition of the Collector's wards the appellants believed they had made a good bargain; and the Collector may well have thought it advantageous to his wards' interests to secure for them a substantial portion of that which Chandī Din had sold to their mother, rather than run the risk of a prolonged litigation. Both parties believed that they gave and received a fair equivalent. The fact that two years later, on December 7th, 1886, the High Court, in Rani Naraini Kuar's appeal, decided that Chandī Din had no title to Chaudhri Naubat Ram's property is, in our view, perfectly [432] immaterial, for, as already observed, this matter must be decided on the basis of the state of things in January, 1885, and not of what happened afterwards. No question of fraud or of undue influence being practised by the Collector, or of his taking an unfair advantage of the appellants was raised before us, and such contention would be absurd, considering the position of the appellants and the legal advice they had at their command. But it was argued that the consideration given by the Collector was so grossly inadequate as to lead to an inference of fraud on his part. To this it is sufficient to reply that in January, 1885, the consideration was by no means inadequate [*see* s. 28 (a) of the Specific Relief Act]. Nor does the fact that the appellants' suit became unnecessary and was withdrawn in January, 1887, by reason of the High Court's decision of December, 1886, in any way militate against the validity of the compromise of January 19th, 1885.

We now come to the last of the appellants' contentions, which is, that this agreement is one which a Court in the proper exercise of its judicial discretion ought not to enforce. On this matter we take as our guide s. 22 of the Specific Relief Act, 1877. That section, first of all, lays down the principle which should guide a Court as to giving a decree for specific performance, and then states certain cases in which in the exercise of its discretion the Court should not decree specific performance. It is contended that these cases are not exhaustive. That may perhaps be a true proposition in the abstract, but the learned counsel for the appellants did not draw our attention to any further cases.

The first of the cases appended to s. 22 of the Act is that which deals with contracts in which the circumstances give the plaintiff an unfair advantage over the defendant. In such a case, we are told that a Court

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might properly exercise its discretion by refusing to decree specific performance. The principle underlying this case is that laid down by Fry, J., in paragraph 372 of his learned treatise on the law of Specific Performance (2nd ed., 1881, page 169), where the learned Judge, citing from reported cases, says :—"Where parties, whose rights are questionable, have equal knowledge of [433] facts and equal means of ascertaining what their rights really are, and they fairly endeavour to settle their respective rights among themselves, every Court must feel disposed to support the conclusion or agreement to which they may fairly come at the time, and that notwithstanding the subsequent discovery of some common error or a subsequent judicial decision showing the rights of the parties to have been different from what they supposed, or that one party had nothing to give up." And again in paragraphs 373 and 374 :—"The principle just stated is perhaps most frequently illustrated by cases of family arrangement or of compromise, but is applicable to contracts of whatever nature.....But, in order to bring a contract within this principle, the uncertainty as to the subject-matter of the contract must at the time of the contract have been a real one to both parties, either from the nature of things or from the state of knowledge of both parties." And further, with especial reference to compromise, in paragraph 1541:—"The Court will specifically enforce private compromises of rights in the way in which it will any other contracts; and inasmuch as the compromise of a *bona fide* claim to which a person believes himself to be liable, and of the nature of which he is aware, is a good consideration for a contract, the Court, in enforcing the compromise, will not enquire into the validity of the claim on which it is founded."

Applying the above principles to the appeal now before us, it is manifest that there are no grounds for holding that the compromise in dispute comes within case I. There was no inequality whatever between the contracting parties. Each had an equal knowledge of the facts of the case and equal means of ascertaining what their respective rights were. Both had the assistance and advice of learned legal practitioners. It is impossible to discern any circumstances which, in January, 1885, could have given the Collector any unfair advantage over the appellants: and though the result of a judicial decision, pronounced some two years afterwards, showed that the consideration given by the Collector was worthless, that is no reason why the Court should not support the agreement arrived at by the parties. When the compromise was made both [434] parties believed that Chandi Din had, at any rate, a good fightable claim; and though eventually it turned out that such was not the case, nevertheless the compromise (as things stood in January, 1885,) was a good consideration for the contract, which may be enforced without any enquiry as to the validity of the claim. It is quite immaterial whether the Collector's opposition, if persisted in, would have been successful or not. The consideration given by withdrawing from the defence was a relief from litigation and was a good consideration (as defined in s. 2 of the Indian Contract Act), whether the claim or the defence were good or not. In support of his argument, and as illustrating the principle laid down by Lord Justice Fry, the learned counsel for the respondent cited to us the cases of *Stapilton v. Stapilton* (1), in which it was held that the compromise of a doubtful right is a sufficient foundation for an agreement, even though it turn out that the right was on the other side;

(1) Russell, 353.

Attwood v.—(1), where a compromise was held to be a sufficient consideration for an agreement, even though it turned out that there was no liability; *Pickering v. Pickering* (2) where the same rule was laid down notwithstanding a common error, and *Callsher v. Biochoffsheim* (3) where it was held that a compromise entered into *bona fide* was a good consideration, even though it turned out subsequently that there was no claim in existence and nothing to compromise.

On the above authorities we have come to the conclusion that the compromise in dispute in this appeal is not one to which case I of section 22 of the Specific Relief Act applies.

Case II of section 22 lays down that specific performance should not be enforced where the performance of it would involve some hardship on the defendant which he did not foresee, while its non-performance would involve no such hardship on the plaintiffs. The hardship on the appellants in this case is that the judicial decision of the High Court in December 1886 shows that the consideration mentioned in the compromise of January, 1885, namely, [435] the Collector's withdrawal from the defence of the suit No. 69 of 1883 was valueless. But, according to Lord Justice Fry,—“The question of the hardship of a contract is generally to be judged of *at the time at which it is entered into*; if it be then fair and just and not productive of hardship, it will be immaterial that it may by the force of subsequent circumstances or change of events have become less beneficial to one party, except where those subsequent events have been in some way due to the party who seeks performance of the contract” (paragraph 398). And again (paragraph 402)—“The general rule seems to be that events subsequent to the contract, and not so involved in it as to render it unequal *at the time it is entered into*, cannot be brought forward to show the hardship of enforcing it.”

Now we have already expressed our opinion that, considering the state of things in January 1885, and the facts and the means of acquiring knowledge of their rights then in the possession of each party, the compromise, as between the parties to it, was not affected with unfairness. That also is the time to be looked at to see did the contract *at that time* involve any unforeseen hardship on the appellants? Considering the uncertainty as to the result of the then pending litigation—an uncertainty which was only put an end to two years subsequently by an elaborate judgment of this Court, and which was in no way due to or brought about by any act of the Collector—we can discern no unforeseen hardship on the appellants. They thought it worth their while then to pay a substantial price to buy off a formidable opponent, and having subsequently succeeded in getting possession of a considerable portion of the property, they cannot now be allowed to plead that they made an improvident bargain by which they gained nothing.

We accordingly hold that case II of section 22 of the Specific Relief Act is not applicable to the compromise in dispute here.

Having now disposed of the first two cases under section 22, we come to the third, which provides that where the “plaintiff has done substantial acts, or has suffered losses in consequence of a [436] contract capable of specific performance, the Court may properly exercise a discretion to decree specific performance.” We are concerned only in the words “has done substantial acts.” At an earlier portion of this judgment we intimated our opinion that the Collector had done everything which under

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(1) White and Tudor 920.

(2) 2 Beavan 31.

(3) L.R. 5 Q.B. 449.

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the compromise he had undertaken to do. It is unnecessary here to repeat our remarks on that point. The act which the Collector did was undoubtedly a "substantial" act, namely, the withdrawal from the defence on behalf of his wards and confessing judgment in favour of the present appellants by admitting their claim to the estate of Chaudhri Naubat Ram. He removed their most formidable opponent from the appellants' path at a time when it was quite uncertain whether the appellants or Chandi Din would be successful, and took the risk in the latter event of losing everything. For if Chandi Din had won his case, he could hardly be expected under the circumstances to admit the validity of the sale-contract between himself and Nawab Mashuq Mahal, and in that case also the compromise would have been waste paper, as its performance was contingent on the appellants' getting possession of the villages named in it, an event which admittedly has happened. We find therefore that, as the plaintiff-respondent did a substantial act in part performance of his part of the contract, this compromise comes within the principle laid down in *Hart v. Hart* (1) and that the Court may properly exercise its discretion to decree specific performance of it under case III of section 22.

On the whole, we are of opinion that this appeal fails on all points. It is not necessary for us to say whether we should have given a decree if the matter had been before us as *res integra*. Suffice it to say that the appellants have not shown us any sufficient reason for interfering with the manner in which the Court below has exercised its judicial discretion.

We dismiss this appeal with costs.

Appeal dismissed.

16 A. 437 = 14 A.W.N. (1894) 178.

[437] APPELLATE CRIMINAL.

Before Mr. Justice Knox and Mr. Justice Blair.

QUEEN-EMPRESS *v.* UMRAO SINGH AND OTHERS.*
[20th June, 1894.]

Act XLV of 1860, ss. 395, 396—Dacoity—Facts necessary to constitute the offence defined in s. 396.

In order to support a conviction under s. 396 of the Indian Penal Code it is necessary to establish, not only that the person accused under that section was committing dacoity conjointly with others, but it must be shown that the murder was committed in his presence.

Hence where certain persons were shown to have been concerned in a dacoity in the course of which murder was committed; but it was not shown that they were in the house in which the dacoity was committed at the time the murder took place, and the evidence, if anything, pointed to a contrary conclusion; it was held that the accused could not properly be convicted under s. 396, but only under s. 395 of the Indian Penal Code.

[Not. F., P L R. (1900) 44 (Cr.); F., 15 P.R. 1901 (Cr.); D., 17 A. 86 = 15 A.W.N. 12.]

THE facts of this case are very fully stated in the judgment of the Court.

Messrs. A. H. S. Reid and J. N. Pogose and Munshi Madho Prasad, for the appellants.

The Public Prosecutor (Mr. A. Strachey), for the Crown.

* Criminal Appeals Nos. 348 and 360 of 1894.

(1) L.R. 18 Ch. D. 670 (685).

JUDGMENT.

KNOX and BLAIR, JJ.—The case before us is one submitted by the Sessions Court of Farakhabad for confirmation of the sentence of death passed upon Charan Singh, Itwari, Imrat Singh, Girwar Singh, Raghubar Singh and Umrao. We have also before us appeals presented by all the above-named persons against the convictions and sentences passed upon them. In addition to the sentence of death, the sentence of the Sessions Court upon Imrat Singh was that he should pay a fine of Rs. 500. Girwar, Raghubar Singh and Umrao have been represented by counsel in this Court, and so also has Charan Singh. Imrat Singh and Itwari have sent in petitions from jail.

In the case of Charan Singh, we have to deal with the plea of guilty pleaded before the Sessions Court, and therefore the only question we have to decide in his case is as regards the sentence passed upon him. We take up his case first.

[438] It is contended on his behalf that he is a person of tender years and that the part that he has taken in this dacoity was one in which he acted under compulsion brought to bear upon him by Hardua. The conviction of all of the accused, Charan included, has been under s. 396 of the Indian Penal Code, and on Charan's behalf it is further contended that he did not actually kill any person, and that the one act of violence which has been laid at his door by the evidence for the Crown may have been due to an accident. We find ourselves unable to accede to any of these contentions. According to the record the age of Charan Singh is given in one place as twenty years, in another as twenty-four years. It is in our opinion amply established by the evidence that he joined the dacoits in the commission of this dacoity and took an active part in the robbery committed on the house of Hira Lal. He was armed with a pistol, and, upon an attempt being made to secure him, did not hesitate to use that pistol and to fire upon those who were trying to arrest him. Since his arrest he has, as the Sessions record shows, attempted to fasten a share of this dacoity upon a person or persons who could not under any circumstances have been concerned in it. There is no evidence whatever to show beyond his own statement that he acted under compulsion of any kind. The evidence on record, and on this point it has not been questioned by any one, shows that on the 2nd of December, 1893, a dacoity was committed at Naorai in the house of Hira Lal, and that in the course of that dacoity some one of the dacoits caused the death of Bhawani Singh and was guilty of the offence of murder. The evidence also shows that the dacoity was deliberately planned and carried out by a large band of men, many of whom were armed with deadly weapons. Under these circumstances, we find no reason whatever for interfering with the sentence passed upon Charan Singh by the Sessions Court at Farakhabad. We confirm the conviction and sentence and direct that the sentence be carried into effect.

With regard to the appellants Girwar Singh and Raghubar Singh there is evidence, and ample evidence, which the [439] Sessions Court has believed, which shows that these two persons were seen on the afternoon of the 2nd of December in the company of a large number of men who were armed, and one of them, Girwar, was seen carrying a long matchlock. It is shown that within two hours, more or less, of the party being assembled at Sherpur the party were again seen to enter Naorai, and numbers of witnesses testify to the attack made by the party upon the

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house of Hira Lal. In the course of that attack, from evidence which we see no reason to disbelieve, one of the band fired upon those who had assembled to defend the house of Hira Lal, and the result of this act was the death of one Bhawani Singh. The medical evidence shows that death was due to shot wounds. Now on behalf of Girwar Singh and Raghubar Singh, it is contended that there is no direct evidence which carries them beyond the halt above alluded to at Sherpur, and it is suggested that they should have the benefit of the doubt as to whether they may not have repented of having taken any part in the transaction, and as to whether they may not have separated themselves altogether from the rest of the dacoits and have taken no actual part in the commission of the dacoity. It is pointed out that they are both of them residents of Sherpur, and that the evidence for the Crown takes them no further than a very short distance from their own doors. Another contention pressed upon us was as to the weight to be attached to the evidence that was given against them. It was brought to our notice, and these remarks apply equally to the case of Umrao, that none of the three have been mentioned as having taken part in the dacoity until long after the dacoity had been committed. In the case of Umrao Singh, it was not until the 24th of February, two months and more after the date of the dacoity, that his name was put forward as having been one of the band who committed the offence on the 2nd of December. We have given full consideration to these contentions, and, to deal first with that which attacks the *bona fides* of the evidence, we find ourselves in the difficulty that no tangible evidence and no strong suggestion is put forward by reason of which we should doubt the evidence given. There is, in the case of Umrao Singh, apparently reason to believe that his name was never mentioned until the 24th of [440] February. Bhagwan Singh, who then made mention of it, distinctly swears that he saw Umrao Singh, on that evening pass within a few yards of him and go to a clump of trees close by. He then saw a number of men, some carrying guns, some swords, some *lathis*, pass him and go into the village. He is positive that the same Umrao Singh was walking at their head, and that immediately after the dacoity took place. Bhagwan Singh was a resident of Naorai, and, unless his silence can be explained, it is undoubtedly more than strange that he should not have mentioned the name of Umrao Singh, a man of influence in Naorai and a person whom he must have known full well. But an explanation is given, and in our opinion the explanation is both possible and probable and sufficiently accounts for his silence. He went to assist Hira Lal in defending his house, and while so occupied was shot by one of the dacoits. Abdul Ali, the Sub-Inspector who first began the investigation, admits that on the 3rd of December he saw Bhagwan Singh. He says that he was then very severely wounded and could not speak coherently, or, at any rate, without cruel pain. He begged not to be pressed, and so the Sub-Inspector let him alone. The medical evidence shows that he, Bhagwan Singh, remained under treatment in the hospital at Etah till the 16th of February. It is suggested that there must have been many an opportunity when Abdul Ali, the Sub-Inspector of Etah, could have seen Bhagwan in the hospital at Etah and have examined him; but the evidence of Abdul Ali shows that the police in this case took up their investigation of the dacoity from Tanassoo, a village far distant, where is the house of Charan Singh, the one dacoit who was arrested on the spot, that they worked backwards, and that it was not till the 22nd of February that the police again visited Naorai. Abdul Ali may have

been, and probably was, in Etah in the interval, but his evidence shows that the investigation was being actively pursued in the way, and manner stated by him, and it may well have been that he left Bhagwan Singh's examination for a more convenient time. Anyhow, on the 22nd of February, when, according to him, he again visited Naorai, he did examine Bhagwan Singh, and on that date the name of Umrao Singh was mentioned [441] by Bhagwan Singh as the one out of the dacoits whom he recognized. Bhagwan Singh was cross-examined as to whether there was any enmity or any other reason for being biassed against Umrao Singh, but no such reason was established, and after careful consideration of Bhagwan Singh's evidence we see no reason for refusing to give it the credit which was attached to it by the Judge and the assessors.

In the case of Girwar Singh and Raghubar Singh the police acknowledge that they were first put on the track by information received indirectly from Indar, Gararia. It is suggested that Indar, being a cattle dealer, may have particular reasons for keeping in good favour with the police, and that what he stated about Girwar Singh and Raghubar Singh is due to influence and pressure brought to bear upon him by them. There is absolutely no evidence to support any such contention. Indar's evidence satisfies us as evidence which may safely be believed, and, as we have already pointed out, it put Girwar and Raghubar as actively participating with the dacoits, and brings them as near Naorai as the village at Sherpur, three miles distant.

It has, however, been urged on behalf of these three men that, even if the evidence be believed, they are not liable to conviction and punishment under s. 396 of the Indian Penal Code. We are unable to attach any weight to the idea that they may have repented and absented themselves from the band of dacoits. In the case of Umrao Singh specially such belief is impossible; but it has been pressed upon our attention that for a conviction, or at any rate for liability to a sentence, under s. 396 it is necessary for the Crown to establish that they were present at the time that the murder was committed in this dacoity. It was contended that s. 396 is not a section creating an offence, but that it is a section awarding certain punishment where in the commission of a dacoity murder is committed, and that the sections of the Code which relate to abetment or sections like 149 cannot be applied to s. 396. We must confess that we have found considerable difficulty in construing s. 396. The wording [442] of the section is peculiar. It differs from the ordinary sections of the Code which prescribe punishments for offences, and the language used in it corresponds very closely with the language used in ss. 397 and 398 of the Code, sections which we certainly do not read as sections creating specific offences. After fully considering the language used by the framers of the Code in s. 396, we have come to the conclusion that it is not a section creating a separate and distinct offence. It is a section which provides a particular punishment for those who conjointly commit dacoity where murder is committed in so committing the dacoity. We are also of opinion that to establish a liability to the punishment provided in this section it is necessary to prove that the person said to be liable was one of the persons who were conjointly committing dacoity and was present when the act of murder in the dacoity was committed. Now, although we have no doubt whatever that Raghubar Singh and Girwar Singh and Umrao participated in this dacoity, we give them the benefit of the doubt as to whether they were actually present at the time when the act of murder was committed. There is room for such doubt, particularly in the case of Girwar Singh

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and Raghubar Singh, for there is no evidence which places them within the house of Hira Lal at the time when the murder was committed. We accordingly admit the appeals of Girwar Singh, Raghubar Singh and Umrao, so far as to set aside the conviction under s. 396 and the sentence passed, but we find Girwar Singh, Raghubar Singh and Umrao, each and all of them, guilty of having committed dacoity on the 2nd day of December 1893, at Naorai, and under s. 395 of the Indian Penal Code direct that Girwar Singh, Raghubar Singh and Umrao Singh, be punished with transportation for life.

There remain the cases of Imrat Singh and Itwari. Imrat Singh, in his petition of appeal before us, raises hardly any plea beyond the bare suggestion that his arrest was due to police action. Itwari simply advances the contention that there are conflicting statements in the evidence of two of the witnesses who have deposed against him and that he was not present at all. In the case of both these [443] men the evidence which connects them with the dacoity is clear and overwhelming, and we have no reason for doubting it. We have no doubt that they were fully and completely identified, and that the evidence which gives them the leading parts in the transaction is trustworthy. It is true that the death of Bhagwan Singh is not clearly traced to the act of either of them, but the dacoity was a serious outrage deliberately planned, and the fact that the dacoits went armed with loaded guns and that five men more or less received serious injuries, in the case of one of them resulting in death, from the weapons taken, satisfy us that every one of those who took part in this dacoity knew that those weapons would be used, and intended those weapons to be used, in the case of any necessity, from a dacoit's point of view, arising. We are unable to relieve any one of the men who have shown to have taken part in this dacoity from liability to a sentence of death, unless they can satisfy us that there is some good and sufficient cause for such relief. In the interest of public security we consider it necessary that acts of outrage of this kind should be sternly suppressed. Neither of these two appellants before us has shown any cause for such relief, and, in the case of Imrat Singh and Itwari, we are satisfied that they were present and conjointly committing dacoity when the act of murder was committed. We therefore dismiss the appeals of Imrat Singh and Itwari, confirm the convictions and sentences, and direct that the sentences be carried into effect.

16 A. 443=14 A.W.N. (1894), 146.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

BANSIDHAR (*Decree-holder*) v. GULAB KUAR (*Judgment-debtor*).
[20th June, 1894.]

Civil Procedure Code, ss. 266 (l), 311, 312, 588—Letters Patent, s. 10—Assignment of villages to Hindu widow in lieu of maintenance—Attachment and sale of such villages in execution of money decree—Objection by widow after sale—Objection allowed—Appeal from order allowing objection.

Certain villages were assigned for her maintenance to a Hindu widow by members of her husband's family. Those villages were subsequently attached and

* Letters Patent. Appeal No. 34 of 1893 from a judgment of Mr. Justice Knox, dated the 18th May 1893.

sold in execution of a simple money decree against the widow. After the sale had become [444] final the widow came forward with an objection to the attachment and sale of the assigned villages on the ground that such attachment and sale were in contravention of s. 266 (l) of the Code of Civil Procedure. The first Court disallowed this objection; but on appeal to the High Court the widow got a decree allowing her objection. On appeal by the decree-holder under s. 10 of the Letters Patent, it was held that, whether or not the widow's interest in the particular villages was capable of being attached, inasmuch as the order asked for by the widow's application was practically an order under s. 312 of the Code of Civil Procedure, an appeal under s. 10 of the Letters Patent would not lie.

[R. 12 C.L.J. 146 (154)=7 Ind. Cas 80 (84); 14 C.P L.R. 114.]

THE facts of this case appear fully from the judgment of the Court. Munshi Ram Prasad and Pandit Sundar Lal, for the appellant. Messrs. D. Banerji and Abdul Majid, for the respondent.

JUDGMENT.

EDGE, C. J., and BANERJI, J.—This appeal has been preferred under s. 10 of the Letters Patent of this Court. A simple money-decree had been obtained against Musammat Gulab Kuar in the Court of the Subordinate Judge of Meerut. The decree-holder obtained from the Court of the Subordinate Judge an order for the attachment and sale of two villages in execution of that decree. That order became final. Under that order the villages were put up for sale and were sold. After the sale Musammat Gulab Kuar presented a petition to the Court of the Subordinate Judge, in which she prayed that the sale should be set aside, alleging that the villages had been given to her in lieu of maintenance by an agreement dated the 7th of May 1889, made in compromise of litigation between her and the owners of the villages, and were, by reason of the proviso to s. 266 of Act No. XIV of 1882, clause (l), not liable to attachment or sale in execution of the decree against her. There were other matters alleged in the petition of Musammat Gulab Kuar as affording grounds for the granting of the relief for which she prayed, but those other matters are not relied upon in the grounds of the appeal before us. Musammat Gulab Kuar made the decree-holder and the purchaser at the auction sale respondents to her petition.

It was proved that Musammat Gulab Kuar, who is a Hindu widow, had, after the death of her husband, obtained a decree for [445] maintenance, and that in lieu of the maintenance so decreed the persons against whom that decree had been made had, by an agreement of the 7th of May 1889, put her in possession of the villages in question. The agreement of the 7th of May 1889 contained no condition against alienation. The Subordinate Judge found that the villages had been given temporarily to Musammat Gulab Kuar. We presume that the Subordinate Judge meant by that finding that the possession and the right to enjoy the profits of the villages were assigned to Musammat Gulab Kuar to be held and enjoyed by her so long as she shall be entitled as a Hindu widow to maintenance from the property of the Hindu family to which her husband had belonged. On that finding the Subordinate Judge having found against Musammat Gulab Kuar on the other matters alleged in her petition, and applying the decision of *Diwali v. Apaji Ganesh* (1), held that the villages were liable to attachment and sale under the decree against Musammat Gulab Kuar, and dismissed the petition.

(1) 10 B. 342.

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From that order of the Subordinate Judge Musammat Gulab Kuar appealed to this Court, and her appeal came to be heard and decided under Rule 1 of this Court's Rules before our brother Knox.

The only point which was argued in the appeal before our brother Knox was whether the rights and interests which have been made over to a Hindu widow by the family to which she belonged in lieu of maintenance can or cannot be attached and sold by auction in satisfaction of a decree against her. Our brother Knox holding that the proviso, clause, (l) to s. 266 of Act No. XIV of 1882, applied and removed rights and interests such as Musammat Gulab Kuar enjoyed in the villages from the category of property which can be sold in execution of a decree, allowed the appeal and set aside the sale. From that order of our brother Knox this appeal has been brought.

Before us it has been contended on behalf of the appellant that when by agreement between a Hindu widow and those liable to [446] allow her maintenance a lump sum of money is handed over to her in satisfaction and discharge of all present and future claims for maintenance, such sum becomes her absolute property and not liable to forfeiture should she become unchaste, and can be attached under a decree against her, as in that case what would be attached would be property actually vested in her and not "a right to future maintenance." It was argued that the transaction effected by the agreement of the 7th of May 1889 was strictly analogous to that put in the above contention, and that the villages were as liable to be attached and sold in execution of a decree against Musammat Gulab Kuar as would the lump sum of money be liable to attachment in execution of a decree against the Hindu widow of the illustration. In answer to that argument it was contended that a decree obtained by a Hindu widow for maintenance ceases to be enforceable except for the maintenance then already accrued due upon the commission by the Hindu widow of an act of unchastity, and that the agreement of the 7th of May 1889 did not confer upon Musammat Gulab Kuar any greater right in the villages than the right to apply the profits derivable from the villages for her maintenance so long, and so long only, as her right to maintenance would, if it had not been for the agreement of the 7th of May 1889 have been enforceable under the decree, that is, so long only as she continued to be a chaste Hindu widow. It was also contended on behalf of Musammat Gulab Kuar that the principle upon which the Legislature acted in enacting that "a right to future maintenance" should not be liable to attachment or sale in execution of a decree was that rights which were entirely uncertain as to duration and extent and which might be determined by an act of the judgment-debtor, as, for instance, by an act of unchastity on the part of the Hindu widow in the present case, are speculative rights, and should, as such, not be made the subject of the sale under a decree. It was argued that the policy which caused the Legislature to enact [s. 266, cl. (k) of Act No. XIV of 1882] that an expectancy of succession by survivorship or other merely contingent or possible right or interest should not be liable to attachment or sale was to prevent merely speculative rights being made the subject of a sale in execution of a decree, and that [447] the rights and interest of Musammat Gulab Kuar in the villages in question were a mere right to hold the villages and to enjoy the profits to be derived from them or future maintenance so long only as she continued to be a chaste Hindu widow, and in that sense that her rights in respect of the villages were merely speculative rights. It was not contended that

the decree-holder might not, had he desired to do so, have attached the rents, if any, actually due and then payable to Musammat Gulab Kuar, and in that respect it was argued from the explanation to s. 266 of Act No. XIV of 1882 that the principle upon which the subjects to which clauses (g), (h), (i) and (f) of that section apply were made not liable to attachment and sale was a different principle or policy from that upon which the subjects to which clauses (k) and (l) respectively apply were exempted from liability to attachment or sale. It was argued that a right to future maintenance was not only uncertain duration, that is, that its duration depended upon the Hindu widow remaining chaste and upon the family property not being sold by the male member of the family in whom the property was vested, but that it was uncertain in extent, depending from time to time upon the fluctuating value of the property.

In reply on behalf of the appellant the order for attachment and sale was relied upon, and it was contended that as that order had not been disturbed by appeal or in review, it had become final prior to the sale, and made, in accordance with the decision of their Lordships of the Privy Council in *Ram Kirpal Shukul v. Musammat Rup Kuari* (1) and *Mungul Pershad Dichit v. Grija Kant Lahiri Chowdhry* (2), the principle of *res judicata* applicable to the question now before us as to whether the villages in question, so far as Musammat Gulab Kuar's interest is concerned, could be sold in execution of the decree against her. As that was a point not previously raised, we heard the advocate for Musammat Gulab Kuar further, and he then contended, although the particular objection to the validity of the sale was that the villages could not lawfully be sold in execution of the decree against Musammat Gulab Kuar, yet that the application having been made after the sale had taken place, and [448] being one for an order to set aside the sale, it must be taken to have been an application under s. 311 of Act No. XIV of 1882.

The decision of their Lordships in *Tasadduk Rasul Khan v. Ahmad Husain* (3) was relied upon as establishing the proposition that an application by judgment-debtors to set aside a sale, even if the sale was prohibited by the express words of prohibition of the Code of Civil Procedure, under which Code only could a sale in execution of a money-decree be lawfully held, was an application under s. 311 of the Code, although that section in terms applies only to application to set aside sales on the ground of material irregularity in publishing or conducting them.

By parity of reasoning it was contended that the application to set aside the sale in the case on the ground that the property sold could not be lawfully sold in execution of the decree against Musammat Gulab Kuar must be treated as an application which had been made under s. 311 of Act No. XIV of 1882. In continuation of that argument, it was further contended that the order of the Subordinate Judge, having been made on an application under s. 311, must have been made under s. 312, and was one to which s. 588 of Act No. XIV of 1882, cl. (16), applied, and consequently that the appeal from the order of our brother Knox did not lie. In support of that last contention, *Muhummad Neimullah Khan v. Ihsan-ullah Khan* (4) and some of the cases therein referred to were relied upon. In answer to that new point it was contended on behalf of the appellant that, although as to part of the application to the Subordinate Judge to set aside the sale the application was one under s. 311 of Act No. XIV of 1882, yet that that application, so far as it was founded on the question in this appeal,

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(1) 11 I.A. 37.

(2) 8 I.A. 123.

(3) 21 C. 66.

(4) 14 A. 226.

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namely, whether the villages could be lawfully sold in execution of the decree against Musammatt Gulab Kuar, was not an application under s. 311, and consequently that, so far as this question is concerned, the order of the Subordinate Judge was not an order under s. 312 to which s. 588, cl. (16) would apply, but was an order under s. 244, and, by reason of its not having been an order specified in s. 588, it was a [449] decree, and that thus this appeal lay under s. 10 of the Letters Patent from the decree of our brother Knox. We consider that we are bound to treat the application to the Subordinate Judge to set aside the sale as one made under s. 311 of Act No. XIV of 1882, and that his order was one made under s. 312, and consequently that by reason of the prohibition contained in s. 588 no appeal lay from the decree or order of our brother Knox. It is only right to say that in *Tasadduk Rasul Khan v. Ahmad Husain* (1) the question to which the argument before their Lordships were directed were as to irregularities in making the proclamation of sale, and as to whether any substantial injury had been shown to have been occasioned to the judgment-debtor by the sale having taken place in contravention of s. 290 of the Code of Civil Procedure and that their Lordships' attention does not appear to have been directed by the arguments to the cases in India in which it was held that the words of the section were words of prohibition.

The other questions above referred to are questions of importance requiring careful consideration when they arise and have to be decided; but, as we are of opinion that this appeal did not lie, it is not necessary for us to express an opinion upon them. We dismiss this appeal with costs.

Appeal dismissed.

16 A. 449 = 14 A.W.N. (1894) 169.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

LACHMI NARAIN AND ANOTHER (*Decree-holders*) v. KUNJI LAL
(*Judgment-debtor*), AND LACHMI NARAIN AND ANOTHER
(*Decree-holders*) v. CHOTE LAL AND OTHERS (*Judgment-debtors*)*
[3rd July, 1894.]

Hindu Law—Joint Hindu family—Simple money-decree against father alone sought to be executed after his death against joint family property in the hands of the son—Civil Procedure Code, ss 234, 244—Execution of decree.

A creditor of a father in a joint Hindu family governed by the law of the Mitaksbara who has obtained a simple decree for money in a suit against the father [450] alone cannot obtain execution of that decree against the joint family property or any part of it in the hands of the son in a proceeding against the son in execution of that decree instituted after the death of the father, and not being a proceeding in continuation of an attachment of the property effected during the lifetime of the father; the proceeding in execution not being barred by the law of limitation, and the son not being precluded by any estoppel from proving that the property was joint family property at the time of his father's death and is in his hands ancestral property and not assets representing what

* Second Appeals Nos. 836 and 837 of 1893 from orders of H. D. Griffin, Esq., District Judge of Farakhabad, dated 20th April 1893, confirming orders of Maulvi Muhammad Anwar Husain, Subordinate Judge of Farakhabad, dated the 7th January 1893.

was at the time of his father's death separate property of his father. But in such a case, if the creditor desires to obtain a remedy against the ancestral property, or any part of it, in the hands of the son, he must seek that remedy in a suit against the son, in answer to which suit, when brought, the son will be entitled to prove that the suit is barred by limitation, that the debt was tainted by immorality, or any other matter that would be a defence against the son. *Suraj Bansi Koer v. Sheo Proshad Singh* (1); *Mussammatt Nanomi Babuasin v. Modun Mohun* (2); *Badri Prasad v. Madan Lal* (3); *Seth Chand Mal v. Durga Dei* (4); *Clegg v. Rowlands* (5); *Payne v. Parker* (6); *Chowdry Wahid Ali v. Mussammatt Jumae* (7); *Raghubar Dyal v. Hamid Jan* (8); *Sangili Virapandia Chinnathambar v. Alwar Ayyangar* (9); *Karnataka Hanumantha v. Andukuri Hanumayya* (10); *Muthia v. Virammal* (11); *Ariabudra v. Dorasami* (12); *Venkatarama v. Senthirelu* (13); *Balbir Singh v. Ajudhia Prasad* (14); *Jagannath Prasad v. Sita Ram* (15); and *Beni Pershad v. Parbatti Koer* (16).

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THE facts of these two cases are fully stated in the judgment of the Court.

Babu *Ratan Chand*, for the appellants.

Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

EDGE, C.J., and BANERJI J.—This appeal and the connected appeal have arisen in proceedings for the execution of a simple money-decree. The decree-holders are the appellants. Kunji Lal, who is the respondent in this appeal, is one of the surviving sons of Narpatt Rai, deceased, against whom the decree in question was obtained by the appellants in the Court of Small Causes of Bombay.

[451] Narpatt Rai and his sons, Chote Lal, Jogi Lal, Khannu Lal and Kunji Lal, had, before the debt was incurred in respect of which the decree was obtained, constituted a joint Hindu family governed by the Mitakshara. Before that debt was incurred, Chote Lal, Jogi Lal and Khannu Lal had separated from Narpatt Rai and his minor son Kunji Lal, the respondent here. On that separation the joint family property was partitioned, Chote Lal, Jogi Lal and Khannu Lal each getting his partitioned and separated share, and Narpatt Rai and Kunji Lal, who, as between themselves, had not separated but had remained joint, getting as their partitioned and separated share of the family property, the property which the appellants here seek, as against Kunji Lal, to attach and to bring to sale in execution of their decree.

The decree in question was one in respect of an unsecured debt due by Narpatt Rai to the appellants. Kunji Lal was not a party to that decree.

The appellants after the death of Narpatt Rai, and in ignorance of the fact that he was dead, obtained an order for the attachment and sale of the property in question in this and in the connected appeal. Kunji

(1) 6 I.A. 88 = 5 C. 148.

(4) 12 A. 313.

(6) L.R. 1 Ch. App. 324, 327.

(8) 12 A. 73.

(11) 10 M. 283.

(14) 9 A. 142.

(2) 13 I.A. 1 = 13 C. 21.

(5) L.R. 3 Eq. 368, 373.

(7) 11 B.L.R. (P.C.) 149 = 18 W.R. 185.

(9) 3 M. 42.

(12) 11 M. 413.

(15) 11 A. 302.

(3) 15 A. 75.

(10) 5 M. 232.

(13) 13 M. 265.

(16) 20 C. 895.

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Lal and his brothers were not parties to that order, which was made on the assumption that Narpai Rai was living and that the property attached was his. When it was ascertained that Narpai Rai had died prior to those proceedings for attachment and sale, the decree-holders abandoned those proceedings and presented an application to the Court of the Subordinate Judge of Farakhabad alleging that Narpai Rai was dead and that Chote Lal, Jogi Lal, Khannu Lal and Kunji Lal were the sons and legal representatives or heirs of Narpai Rai, and praying that "execution (of their decree) be proceeded with as against his (Narpai Rai's) legal representatives or heirs aforesaid according to law." Upon that application the Subordinate Judge issued a notice under s. 248, cl. (b), to Chote Lal, Jogi Lal, Khannu Lal and Kunji Lal and fixed the 2nd of November 1892 as the date upon which cause might be shown why the decree should not be executed [452] against them. On the 2nd of November 1892 the Subordinate Judge made the following order:—

"As the 24th November 1892 has been fixed in the objection case; ordered, that this case be brought forward on the 24th November 1892, after the decision of the objections."

On the 22nd of November 1892 the decree-holders filed an inventory of "the property owned and possessed by the judgment-debtor and left by him," and prayed for its attachment and sale. The property mentioned in that inventory is the property in question in this and the connected appeal.

On the 24th of November 1892 the Subordinate Judge, without deciding the questions raised by the objections made by Chote Lal, Jogi Lal, Khannu Lal and Kunji Lal to an attachment and sale of the property under the decree, ordered the property to be attached. We presume that the order of the 24th of November 1892 was an interim order.

On the 5th of December 1892 the property was attached under the order of the 24th of November.

On the 7th of January 1893 the Subordinate Judge considered the objections made by Chote Lal, Jogi Lal and Kannu Lal and the objections made by Kunji Lal, and allowed those objections and released the properties from attachment. The decree-holders appealed from that order to the Court of the District Judge. The District Judge dismissed the appeal, and from his order of dismissal the decree-holders have brought this appeal in which Kunji Lal is the respondent, and the connected appeal in which Chote Lal, Jogi Lal and Khannu Lal are the respondents.

For the decree-holders, appellants, it has been contended that the property for the attachment and sale of which they applied was liable to be attached and sold after the death of Narpai Rai in execution of their simple money-decree against Narpai Rai.

For the respondent to this appeal and for the respondents to the connected appeal it has been contended that they do not hold the properties as the heirs or representatives of Narpai Rai; that [453] Kunji Lal held the property in his possession by virtue of the right vested in him on his birth, and as the survivor of the joint Hindu family which had after the partition consisted of himself and his father Narpai Rai, and that Chote Lal, Jogi Lal and Khannu Lal held the property in their possession respectively by right of separation and partition of the family property prior to the time when the debt in respect of which the decree in execution was obtained was incurred by Narpai Rai. It has been contended on behalf of all these respondents that the property not having been attached prior to the death of Narpai Rai, and they not having been parties to the

decree, the remedy, if any, of the decree-holders against this property is by a suit against them in which the question as to whether their properties are liable to be sold in satisfaction of the debt incurred by their father can be determined, and that that question cannot be decided in proceedings under s. 234 or s. 244 of Act No. XIV of 1882.

The decree-holders had not obtained any attachment under their decree in the lifetime of Narpat Rai.

The following are the questions which appear to us to arise on the arguments in the appeal in which Kunji Lal is a respondent:—Can a creditor of a father in a joint Hindu family governed by the law of the Mitakshara, who obtained a simple decree for money in a suit against the father alone, obtain execution of that decree against the joint family property or any part of it in the hands of the son in a proceeding against the son in execution of that decree instituted after the death of the father, and not being a proceeding in continuation of an attachment of the property effected during the lifetime of the father, the proceeding in execution not being barred by the law of limitation and the son not being precluded by any estoppel from proving that the property was joint family property at the time of his father's death, and is in his hands ancestral property and not assets representing what was at the time of his father's death separate property of his father, or, in such a case, if the creditor desires to obtain a remedy against the ancestral property or any part of it in the hands of the son, [454] must he seek that remedy in a suit against the son, in answer to which suit when brought the son will be entitled to prove that the suit is barred by limitation, that the debt was tainted by immorality, or any other matter which would be a defence to the suit against the son?

In order to answer those questions, so far as it is necessary to do so in this appeal, it appears to us to be necessary to consider what is the liability in law of a Hindu son in respect of debts contracted by his deceased father at a time when the father and son were members of a joint Hindu family governed by the law of the Mitakshara, and in what character or capacity such son is a party to proceedings in the execution of a simple decree for money obtained by the creditors in a suit against the father alone, in which proceedings a notice under s. 248, cl. (b) of Act No. XIV of 1882 was necessarily issued to the son.

It is in our opinion necessary in considering those questions to bear in mind the distinction between the assets strictly so called of the father in the hands of the son and other property in the hands of the son which, although, strictly speaking, not assets of the father in the hands of the son, is liable to be sold in discharge of those debts of the father which were not tainted by immorality.

It appears to us that separate and self-acquired property of a father in a joint Hindu family governed by the law of the Mitakshara which had not become an accretion to the joint family property in the father's lifetime would, on the death of the father and in the hands of the son, be assets strictly so called of the father, against which a decree which had been obtained against the father alone could be executed after his death in proceedings instituted by the service of a notice upon the son under cl. (b) of s. 248 of Act No. XIV of 1882, whether the debt in respect of which a decree was obtained was or was not tainted with immorality; because in such case the son took such assets as an heir to, and not as a surviving coparcener of, his father.

On the other hand, it appears to us that in a joint Hindu family governed by the law of the Mitakshara joint family property, [455]

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whether such property was ancestral at the time of the birth of the son, or is composed, as to part, of property which was ancestral at the time of the birth of the son and, as to the remaining part, of property acquired after the birth of the son and in the lifetime of the father which became an accretion to the ancestral property, cannot be considered in whole or in part as assets of the father in the hands of the son after the father's death, although a sale of such property by the father alone for a consideration not tainted with immorality would have been binding as against the son, and although a creditor of the father would have a remedy against such property in the hands of the son after the father's death in respect of a debt not tainted by immorality due by the father, whether such debt was or was not contracted for family purposes. One reason for holding that opinion is that in a Hindu family to which the law of the Mitakshara, uncontrolled by legislative enactment or well-established special custom as to inheritance, applies, a son upon his birth takes with his father and his brothers, if any, a co-ordinate and co-parcenary share in all ancestral property of the father or of the family; and on the death of a brother without male issue or descendants in the male line surviving him, or on the death of his father, such surviving son takes, not as heir to his brother in the case of the brother, or as heir to his father in the case of the father, but by survivorship, the interest of such deceased brother or of such deceased father, as the case may be, simply lapsing on his death and so enlarging the share of the surviving son or sons of the father of the joint family. It appears to us that in such case there is no difference in the title of the survivor, whether he be the son surviving his father or the brother surviving a brother who has died leaving no male issue or descendants in the male line, and that in neither case is the ancestral property or any part of it assets of the deceased member of the joint family in the hands of survivor. The fact as established by the decision of their Lordships of the Privy Council in *Suraj Bansi Koer v. Sheo Proshad Singh* (1) that a creditor who has obtained a decree against a member of a joint Hindu family (the father in that [456] case), and has under such decree and in the lifetime of the judgment-debtor attached the judgment-debtor's interest in the joint family property has thereby obtained a valid charge upon the joint family property to the extent of the undivided share and interest of the judgment-debtor which cannot be defeated by the death of the judgment-debtor before partition or sale under the decree, is not at variance with, but, on the contrary, supports the view which we have expressed. The principle of that decision is that each member of a joint Hindu family possessed of ancestral property which is not impartible, has a right to have his share partitioned off, and the judgment-creditor of a member of such family gets by a subsisting attachment under his decree effected in the lifetime of the judgment-debtor a charge upon the undivided share of the judgment-debtor which enables him or the purchaser at a sale under his decree to work out his rights under the decree and charge by means of a partition, whether the judgment-debtor had or had not died before the sale under the decree. Again, the fact as finally established by the decision of their Lordships of the Privy Council in *Mussamut Nanomi Babuasin v. Modun Mohun* (2) that the sons in a joint Hindu family cannot set up their co-parcenary rights in the ancestral family property against the remedies of the creditors of their father for their debts if not tainted with

(1) 6 I.A. 88=5 C. 148.

(2) 13 I.A. 1=13 C. 21.

immorality, does not conflict with the opinion which we have expressed. The principle of the decision in *Mussamat Nanomi Babuasin v. Modun Mohun* is that, although in a family governed by the Mitakshara a son on his birth takes a present vested interest jointly with his father in ancestral estate, he, by reason of the moral obligation upon a Hindu son, is legally bound to pay his father's debts not incurred for immoral purposes, to the extent of the joint ancestral property which is in his hands. This Court in *Badri Prasad v. Madan Lal* (1) has held that legal liability can be enforced, even in the lifetime of the father, in a suit against the father and sons on a mortgage of the ancestral property made by the father alone.

[457] Reading together the decisions of their Lordships of the Privy Council in *Suraj Bunsî Koer v. Sheo Proshad Singh* and in *Mussamat Nanomi Babuasin v. Modun Mohun*, we think it is manifest that ancestral property is not, nor is any part of it, in the hands of a son to whom the Mitakshara law applies, assets of his deceased father, and that the son's right to such property is, not that of an heir or legal representatives of his deceased father, but that of a surviving co-parcener, although, by reason of the moral duty on a son to pay his father's debts which are not tainted with immorality, there is upon him a legal liability to pay such debts which can be enforced against the ancestral property in his hands. Such liability must stand, as it does, upon a principle entirely different from the liability of an heir or legal representative whose liability in the execution of a decree obtained against a deceased person of whom he is heir or legal representative is, by s. 234 of Act No. XIV of 1882, confined to the extent of the property of the deceased which has come to the hands of such legal representative and has not been duly disposed of. If it were not so, a creditor who had obtained a simple decree for money against the father in a joint Hindu family governed by the Mitakshara in a suit in which the sons were not parties, could for the first time after the father's death, attach what represented the undivided share of the father in the ancestral property and bring that interest to sale in execution of his decree, whether the debt in respect of which the decree had been obtained was or was not tainted with immorality, and consequently whether or not such debt was one which the sons were morally and legally bound to pay, to the extent of the ancestral property in their hands. This Court has in Full Bench in *Seth Chand Mal v. Durga Dei* (2) held, Tyrrell, J., dissenting, that when the holder of a decree against the father in a joint Hindu family governed by the Mitakshara proceeds under s. 234 of Act No. XIV of 1882, after the death of the father, to execute the decree by attachment and sale, and the son objects that the property in his hands, sought to be attached and sold, is his own property and not assets of his deceased father, that question is one to be decided under s. 244 of Act No. XIV of 1882 by the Court [458] executing the decree; but that when the objection is that the property in the hands of the son is, not his beneficially, but is solely vested in him as trustee for another, that question cannot be decided under s. 244, but must be decided in a separate suit. From the distinction having been drawn in that case between the case of a son setting up a claim to the property as his own and the case of his objecting that he holds the property merely as trustee for another, it appears to be considered that the opinion of the Full Bench was that all questions which might arise upon the claim of the son that

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(1) 15 A. 75.

(2) 12 A. 313.

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the property was his own and not assets of his father, including the question whether the debt was one which it was the pious and legal duty of the son to pay, are to be decided under s. 244 of Act No. XIV of 1882 by the Court executing the decree. That is not, in our opinion, what the judgment of the Full Bench means. The reason for the distinction drawn in that case by the Full Bench is obvious. In the first case the Court executing the decree has before it in the son the person who admittedly is legally and beneficially entitled to the property in his hands, if it be ancestral property or if it be property which was separately from his father acquired by him, and who, if the property was not ancestral property or so self-acquired, has the property in his hands as assets of his deceased father. In the other case the beneficiary for whom the son alleges that he holds the property as trustee is entitled to be heard on the question as to whether the property is trust property and not assets of the deceased judgment-debtor, and such beneficiary, unless he was a party or is a representative of a party to the suit in which the decree was passed, is not and cannot be made under Act No. XIV of 1882 a party to the proceeding in execution of the decree. Section 437 of Act No. XIV, 1882, would not enable the Court executing the decree to order the beneficiary to be made a party to the proceeding in execution of the decree against the deceased father of the beneficiary's trustee, as the suit in which that decree was passed was not one against the trustee and was not one concerning property vested in any one as trustee who was a party to that suit, and as Act No. VI of 1892 prohibits the application of s. 647 of Act No. XIV of 1882 to applications [459] for the execution of decrees. According to the practice of the Court of Chancery in England all *cestuis que trustent* were, subject to certain exceptions, necessary party to suits against their trustees by which their rights were likely to be affected. Although, under the practice of the High Court of Justice in England, trustees may be sued without joining their *cestuis que trustent* as representing the property of which they are trustees and as representing the persons for whom they are trustees, the Court may, at any stage of the suit, order the *cestuis que trustent* to be made parties to the suit. It appears to us that the High Court of Justice in England would in a suit in which the question was whether, for the discharge of a debt incurred by a person for the payment of whose debts a *cestui que trust* was not responsible, the property sought to be sold was assets of the deceased judgment-debtor in the hands of his heir or legal representative, or was property vested in the persons who happened to be such heir or legal representative, vested in him not as such heir or legal representative but as the trustee for such *cestui que trust*, order such *cestui que trust* to be made a party. That we infer from *Clegg v. Rowlands* (1) and from *Payne v. Parker* (2). In such a case the trustee would have an interest adverse to the *cestui que trust*, for it would be to the interest of the trustee that the trust property, and not his own ancestral property, or the assets of his father, should be sold in satisfaction of the debt of the judgment-creditor. In *Chowdry Wahed Ali v. Mussamat Jumae* (3) in execution of a decree a person had been made a party to the proceedings in execution in a representative capacity, and their Lordships of the Privy Council held that the question whether property in the hands of the representative defendant belonged to him in his own right or in his representative character was one which

(1) L.R. 3 Eq. 368 (375).

(2) L.R. 1 Ch. App. 324 (327).

(3) 11 B.L.R. P. C. 149=18 W.R. 185.

related to the execution of the decree. The procedure in that case was the procedure of Act No. XXIII of 1861. In *Raghubar Dyal v. Hamid Jan* (1) it was held that the representative of a deceased judgment-debtor, who as such representative was a party [460] to the proceedings in execution of the decree, not having taken an objection in those proceedings that the property was his own and not assets of the deceased judgment-debtor, and the property having accordingly been sold in execution of the decree, neither he nor his subsequent vendee could question the title of the purchaser at the sale under the decree. The last two decisions to which we have just referred appear to us to support the view which we entertain as to ss. 234 and 248 (b) and 244 of Act No. XIV of 1882. In our opinion it was competent for the Subordinate Judge in these proceedings to determine the question as to whether the property sought to be sold was ancestral property in the hands of Kunji Lal or was assets of his deceased father Narpal Rai, and we are further of opinion that he rightly decided that the property in question was ancestral property in the hands of Kunji Lal and not assets of his deceased father. Upon that finding we think it necessarily follows that the jurisdiction of the Court of the Subordinate Judge was in these proceedings in execution limited to making an order allowing the objection of Kunji Lal and releasing from attachment under the decree the property sought to be sold. We think that such view is not only consistent with but is supported by all the authorities which have been cited to us in argument.

In *Sangili Virapandia Chinnathambiar v. Alwar Ayyangar* (2) in which case the property was an impartible zamindari, it was held that, as the entire interest in an impartible zamindari passes upon the death of the father to the son, there is nothing in the estate itself which can be attached after the father's death under a decree against him or which can be made liable in the execution of such decree against the son as the representative of the father. The decision in that case does not, upon an examination of the judgment, appear to have turned upon the fact that the property there was impartible, but upon the rule of procedure of s. 234 of Act No. X of 1877, and upon the view that the son was merely a party to the decree, or rather to the proceedings in execution of the decree as the representative of his father, and as such representative could [461] only be liable under the decree to the extent of such assets of his father as had come to his hands and had not been duly disposed of. The learned Judges in that case declined to decide what would have been the result if the property had been attached in the father's lifetime under the decree and the subsequent proceedings had been a continuation of proceedings in execution of an attachment made in the father's lifetime.

In *Karnataka Hanumantha v. Andukuri Hanumayya* (3) in Full Bench it was held, in proceedings to execute a decree which had been obtained against a father for money, that the father having died and his interest in the ancestral property of the joint Hindu family not having been attached in his lifetime, his interest passed on his death to his son by survivorship and ceased to be his property, and that, although the interests of sons in Hindu ancestral property are liable to satisfy a father's debt, that liability does not attach to the ancestral property in their hands in their representative character, and in such case the decree-holder must have recourse to a separate suit. In that case the procedure referred to was that of Act

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(1) 12 A. 73.

(2) 3 M. 42.

(3) 5 M. 232.

1894 No. X of 1877, which in that respect was the same as that of Act No. XIV
JULY 3. of 1882. That decision was followed in *Muthia v. Virammal* (1).

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APPEL- In *Ariabudra v. Dorasami* (2) the judgment-debtor having died before
LATE execution of a decree against him, the judgment-creditor sought to have
CIVIL. the decree executed against the representatives of the judgment-debtor.
The decree was one for sale in a suit upon a hypothecation bond and was
passed prior to the coming into force of Act No. IV of 1893.

16 A. 449 = The legal representatives were sons of the judgment-debtor. In the
14 A.W.N. execution proceedings the objection of the legal representatives to the
(1894) 169 attachment and sale of their interest in the hypothecated property in
execution of the decree was allowed.

Thereupon the execution creditor brought a suit against the representatives claiming a declaration that their shares were liable for the debt.

[462] The High Court at Madras dismissed that suit under the *proviso* to s. 42 of Act No. I of 1877 (The Specific Relief Act, 1877). Thereupon the execution creditor brought a suit against the sons to recover from them the balance of the judgment debt which remained unsatisfied to the extent of the value of the ancestral property which had come to their hands; and, it having been found that the debt was not tainted with immorality, the claim was decreed in the first Court and in first appeal. In second appeal it was contended on behalf of the sons that the liability of the ancestral property in their hands was a matter which ought to have been dealt with in the execution proceedings under s. 244 of Act No. X of 1877 in execution of the original decree. As to that contention Sir Arthur Collins, C. J., and Muthusami Ayyar, J., said in their judgment:—"It is provided by s. 244 that all questions arising between the parties to the suit in which the decree is passed or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by order of the Court executing the decree and not by a separate suit. The question therefore for decision in this second appeal is whether the son's pious obligation under the Hindu Law to pay the debt of his father out of his share in the ancestral property is a matter which relates to the execution of a decree against his father within the meaning of that section. We are of opinion that it is an obligation distinct from that created by the decree which was passed against the father, that if the decree debt was either illegal or immoral the sons would be under no obligation to satisfy it, though the decree against the father might be perfectly valid, and that the questions contemplated by s. 244 are those which relate to the enforcement of the obligation created by the decree. It is one thing to execute a decree as we find it, and another to add to the obligation created by it so as to extend its scope."

Those learned Judges also held that "the suit was clearly one to enforce payment of money charged on immoveable property, and the contest was whether the charge was validly created by the father as against his son. The claim is therefore not barred by [463] limitation," and they dismissed the appeal, holding that the suit lay.

That was a very instructive case.

In *Venkatarama v. Senthiveli and another* (3) Muthusami Ayyar and Parker, JJ., held:—"When, therefore, there is a money decree against

(1) 10 M. 283.

(2) 11 M. 419.

(3) 13 M. 265.

the father and when the judgment-creditor seeks to attach ancestral property after it has vested in the son by survivorship under Hindu Law upon the father's death, he cannot be considered as executing the decree against the property of the deceased judgment-debtor within the meaning of s. 234 of Act No. XIV of 1882. How far the son's pious obligation would make him liable for the decree debt is a matter to be investigated in a fresh suit."

In *Balbir Singh v. Ajudhia Prasad* (1) it was held that the plaintiff was entitled to a decree declaring that his proprietary right in certain ancestral property was not liable to be sold in execution of a decree for money against his father alone. That part of the judgment in that case in which it was held that a decree against the father alone for sale upon an hypothecation bond could be executed against the ancestral property, if it meant that under that decree, to which the sons apparently were not parties, their shares in the ancestral property could be sold, may require reconsideration when a similar case arises.

In *Jagannath Prasad v. Sita Ram* (2) it was held that a judgment-creditor of a father could not, in execution of the decree, which was for money against the father alone, attach and bring to sale after the father's death the ancestral property in the hands of the son.

In *Beni Prasad v. Parbati Koer* (3) it was held that a decree for sale upon a mortgage which was passed against the father in a joint Hindu family governed by the Mitakshara could, after the father's death, be executed against the interest which the father had in the ancestral property, it appearing that [464] there was subsisting an attachment against that interest made prior to the death of the father. The inference to be drawn from the judgment in that case is in support of the view of the law which we have expressed.

We hold that the decree-holders, appellants, cannot execute their decree against any part of the ancestral property in the hands of Kunji Lal, and that, if they have any remedy now against the ancestral property in the hands of Kunji Lal, as to which we express no opinion, it must be sought in a suit against Kunji Lal.

We dismiss this appeal with costs.

Appeal dismissed.

16 A. 464 = 14 A.W.N. (1894) 137.

APPELLATE CIVIL.

Before Mr. Justice Tyrrell and Mr. Justice Burkitt.

HAR CHARAN SINGH (*Plaintiff*) v. HAR SHANKAR SINGH AND
OTHERS (*Defendants*).^{*} [4th July, 1894.]

Civil Procedure Code, s. 13—Res judicata—“Court of jurisdiction competent to try the suit in which such issue has been subsequently raised”—Act XIX of 1873 (N.W.P. Land Revenue Act), ss. 113, 114.

One H. S. mortgaged in 1864, by two mortgages of the same date, certain immoveable property to one A. S. In 1877 A. S. applied for foreclosure of these mortgages and obtained an order under s. 8 of Regulation XXVII of 1806, but

^{*} First Appeal No. 219 of 1892, from a decree of Pandit Bansidhar, Subordinate Judge of Ghazipur, dated the 18th July 1892.

(1) 9 A. 142.

(2) 11 A. 302.

(3) 20 C. 895.

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these proceedings were, it was alleged, never brought to a legal conclusion. Subsequently, the mortgagee applied in a Court of Revenue for partition in his favor of the mortgaged property. The mortgagor resisted that application on the ground that the foreclosure proceedings had not been completed; but the Court, acting under ss. 113 and 114 of Act No. XIX of 1873, overruled that objection and granted partition in favor of the mortgagee. In 1892 the mortgagor sued the representatives of the original mortgagee in a Civil Court for redemption of the mortgages of 1864. The defendants resisted the suit principally on the plea that s. 13 of Act No. XIV of 1882 applied and was a bar to the suit; but no plea of *res judicata* outside s. 13 was raised. The plaintiff's suit was dismissed as barred by the principle of *res judicata*. The plaintiff appealed.

Held by Tyrrell, J., that, the Court of Revenue being incompetent to determine the suit in which the issue whether the mortgage had been foreclosed or not was subsequently raised, s. 13 of Act No. XIV of 1882 did not apply, and no plea of *res judicata* outside s. 13 could be entertained, inasmuch as no such plea had been put [465] forward in the Court below or in the High Court. *Misir Itaghobar Dial v. Sheo Baksh Singh* (1) referred to.

Per Burkitt, J., *contra*. The provisions of s. 13 of Act No. XIV of 1882 are not exhaustive, and, the plaintiff not having appealed therefrom, the decision of the Court of Revenue must be held, upon the principle of *res judicata*, to be a bar to the present suit. *Ram Lal v. Chhab Nath* (2) and *Ram Kirpal v. Rup Kuari* (3) referred to.

[R., 20 M. 332.]

THE facts of this case sufficiently appear from the judgment of Burkitt, J.

Maulvi Ghulam Mujiaba, for the appellant.

Mr. T. Conlan, Munshi Jwala Prasad and Munshi Gobind Prasad, for the respondents.

JUDGMENT.

TYRRELL, J.—The appellant is the plaintiff of the suit below. He is a mortgagor suing to redeem a mortgage against the respondents. His suit has been dismissed on the single ground of *res judicata* in the sense of s. 13 of the Code of Civil Procedure, and not on any other grounds of *res judicata* outside the terms and provisions of s. 13 of Act No. XIV of 1882. Two previous decrees were prayed in aid for the defence. One is in a civil suit in which the plaintiff and defendants of this suit were in the same array, being all defendants in the former suit. The Court below has rightly held that a decree affecting parties in the same array cannot be used in the sense of s. 13 (*supra*) between the same parties arrayed in opposition the one to the other in a subsequent suit. The recent ruling of this Court, *Bishnath Singh v. Bisheshar Singh* (4) is conclusive on this point. The other decision, or decree, relied on by the defendants, is one which was made between the parties controversially by a Deputy Collector disposing of a partition case under ss. 113 and 114 of Act No. XIX of 1873.

No doubt Mr. Nageshar Prasad in that case was presiding in a Court of Civil Judicature of first instance, and his decision that the plaintiff had not then the subsisting mortgagor rights which he asserted was a decree. But that is not alone sufficient to make the present suit amenable to the disabling rule of s. 13 (*supra*), [466] for Mr. Nageshar Prasad may not have been, and possibly is not now, a Court competent to try this suit, (No. 75 of 1892) for redemption. No Court acting under Act No. XIX of 1873 could entertain, try and determine the suit provided for by s. 91 of Act No. IV of 1882.

(1) 9 C. 489.

(2) 12 A. 578.

(3) 6 A. 269.

(4) 11 A.W. N. (1891) 34.

It is possible that the provisions of s. 13 (*supra*) as they stood in the Code of 1877 might have sufficed for the dismissal of this suit. That section runs thus:—"No Court shall try any suit or issue, in which the matter directly and substantially in issue has been heard and finally decided by a Court of competent jurisdiction, in a former suit between the same parties, or between parties under whom they or any of them claim litigating under the same title." But the subsisting s. 13 contains the additional proviso that the Court which tried the former (*i. e.*, the partition case) be also "competent to try such subsequent suit, or the suit in which such issue have been subsequently raised." See also the ruling of their Lordships of the Privy Council in *Misir Raghobar Dial v. Sheo Baksh Singh* (1).

Mr. Conlan supported the decree below on the authority of *Amir Singh v. Naimati Prasad* (2), but that ruling does not help him, for in that case it was obvious that the Court which had tried the former suit was competent to try the subsequent suit likewise, which was identically the same case as had been tried by the Assistant Collector. The case of the plaintiffs before the Assistant Collector was that in a partition between the parties "the common land should be divided into parts proportionate to the size of the different parties," a proposition disallowed by the Assistant Collector. The "subsequent suit" brought by these defeated persons in the Civil Court was "for a declaration that the defendants were entitled to a share of the common land proportionate to the area of their *pattis*." It was the same suit in both the Courts, and it followed that the Assistant Collector would be competent to try the subsequent suit. Mr. Conlan also relied on *Bhola v. Ramdhin* (3), in which certain parties defeated in a Revenue Court [467] exercising jurisdiction under ss. 112 and 113 of Act No. XIX of 1873, on allegations that the opposite parties in that suit were excluded by prescription from their proprietary rights, instituted a suit in a Civil Court re-asserting that the defendants had been more than twelve years out of possession and were not entitled to be parties to the partition. Here again it is plain that s. 13 applied, for the Revenue Court was no less competent to try the subsequent case than it had admittedly been to try the former case, which was in fact the same case in all respects. Thus Mr. Conlan had no case authority for the applicability of s. 13 of Act No. XIV of 1882, to the present suit. On the other hand, the ruling in *Gopal v. Uchabal* (4), as well as numerous similar rulings in the reports, favours the contention for the appellants.

It seems to me that the words "competent to try such subsequent suit, or the suit in which such issue had been subsequently raised," are conclusive of the question. It would have been otherwise if the second clause of the above quoted sentence had run as—"or the issue raised in a suit subsequently brought." In that event I would have held that Mr. Nageshar Prasad would presumably be competent now, as he was in the partition case, to try the issue which he then decided against the present appellant. But it is not so: the sentence is to try, not the issue again raised in the subsequent suit, but "the suit in which such issue has been subsequently raised." It will hardly be denied that Mr. Nageshar Prasad, if he has not left the revenue for the judicial branch of the public service, which is not alleged, is not competent to try the present suit for redemption of a mortgage.

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(1) 9 C. 439.

(2) 9 A. 398.

(3) 7 A. 894.

(4) 3 A. 51.

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16 A. 464 =
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Mr. Deputy Collector Nageshar Prasad's proceedings in the suit under ss. 112, 113 of Act No. XIX of 1873 are printed at pages 10 *et seqq* of the respondents' book. Bhaya Arjun Singh was the applicant for partition in the month of October 1880. The present plaintiff-appellant was a leading objector. In 1864 (respondents' book, p. 1, No. 5) Bhaya Har Charan, then the proprietor of the property in suit, mortgaged it by a conditional sale-deed [468] to this Bhaya Arjun Singh, the applicant for partition in 1880. Then the once mortgagee Arjun Singh claimed to have attained the higher status of proprietor, and his *quondam* mortgagor denied it. The Deputy Collector tried this issue, and on the basis of some crude notions of law, the main one being that "given an order in favour of a mortgagee for foreclosure, the applicant will be regarded as the absolute owner without instituting a regular suit, and being an absolute owner *must* be entitled to partition," disallowed the mortgagor's objections without consideration thereof. They were aimed at the alleged facts of foreclosure and their validity, and will be found in the 5th and 6th clauses of the plaint before me in this appeal. It is possible that what Mr. Nageshar Prasad meant was that Bhaya Arjaun Singh being ostensibly in possession of an order under Regulation No. XXVII of 1806 (respondents' book, p. 3) *prima facie* represented the mortgaged estate so as to be competent to apply for partition. If this be what he meant it is clear that he made no decision on the title claimed by Arjun Singh and by the appellants respectively, and that his decision cannot affect the present case. But I am content to decide the issue relating to s. 13 of Act No. XIV of 1882, on the simple ground that there is nothing to show that Mr. Nageshar Prasad on the 16th of February 1892, was competent to try this suit or any similar *suit* in which the issue whether Arjun Singh's mortgagee interest in the property which he took in mortgage as the property of his mortgagor, Har Charan (plaintiff-appellant) in 1864, had become the proprietary estate of the mortgagee in 1880 is raised.

I will only add that, though Har Charan's right of action for his objection to his mortgagee's claim for partition in 1880, and the *corpus* of the property may be, nay apparently are, identical with the right action and the *corpus* of this suit, it seems to me that the causes of action, the issues raised, the reliefs sought, and the results to be obtained by the present suit are entirely different from, and, save in respect of the issue whether the mortgage had ceased to subsist in 1880, irrelevant to the suit of 1880. In trying the question of the propriety of the decree which has dismissed this [469] suit on the sole and simple issue of the express bar of s. 13 of Act No. XIV of 1882, I do not think I ought to try any other issue, outside the four corners of that section, not sent to trial and tried in the Court below. The issue of the applicability of any other bar to the plaintiff's right to have the case tried, whether such other bar be by way of *res judicata* generally outside the provisions of s. 13 (*supra*) or any other plea in bar, was not sent to trial or tried below. I think I ought not to try it here. The plaintiff is entitled to be heard on it below, and again to be heard on it in appeal, if the lower Court should decide it against him. If the case goes back on remand, there is nothing in this judgment to preclude the raising and trying of such plea, or pleas *dehors* the express bar of s. 13 (*supra*). It is enough for me to decide as I do, and as possibly my brother Burkitt also has done, that the decree below is not justified by the terms of that section. I would remand the case for trial under s. 562 of Act No. XIV of 1882. Costs to abide the result.

BURKITT, J.—The plaintiff-appellant in this suit sought to redeem

two mortgages with possession executed by him in 1864, in favour of the predecessor in title of the respondents. The defence was that the suit was barred by limitation and by a *res judicata*. The Subordinate Judge was of opinion that the suit was barred by s. 13 of the Code of Civil Procedure and therefore dismissed it. Hence this appeal.

The facts appear to be as follows :—

In or about the year 1880, the predecessor in title of the respondents applied to a Court of Revenue for partition of the property which had come into his possession under the mortgages mentioned above. He alleged that he had fulfilled all the conditions and formalities necessary for foreclosure, that he was no longer mortgagee, and was absolute owner of the land of which he sought partition.

The present plaintiff-appellant opposed the application on the ground that the applicant for partition had not become absolute owner of the property, as he had not brought the possessory suit [470] required to complete his title. His contention was that the applicant for partition had no title as owner to claim partition. Now this objection raised a question of title and of proprietary right, such as is contemplated by s. 113 of Act No. XIX of 1873. On this objection two courses were open to the Assistant Collector, namely, (1) to decline to grant the application until the question had been settled by a Civil Court, or (2) to try and decide the question himself as a Court of civil judicature of first instance. The Assistant Collector adopted the latter course, and, after hearing the parties, he, on the 19th of October, 1880, recorded a proceeding declaring that the applicant for partition was the absolute owner of the property in dispute and, as such, entitled to partition. That decision of the Assistant Collector was appealable to the District Judge. No appeal, however, was instituted. It follows therefore, in my opinion, that the decision of the Assistant Collector (who for the trial of the question had constituted himself a Court of civil judicature of first instance) must be treated in the same way as any decision of a Civil Court of first instance, namely, that in the absence of any appeal it had become a final decision binding on the parties.

In the present suit, instituted nearly twelve years after the decision of the Assistant Collector, the plaintiff-appellant seeks to redeem the mortgages of 1864, on the ground that the respondents hold the property under subsisting mortgages and not as absolute owners.

The question before us is, can such a suit be maintained with reference to the circumstances mentioned above?

The Court below has applied s. 13 of the Code of Civil Procedure to the suit and held it to be barred. To that decision it is objected that an Assistant Collector would not be competent to try the present suit, it being a suit for redemption, even though the very issue (mortgage or no mortgage) tried by the Assistant Collector as a Court of civil judicature is the only issue in it. It may be that such is the case, but I do not desire to offer any opinion on that matter. In my opinion the suit is barred, not under any pro-[471]vision to be found in s. 13, but on the general principle of *res judicata*. As remarked by this Court in *Ram Lal v. Chhab Nath* (1) with reference to the case of *Ram Kirpal v. Rup Kuari* (2), s. 13 of the Code of Civil Procedure "is not exhaustive." The Legislature has provided by a special Act (No. XIX of 1873) for the proceedings to obtain, and in, partition. Among the provisions of that Act is one which prescribes the

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(2) 6 A. 269.

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manner in which any question of title or of proprietary right raised in the partition shall be decided. Such a question was raised here and was decided in accordance with the procedure permitted by the Act, namely, by the Assistant Collector constituting himself a Court of civil judicature. The Act permits an appeal from such a decision. No appeal was made by the defeated party. In my opinion it was the intention of the Legislature that decisions made by an Assistant Collector under s. 113 of Act No. XIX of 1873, could be questioned only by appeal and not otherwise, that such a decision when not appealed became final to all intents and purposes, and that the issue raised and decided in it could not be raised again in any other Court. Here the Assistant Collector decided that the applicant for partition had become full and absolute owner. The issue which plaintiff-appellant would raise in this suit is the very issue which the Assistant Collector had decided. In my opinion it would be most unjust to allow a party who had not taken the trouble of appealing from the decision under s. 113 of the Act No. XIX of 1873, to raise again the question which had been then decided against him. If the facts had been slightly different, if the plaintiff-appellant had asserted that the applicant for partition was, *e.g.*, a trespasser, and not even a mortgagee, and if the Assistant Collector had, as here, held that the latter by foreclosure had become absolute owner, it is clear that the appellant could not afterwards have sued in a Civil Court to eject the respondents as trespassers. Why then should the appellant be permitted to sue to redeem mortgages which had been declared by a competent Court of civil judicature to have been foreclosed and to be no longer subsisting mortgages, and so by a side wind to re-open the very issue [472] which had been decided against them and had not been appealed by them. It may be that technically such a suit is not in express terms forbidden by s. 13 of Act No. XIV of 1882, but in my opinion it is one to which the general principle of *res judicata* applies; and as the issue which the appellant seeks to raise in this suit is one which was decided against him by a competent Court according to the procedure expressly provided by the Legislature for such a case, I am of opinion that the suit is barred by the principle of *res judicata*. I would therefore affirm the decree of the lower Court and would dismiss this appeal with costs.

In accordance with the provisions of s. 575 of the Code of Civil Procedure, this appeal is dismissed with costs.

Appeal dismissed.

16 A. 472=14 A.W.N. (1894) 182.

APPELLATE CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

QUEEN-EMPRESS v. BHUTAN.* [6th July, 1894.]

Act XLV of 1860, s. 304-A—Causing death by negligence—Lessee of Government ferry allowing unsound boat to be used on ferry—Criminal liability of lessee.

The lessee of a Government ferry having the exclusive right of conveying passengers across a certain river at a particular spot allowed an unsound boat to be used at the ferry. In consequence of its unsoundness the boat sank while crossing the river and some of the persons in it were drowned. *Held* that the lessee of the ferry was properly convicted of the offence provided for by s. 304-A of Act No. XLV of 1860.

[R., 24 P.L.R. 1905=22 P.R. 1905 (Cr.)=2 Cr.L.J. 207.]

* Criminal Appeal No. 423 of 1894.

THE facts of this case sufficiently appear from the judgment of the Court.

The Public Prosecutor (Mr. A. Strachey), for the Crown.

JUDGMENT.

EDGE, C.J., and BANERJI, J. — Bhutan Tiwari was a lessee under the Government of the Gai Ghat ferry on the river Ganges. As lessee of the ferry he had the exclusive right to carry passengers backwards and forwards across the river at that place. By his lease he was bound to maintain for the purpose of the ferry eight boats in efficient condition. It is proved that the boats which he employed at the ferry were not his own boats, but that he allowed [473] different *mallahs* to act as ferrymen, using for the purpose their own boats, the lessee receiving a proportion of the toll paid to the *mallahs*. It is also proved that on certain days when pilgrims visited a neighbouring shrine, and when those days were not *mela* days, he and the *mallahs* allowed pilgrims to be ferried over free of toll. The 16th of March 1893 was one of such days, and on the morning of that day a number of pilgrims, over fifty, and, as we believe, under eighty, embarked on one of the ferry boats. The boat was in charge of one of the *mallahs*. The day was fine. The river was low. There were no waves; and we find on the evidence that there was no wind. When the boat got about half-way across it sank, and twenty-five of the people in it were drowned. Bhutan was found guilty by the District Magistrate of the offence under s. 304A of the Indian Penal Code. The Sessions Judge of Ghazipur set aside that conviction and acquitted Bhutan. The Government has appealed.

Before considering the legal bearings of the case we shall express the conclusions to which we have come on the evidence. The boats at the ferry were as a rule inspected every month by a Government official. They were, however, frequently changed; the consequence being that a boat in use in March might not have been inspected previously by any Government official. In November 1892 it was found on inspection that four of the boats at this ferry required repairing. At the inspection in December 1892 it was found that three boats in use at this ferry were old and unsafe. Those three boats were unsafe by reason of the bottom and side planks being weak and the boats being leaky. The boat which sank in March 1893 was not recovered, and consequently neither of the inspecting officers could say that he had seen that particular boat. So far as the evidence goes, it shows this, that at two inspections within five months of the 16th of March 1893, old and infirm boats, and boats which needed repairs and were leaking, were found at the ferry in use there.

For the defendant witnesses were called whose evidence was that the boat which sank was a new boat; but no witnesses were called to show when or where the boat was built. The defendant's [474] witnesses say that the boat was capable of carrying with safety from eighty to one hundred and twenty-five persons. We find as a fact that there was nothing in the weather or in the condition of the river which would have caused an ordinarily safe boat to founder on that occasion. It is proved conclusively that the boat did not strike against anything in its passage through the river. It is proved that, after the boat had got some way across the river, water was seen coming up through the straw at the bottom of the boat, apparently rising from the bottom of the boat; that that water continued to rise quickly, and that it was that water getting into the boat from the bottom which caused the boat to sink on an even

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keel. Under these circumstances the only conclusion which we can come to is that the boat sank by reason of its being rotten, or being otherwise in a bad state of repair, and not being safe for the purposes of a ferry boat.

Now comes the question of what legal liability in the criminal law attaches to the defendant. The mere fact that he had covenanted in his lease to provide efficient boats for use at the ferry would not make him criminally responsible if they turned out not to be efficient. His duty, in our opinion, stands upon a much higher basis than this. He was the only person who had the concession of the right to use ferry boats at this particular ferry. The consequence is that the public who were entitled to cross at the ferry were bound to use his boats. It does not appear to us to be any defence that the boats which were used were boats belonging to different *mallahs* and not his own property. It was his duty as lessee of the ferry to see that the boats which he placed at the ferry were reasonably safe boats for the carriage of passengers. In his own statement he said, "I do not allow boats to ply which I consider unfit." He also said that the *mallahs* brought the particular boat which was lost from Bengal; that he never had the boat beached to examine it, and that whilst it was with him it was never repaired. He said that he had examined the boat and felt to see if it was safe. It is obvious from the evidence and from Bhutan's statement that for the purposes of the ferry the boats must be [475] considered as his boats. Although they had not been purchased by him, they were procured by him, the owner getting for his own services one-quarter of the profits of the boat and handing over three-quarters to Bhutan. Bhutan's own statement shows, if the question was material, that he was aware that it was his duty not to allow any unsafe boat to ply at the ferry. The conclusion which we have come to is that he allowed this boat in question to be put on at the ferry for work and to be continued there, although the boat was in an unsafe condition. Whether he had examined the boat or not we cannot say, but the boat could not have sunk under the circumstances unless it was in an unsafe condition—and the fact is beyond doubt that he allowed the particular boat to be used for the purposes of the ferry. The fact that the passengers in the boat on the particular day did not pay any toll is in our opinion immaterial in this case on the question of criminal liability. Shortly put, it was the duty of Bhutan to the public not to allow any boat to ply at the ferry which was not in a reasonably safe condition as a ferry boat. He did allow the boat which sank to be used at the ferry for ferrying purposes. That boat was in an unsafe condition, and by reason of Bhutan's allowing a boat which was in an unsafe condition to ply at the ferry the deaths of the persons who were drowned on the 16th of March 1894 were caused. In our opinion this was not merely a negligent omission—it was a negligent act in putting a boat in the ferry which was in an unsafe condition.

We set aside the acquittal of the Sessions Judge, and convict Bhutan of the offence punishable under s. 304A of the Indian Penal Code, and sentence him therefor to three months' rigorous imprisonment and a fine of Rs. 500, or in default to three months' further rigorous imprisonment.

16 A. 476 (F.B.) = 14 A.W.N. (1894) 183.

[476] REVISIONAL CIVIL—FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji and Mr. Justice Burkitt.

SARMAN LAL (*Plaintiff*) v. KHUBAN AND OTHERS (*Defendants*).^{*}

[23rd July, 1894.]

Act IX of 1887 (*Provincial Small Cause Courts Act*), s. 25—Revision—Small Cause Court suit—Application of s. 25—Civil Procedure Code, s. 622.

Section 25 of Act No. IX of 1887 was not intended to give what would practically be an appeal in every case from the decision of a Court of Small Causes, but the discretion to be exercised thereunder should be guided by the same considerations as those which govern the application of s. 622 of Act No. XIV of 1882. *Muhammad Bakar v. Bahal Singh* (1) and *Raghunath Sahai v. The Official Liquidator of the Himalaya Bank* (2) referred to.

[*Diss.*, 11 C.P.L.R. 91; 66 P.R. 1904=138 P.L.R. 1903; R., 21 A. 89; 27 A. 92=A.W.N. (1904) 227=1 A.L.J. 697; 6 A.L.J. 944=3 Ind.Cas. 817 (819); 11 A.L.J. 295 (296); 19 Ind. Cas. 782; 5 C.L.J. 413; 19 P.R. 1901=68 P.L.R. 1901; 113 P.L.R. 1903.]

THIS was a reference to the Full Bench made by Tyrrell and Burkitt, JJ., to whom the case had been referred by Banerji, J., in view of the ruling in *Raghunath Sahai v. The Official Liquidator of the Himalaya Bank* (2). The question was referred in the following form:—"Let this go to a Full Bench on the question whether s. 25 of Act No. IX of 1887 is in all respects *pariter* with s. 622 of the Code of Civil Procedure, so that a decree or order of a Court of Small Causes cannot be called in question under the said s. 25, unless there are circumstances which would justify revision of an order not made by a Court of Small Causes under s. 622 of the Code of Civil Procedure."

The suit out of which this application for revision arose was one by a person who had lent money to the predecessor in title of the defendants upon a mortgage bond, but had failed to hand over more than half the stipulated amount, to recover from the so-called mortgagor the money lent. The plaintiff originally brought his suit in the Court of the Munsif of Agra but his plaint was returned for re-presentation in the proper Court. On the suit being brought in the Small Cause Court it was held that the plaintiff's suit was barred by limitation under art. 57 of sch. ii of Act No. XV of 1877. [477] The plaintiff accordingly applied to the High Court under s. 25 of Act No. IX of 1887, for revision of the Small Cause Court Judge's order.

Babu Jogindro Nath Chaudhri, for the petitioner.

The opposite parties were not represented.

THE judgment of the Court (EDGE, C. J., KNOX, BLAIR, BANERJI and BURKITT, JJ.) was delivered by EDGE, C. J.:—

JUDGMENT.

This reference to the Full Bench raises the question to what extent this Court should apply s. 25 of Act No. IX of 1887. Almost the same question was considered by a Full Bench of this Court in *Muhammad*

^{*} Civil Revision No. 5 of 1894 from an order of Judge of the Small Cause Court at Agra.

(1) 13 A. 277.

(2) 15 A. 139.

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Bakar v. Bahal Singh (1). The question was also considered by one of the Judges of this Court in *Raghunath Sahai v. The Official Liquidator of the Himalaya Bank* (2). In the case last referred to it is obvious that it was not intended by the judgment that a Court could not act under s. 25 of Act No. IX of 1887, except in cases in which it might act under s. 622 of Act No. XIV of 1882. What that judgment meant was that s. 622 of Act No. XIV of 1882 should be taken as indicating the line of discretion to be exercised by a Judge in considering whether he should or should not apply s. 25 of Act No. IX of 1887, i.e., that judgment meant that a case which could not be taken up under s. 622 of Act No. XIV of 1882 ought not to be taken up under s. 25 of Act No. IX of 1887. We are satisfied that the Legislature did not intend to give under the cloak of s. 25 of Act No. IX of 1887 practically an appeal on law and on facts from the decisions of Courts of Small Causes, whose decisions were final, subject to the power given by s. 25, and in our opinion s. 25 is not intended by the Legislature to be applied except in those cases to which s. 622 of Act No. XIV of 1882 was considered to be applicable before the decision of their Lordships of the Privy Council in *Amir Hassan Khan v. Sheo Baksh Singh* (3).

The case will go back with this opinion to the Bench which made the reference.

Order accordingly.

16 A. 478 (F.B.) = 14 A.W.N. (1894) 151.

[478] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji and Mr. Justice Burkitt.

JANKI PRASAD (*Plaintiff*) v. KISHEN DAT (*Defendant*).
[23rd July, 1894.]

Act No. IV of 1882 (Transfer of Property Act), ss. 3, 85—Notice—Registration equivalent to notice to prior mortgagee of subsequent incumbrance.

For the purposes of s. 85 of the Transfer of Property Act, a mortgagee will be deemed to have notice of a subsequent registered incumbrance affecting the property mortgaged to him, inasmuch as it is the duty of such prior mortgagee before suing on his mortgage to search the registry for record of any such subsequent incumbrance, and if he has not done so he must be taken either to have wilfully abstained from an inquiry or search which he ought to have made, within the meaning of s. 3 of the above-mentioned Act, or have omitted to do an act which a reasonably prudent mortgagee about to bring a suit on his mortgage under chapter IV of Act No IV of 1882 ought to have done, and would have done, which act, inquiry or search would have resulted in the disclosure of the existence of the subsequent incumbrance.

[*Dis.*, 7 C.W.N. 11; *Not F.*, 8 Ind. Cas. 1199=3 Bur. L. T. 103; *F.*, 22 A. 212; 21 A.W.N. 22; 132 P.W.R. 1908=64 P.R. 1908; 1 S.L.R. 68 (70); *R.*, 17 A. 537 (547); 18 A. 109; 20 A. 110; 26 B. 538; 13 C.P.L.R. 43; 1 Ind. Cas. 227 (228); 8 Ind. Cas. 633 (635)=12 Bom. L.R. 940 (945); 17 Ind. Cas. 927 (930)=16 C.L.J. 394 (400); 1 O.C. 53 (62); 11 O.C. 206; *D.*, 23 A. 25.]

THIS was a reference made by Knox and Burkitt, JJ., of the question whether, when it is found that a prior mortgagee did not as a matter of

* Second Appeal No. 1108 of 1893 from a decree of R. Greoven, Esq., Officiating District Judge of Shahjahanpur, dated the 27th July 1893, confirming a decree of Munshi Jwala Prasad, Munsif of Suhavan, dated the 18th March 1892.

(1) 13 A. 277.

(2) 15 A. 139.

(3) 11 C. 6.

fact know of the existence of a subsequent incumbrance, binding the property already mortgaged to him, the fact of such subsequent incumbrance being made by a registered instrument affects the prior incumbrancer with notice of such subsequent incumbrance. The facts on which the reference arose are fully stated in the order of the Full Bench.

Babu *Ratan Chand*, for the appellant.

Mr. *A. H. S. Reid*, for the respondent.

The judgment of the Full Bench (EDGE, C. J., KNOX, BLAIR, BANERJI and BURKITT, JJ.) was delivered by EDGE, C. J. :—

JUDGMENT OF THE FULL BENCH.

The question which has been referred to this Full Bench arises out of the following circumstances :—The same property was mortgaged to Kishen Dat, the defendant in this suit, and subsequently mortgaged to one Tika Ram, the mortgagor in each case being the same party. Tika Ram brought a suit on his mortgage, obtained a decree for sale, put the property up to sale, and it was purchased by Janki Prasad, the plaintiff here. Kishen Dat was not made a party to that suit or to the sale. Tika Ram's suit was commenced after the coming into force of Act No. IV of 1882. Kishen Dat, subsequently to the coming into force of Act No. IV of 1882, brought a suit on his mortgage. He did not make Tika Ram a party to that suit, nor was Janki Prasad, the plaintiff here, made a party to that suit. Kishen Dat got his decree on the 10th of September 1889. Tika Ram had got his decree on the 12th of June 1886, and the sale to the plaintiff took place on the 22nd of June 1891. Kishen Dat proceeded to put his decree for sale into execution. On that Janki Prasad, the plaintiff here, objected that the property could not be sold under that decree. That objection was disallowed and Janki Prasad brought his suit. It has been found in this suit that Kishen Dat had not notice in fact, when he brought his suit, of the subsequent mortgage to Tika Ram or of Tika Ram's suit. Both the first and the second mortgages were duly registered documents.

The question which has been referred to the Full Bench is—did the fact that Tika Ram's mortgage was registered affect Kishen Dat with notice of that mortgage?

It has been decided by this Court that the registration of a prior mortgage affects a subsequent mortgagee with notice of the prior mortgage. The answer to this reference to the Full Bench appears to us to be found in s. 3 and s. 85 of Act No. IV of 1882. By s. 85 it is enacted that, "subject to the provisions of the Code of Civil Procedure, s. 437, all persons having an interest in the property, comprised in a mortgage must be joined as parties to any suit under this chapter relating to such mortgage. Provided that the plaintiff had notice of such interest." There were good grounds for the enacting of the provisions of the section. Prior to the passing of Act No. IV of 1882, the multiplicity of suits relating to one and the same mortgaged property, but arising under different mortgages and in respect of separate interests in the property mortgaged, created a scandal. No purchaser at an auction sale held [480] under a decree upon a mortgage, was ever reasonably certain that he would not have to defend a suit or suits by one or more mortgagees, who were not made parties to the suit in which the decree was made under which he purchased. Again, much hardship resulted from the system then in vogue, not only to prior but to subsequent mortgagees.

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Under that system a mortgagee, whether prior or subsequent, brought his suit for sale on his mortgage without making the other mortgagees or any other party interested in the property (the mortgagor excepted) a party to the suit. The object of s. 85 of Act No. IV of 1882 was to compel any person suing on a mortgage to bring into one suit, so far as he had notice of their interests, all persons interested in the property, so that in one suit, instead of in several, the rights and interests of the different persons interested in the mortgaged property might be ascertained, protected and dealt with. The result of the system which obtained previously to Act No. IV of 1882 was that mortgaged property when sold in execution of a decree seldom fetched anything like its value, and that was a result only to be expected from the uncertainty of the title obtained under a decree for sale under the system then in operation.

Section 85 only makes it compulsory that all the persons interested should be joined in the suit of whose interests the plaintiff had notice. Now the notice referred to in s. 85 must necessarily be the notice referred to and defined by s. 3 of the same Act. By s. 3 it is enacted that—"a person is said to have 'notice' of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it * * ." Under the Indian Registration Act, certain documents are rendered ineffectual as against interests in land unless they are registered under that Act. Each of the mortgages in this case was registered under that Act, and each was a document which under that Act was compulsorily registrable. The registry is open to search by any one disposed to make a search. In this particular case Kishen Dat made no search, and we have to decide whether he must be taken to have notice by [481] reason of the fact that Tika Ram's mortgage was in fact registered in the office where that document was bound under the Act to be registered.

It appears to us that it must be held that every person dealing with immovable property knows that certain documents, such as mortgages of the value of over Rs. 100, must be registered, and that the fact whether such a mortgage has been registered will be disclosed by a search in the registry. It also appears to us that it is the duty of every person bringing any suit on a mortgage under Chapter IV of Act No. IV of 1882, to ascertain, so far as he reasonably can, that he has as parties to the suit which he is about to bring all persons having an interest in the property comprised in his mortgage. It also appears to us that any reasonably prudent person who was bringing such a suit ought to search in the registry in order to ascertain what were the dealings with the property the subject of his mortgage, whether those dealings were anterior or subsequent to his mortgage, if he intends to bring a suit on that mortgage. It is obvious here that if Kishen Dat had made a search in the registry he would have ascertained the existence of the subsequent mortgage made to Tika Ram, and as that mortgage was made before Kishen Dat's suit was instituted it would have been only reasonably prudent on the part of Kishen Dat to have ascertained by inquiry from Tika Ram and the mortgagor whether that mortgage was still subsisting and unsatisfied. Indeed, unless he had positive proof before him that the mortgage had been satisfied, his only safe course would have been to have made Tika Ram a party to his suit. In our opinion Kishen Dat must be taken to have either wilfully abstained from searching the registry, or, in not making a search in the registry, to have omitted to do an act which a reasonably prudent mortgagee about to bring a suit on his mortgage under Chapter IV of Act

No. IV of 1882 ought to have done and would have done. In either case, in our opinion, Kishen Dat must, by reason of Tika Ram's mortgage having been registered, be taken to have had notice of the interest created by that mortgage, and, if he had ascertained that that mortgage had been [482] made, it would have put him on further inquiry, which he was bound to have made, as to who was the person who was at the time of the suit interested in the property.

We do not decide that registration is of itself notice to all the world. All we do decide is that where it is the duty of a person to search or where a reasonably prudent man would in his own interests make a search, then the fact that the search, if made, would have disclosed a document affecting the property, affects that man with notice of such document and puts on him the necessity of further inquiry. With this answer we return the case to the Bench which made the reference.

The appeal being again laid before the Bench which made the reference the following order was passed :—

ORDER OF DIVISION BENCH.

KNOX and BURKITT, JJ.—The facts connected with this second appeal have been fully set out in the judgment of the Full Bench, on a reference made by us on the 20th of July 1894, and need not therefore be recapitulated here. It was held that Kishen Dat, although a prior mortgagee, had constructive notice of a subsequent mortgage in favor of Tika Ram by reason of that mortgage-deed having been duly registered. The case therefore falls under s. 85 of the Transfer of Property Act. The sole question which now remains to be decided is whether Kishen Dat, the respondent, is entitled under the decree which he obtained on the 10th of September 1889, to bring to sale the property affected by his decree, which property had, as the facts set out in the Full Bench judgment show, been purchased by the plaintiff-appellant in pursuance of a decree obtained by Tika Ram, the subsequent mortgagee, upon the basis of his subsequent mortgage, and which is the decree dated the 12th June 1886. Now no mortgagee can sell the mortgaged property except under a decree for sale obtained under Act IV of 1882. A first mortgagee cannot sell except under a decree which has given a second mortgagee a right to redeem within a time to be fixed by the Court, which, in the event of the second mortgagee not redeeming the first mortgagee, forecloses the second mortgagee's right to [483] redeem. The first mortgagee's right to sell under the decree arises only on the second mortgagee having failed to redeem and being foreclosed by the decree. There is no such decree in the case before us, that is to say, there is no decree giving the second mortgagee the right to redeem. It is not for us to say what will be the result if Kishen Dat institutes another suit for sale with a proper array of defendants. All we need say is that under the decree of the 10th of September 1889, Kishen Dat is not entitled to bring the mortgaged property the subject of this appeal to sale. It is on this ground that we now allow the appeal and set aside the decrees of the Courts below, but without costs, as the ground now raised before us in second appeal was not taken in the Court of first instance.

Appeal decreed.

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16 A. 483 = 14 A.W.N. (1894) 184.

APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.*BADRI NARAIN (*Decree-holder*) v. JAI KISHEN DAS AND
OTHERS (*Objectors*).^{*} [25th July, 1894.]16 A. 483 =
14 A.W.N.
(1894) 184.*Execution of decree—Civil Procedure Code, ss. 232, 244, 540—Transferee of decree—Representative of party to suit—Appeal.*

A person who, within the meaning of s. 232 of the Code of Civil Procedure, is a transferee of a decree is a representative within the meaning of s. 244, *qua* the decree, of the party to the suit under whom he immediately, or by *mesne* assignment in writing, or by operation of law, has derived title to the decree in the suit. It is the assignment in writing from the decree-holder, and not the recognition by a Court of him as a representative, which makes such transferee a representative of a party to the suit. A Court upon the application of such a transferee for execution of a decree may wrongly decide that he is not a transferee within the meaning of s. 232, or that, although he is a transferee within the meaning of that section, he is not a representative of a party to the suit, or that by reason of limitation he is not entitled to obtain execution of the decree, and if the Court has so decided, it has determined a question or questions mentioned or referred to in s. 244 of Act No. XIV of 1882, but not specified in s. 588 and an appeal lies under s. 540 of that Act.

[484] *Purmananddas Jiwandas v. Vallabji Wallji* (1) and *Gulzari Lal v. Daya Ram* (2) approved. *Ram Bakhsh v. Panna Lal* (3) considered. *Halodhar Shaha v. Harogobind Das Koiburto* (4), *Sambasiva v. Srinivasa* (5), *Rama v. Muppil Nayar* (6) and *Vilayati Begam v. Inizar Begam* (7) referred to.

[F., 27 C. 670; 20 M. 378 = 7 M.L.J. 89; 1 Ind. Cas. 353; 2 M. L. T. 93; R., 25 A. 443 = A.W.N. (1903) 99; 26 A. 447 = A.W.N. (1904) 61; 26 C. 250; 21 M. 388; 25 M. 545; 33 M. 62 (64); 6 M.L.T. 273 (275) = 3 Ind. Cas. 938 (939); 1 A.L.J. 61; 12 C. L. J. 312 (318); 7 Ind. Cas. 55 (59); 15 C.P.L.R. 69; 5 M.L.T. 260; 6 M.L.T. 273; 10 O.C. 263 (266); 16 O.C. 70 (72) = 18 Ind. Cas. 97 (98); D., 11 C.W.N. 433 = 6 C.L.J. 437; 3 O.C. 32.]

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Bishnu Chandar and Pandit Madan Mohan Malaviya for the appellant.

Maulvi Ghulam Mujtaba and Maulvi Muhammad Ishaq for the respondents.

JUDGMENT.

EDGE, C. J., and BANERJI, J.—This appeal which has been brought under s. 10 of the Letters Patent, has arisen out of an application made on the 28th of November 1890 to the Court of the Subordinate Judge of Azamgarh for the execution of a decree for money.

The decree sought to be executed was passed on the 15th of July 1884, in favor of one Sarju Prasad. On the 16th of July 1885, Badri Narain, alleging that the decree has been transferred to him by assignment in writing from Sarju Prasad, applied, as the transferee of the decree, for its execution to the Court which had passed it. That application was struck off the file of pending applications on the 28th of November 1895, on the ground that the applicant had not given the correct date of a record which was required.

^{*} Appeal No. 55 of 1893, under s. 10 of the Letters Patent, from a decree of Burkitt, J., dated the 30th June 1893.

(1) 11 B. 506.

(2) 9 A. 46.

(3) 7 A. 457.

(4) 12 C. 105.

(5) 12 M. 511.

(6) 14 M. 478.

(7) 13 A.W.N. (1893) 106.

On the 14th of July 1888, Badri Narain presented another application, as such transferee, for the execution of the decree. That application was on the 30th of November 1888, struck off the file on the ground that Badri Narain had failed to deposit a sum for the issue of process.

On the 19th of November 1889, Badri Narain, as such transferee, presented another application for the execution of the decree. That application was, on the 21st of February 1890, struck off on the [485] ground that Badri Narain had not deposited a sum for the costs of a certificate which had been applied for. On none of those applications had there been any order made or decision expressed determining any question mentioned or referred to in s. 244 of Act No. XIV of 1882.

The Additional Subordinate Judge, after referring to the applications which we have mentioned, said in his judgment dismissing the application now in question:—Throughout all these proceedings Badri Narain was never recognised by the Court as a transferee of the decree, and there is no order granting his application. Further, no notice to the transferor and the judgment-debtor was ever sent as required by s. 232 of the Civil Procedure Code. I am of opinion that none of the applications presented by Badri Narain can save limitation: I find that execution of decree is barred.

Badri Narain appealed to this Court. His appeal, which was a first appeal, was dismissed by our brother Burkitt on the ground that Badri Narain was unable to point to any order on the record by which he was recognised as a transferee of the decree and made a party to the proceedings instead of the original decree-holder. In dismissing Badri Narain's appeal our brother Burkitt, we assume, was of opinion that the case was one to which, by reason of there having been no decision that Badri Narain was the representative in title of Sarju Prasad *qua* the decree, section 244 of Act No. XIV of 1882 did not apply, and the decree or order of the Additional Subordinate Judge dismissing the application was consequently not appealable. Badri Narain has brought this appeal.

In support of this appeal, Mr. Bishnu Chandar has relied upon *Gulzari Lal v. Daya Ram* (1), *Gour Sundar Lahiri v. Hem Chunder Chowdhry* (2) and *Purmananddas Jiwandas v. Vallabdas Wallji* (3).

Mr. Ghulam Mujtaba for the respondents, judgment-debtors, has relied upon *Ram Bakhsh v. Panna Lal* (4), *Sambasiva v. Srinivasa* (5) *Raman v. Muppil Nayar* (6) *Halodhar Shaha v. Harogobind Das Koiburto* (7) and *Vilayati Begam v. Intizar Begam* (8).

As we have not the evidence before us necessary to enable us to determine whether or not Sarju Prasad did transfer to Badri Narain by assignment in writing the decree of the 15th of July 1884, we do not decide that Badri Narain is or is not a transferee of that decree within the meaning of s. 232 of Act No. XIV of 1882. He has in this and in the previous applications claimed as such transferee to execute the decree.

The first question which we have to consider is, does an appeal lie from an order of a Court dismissing an application for the execution of a decree made by a person who is, or claims to be, a transferee of the decree within the meaning of s. 232 of Act No. XIV of 1882. The answer to that question appears to us to depend on the question of law, whether a

(1) 9 A. 46

(2) 16 C. 355.

(3) 11 B. 506.

(4) 7 A. 457.

(5) 12 M. 511.

(6) 14 M. 478.

(7) 12 C. 105.

(8) 13 A.W.N. (1893) 106.

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person who is a transferee of a decree within the meaning of s. 232 of Act No. XIV of 1882, is a representative within the meaning of the term "representatives" as that term is used in s. 244 of Act No. XIV of 1882. In those cases in which it was decided that such a transferee had no right of appeal against an order refusing his application for the execution of a decree, the learned judges apparently considered, either that such a transferee did not become a representative within the meaning of s. 244, until the Court had recognised him as a representative, and had accepted him on the record as a representative, or that the question as to whether such a transferee should have execution of the decree was one to be decided under s. 232 and not under s. 244 of Act No. XIV of 1882.

Section 232 of Act No. XIV of 1882 contemplates that a person who is a transferee within the meaning of that section may apply for and obtain execution of the decree which was assigned to him by the decree-holder, and that "the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder." The term "decree-holder" is [487]-defined in s. 2 of Act No. XIV of 1882, thus:—"Decree-holder means any person in whose favor a decree or any order capable of execution has been made, and includes any person to whom such decree or order has been transferred." The terms "representative" and "legal representative" are not defined in Act No. XIV of 1882. The primary meaning of the terms "representative" and "legal representative" is executor or administrator as such of a deceased person. See the cases referred to at pages 431 and 676 of Stroud's Judicial Dictionary under the titles "legal representative" and "representative." In s. 244 of Act No. XIV of 1882 the term "representative" is used. In ss. 363, 364, 365, 366, 367 and 368, which relate to the death pending suit of a party to a suit, the term "legal representative" is used. In s. 234, which relates to the death of a judgment-debtor before the decree against him has been fully executed, the term "legal representative" is also used. Again in s. 252 the term "legal representative" is used. The Courts in India have not confined the terms "representative" or "legal representative," where those terms have been used in the Code of Civil Procedure, to their primary meaning of an executor or administrator. In *Greender Chunder Ghose v. Mackintosh* (1) the heir of an intestate was held to be the legal representative of the deceased intestate. In *Shaik Moosa v. Shaik Essa* (2) it was held that an executor under Act No. V of 1881 is the legal representative of the deceased before probate. According to the explanation to s. 366, "a certificate of heirship, or a certificate to collect debts does not of itself constitute the person holding it the legal representative of the deceased. But when the person holding any such certificate obtains thereby property belonging to the deceased he may be treated as a legal representative in respect of such property." Persons whose sole title to property in their possession was that as heirs to a deceased, have been treated as his legal representatives within the meaning of s. 234 and as his representatives within the meaning of s. 244. In these provinces it would, in the great majority of cases to which s. 368 applies, be impossible for a plaintiff to bring on to the record of a suit any person as the legal [488] representative of a deceased defendant if the term "legal representative," as it is used in that section, were confined to an executor or administrator of a deceased defendant, or to the holder of a certificate of heirship or of a certificate to collect debts who thereby

(1) 4 O. L. R. 193 (210).

(2) 8 B. 241.

obtained property which belonged to the deceased defendant at the time of his death. It has been held by this Court and by the High Court at Calcutta that assignees from a mortgagor of mortgaged property are representatives of such mortgagor in proceedings under s. 244 for the execution of a decree against the mortgagor for sale of the mortgaged property.

It appears to us that, whatever the Legislature may have meant by the term "legal representative" when that term is used in ss. 234, 252, 363, 364, 365, 366, 367 and 368 of Act No. XIV of 1882, the Legislature, when in s. 244 it departed from that phraseology and used the term "representatives" in relation to parties to suits, must have intended "representatives" to have a wider application than they intended the term "legal representative" to have, when that term is used in the Code, and must have intended the term "representatives" to include, not only the persons to whom the term "legal representative" would apply in the other sections of the Code, but every person who at the time was the transferee within the meaning of s. 232 of the decree in the suit. The definition of decree-holder does not make a transferee of a decree a party to the suit in which the decree was passed, nor is the term "decree-holder" used in s. 244. There is no term in s. 244 except the term "representative" which would be applicable to a person who was a decree-holder by assignment and not a party to the suit. Section 232 is included in the group of sections under the heading "B. Of applications for execution" of a decree. Section 244 is included under the heading "D. Directions for Court executing decree." The latter heading is to some extent misleading, as, according to ordinary construction, it would apply only when the Court had decided that the decree was to be executed and was proceeding to execute it, whereas one of the questions which have frequently to be decided under s. 244 is the question whether Act No. XV of 1877 has [489] barred the execution of the decree, and from an order determining that question it has never been doubted that an appeal lies as from a decree. No appeal would lie from such an order if it were not that the order is a decree within the meaning of the term "decree" as defined in s. 2 of Act No. XIV of 1882, and it can only be a decree within the meaning of that section by reason of its being an order determining a question mentioned or referred to in s. 244, but not specified in s. 588.

The logical result of those rulings in which it was decided that a transferee by assignment in writing of a decree could not have an appeal against an order under s. 244, unless he had been recognised by the Court as a representative of a party to the suit in which the decree was passed, is that there could be no appeal by or against any person not a party to the suit, who was in fact a representative in any capacity of a party to the suit, unless the Court had decided that he was, as he said he was, or as he was said to be, a representative of a party to the suit. If such were the law, no appeal from an order on an application for the execution of a decree would have lain in the following case. A applied to execute his decree against B, whom he alleged to be the legal representative of his deceased judgment-debtor. B raised the objections to that application that the execution of the decree was barred by limitation and that he was not a legal representative of the deceased judgment-debtor, and the Court dismissed the application for execution on the ground that the execution of the decree was barred by limitation, but did not decide whether or not B was a legal representative of the deceased judgment-debtor. If the view apparently entertained in some of the cases to which we were referred in argument was correct, A in the case which we have

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put by way of illustration was left without a remedy. He had no appeal because the Court had not recognised and brought on the record B as the legal representative of the deceased judgment-debtor, and a suit against B as the legal representative of the deceased party to the suit to have it determined whether the execution of decree was barred by limitation, would not lie by reason of the prohibition of s. 244. Whatever [490] doubt might have been entertained before the passing of Act No. VII of 1888, as to meaning of s. 244 of Act No. XIV of 1882, and as to the duty of a Court to determine or have it determined whether a person applying for the execution of a decree, or a person against whom execution of a decree was sought, was a representative of a party to the suit, cannot now be entertained, as s. 244 of Act No. XIV of 1882, as amended by s. 26 of Act No. VII of 1888, makes it clear that when the question arises as to who is the representative of a party for the purposes of s. 244, the Court has only two courses open to it, one being to stay the execution of the decree until that question has been determined by a separate suit; and the other being itself to determine that question by an order under s. 244, which order would obviously be appealable.

The case of *Ram Bakhsh v. Panna Lal* (1) was decided before Act No. VII of 1888 was passed. It would appear from the judgments in that case that Oldfield, J., considered that the order in that case dismissing the application for execution of the decree was made under s. 232 of Act No. XIV of 1882, and that Mahmood, J., considered that, as the transferee of the decree had not been accepted on the record as a holder of the decree, the questions between him and the judgment-debtor could not be regarded as questions within s. 244 of Act No. XIV of 1882. Section 232 and s. 234 enable an application for execution of a decree to be made where, in the one case, the person applying, and where, in the other case, the person against whom the application is made is, in the first case, a transferee by assignment in writing or operation of law of the decree, and, in the second case, the legal representative of the judgment-debtor; but, as it appears to us, in neither case would the order allowing the application or the order dismissing it be an order made under either of those sections: such an order would in our opinion be an order under s. 244. Section 232 of Act No. XIV of 1882, apparently had its origin in s. 208 of Act No. VIII of 1859, and at a time when it was necessary to give a Court a discretion as to whether an application by a transferee of a decree for execution of the decree [491] should be allowed, as there was then no legislative protection of the equities of a judgment-debtor in such a case, such as there is now to be found in s. 233 of Act No. XIV of 1882. An order for the execution of a decree or dismissing an application for the execution of a decree is not made, for example, under s. 230, but under s. 244 of Act No. XIV of 1882, although s. 230 gives a discretion to the Court to refuse execution at the same time against the person and property of the judgment-debtor. Similarly, it appears to us that when a Court makes an order for execution of a decree upon the application of one of two or more joint decree-holders, the order is made under s. 244 and not under s. 231, although the latter section empowers the Court to pass such order as it deems necessary in such a case for protecting the interest of the persons who have not joined in the application. In our opinion, the definition of "decree" in s. 2 of Act No. XIV of 1882, necessarily leads to those conclusions.

(1) 7 A. 457.

The case of *Halodhar Shaha v. Harogobind Das Koiburto* (1) was decided before Act No. VII of 1888 was passed.

It does not appear from the reports whether the application for execution to which the decisions in *Sambasiva v. Srinivasa* (2) and *Raman v. Muppil Nayar* (3) related were made prior or subsequent to the coming into force of Act No. VII of 1888.

The decision in *Purmananddas Jiwandas v. Vallabdas Wallji* (4) and that in *Gulzari Lal v. Daya Ram* (5) are direct authorities supporting the opinion which we hold, that, even before the coming into force of Act No. VII of 1888, a person who was a transferee, within the meaning of s. 232 of Act No. XIV of 1882 of a decree was, as such transferee, a representative of a party to the suit in which the decree was made within the meaning of the term "representative," in s. 244, and consequently had a right of appeal if his application to execute the decree was dismissed.

In *Vilayati Begam v. Intizar Begam* (6) Tyrrell and Blair, JJ., held that the applications for execution in that case were not made [492] against Intizar Begam as the legal representative of the deceased judgment-debtor.

For the reasons already stated, we are of opinion that a person who, within the meaning of s. 232, is a transferee of a decree is a representative, within the meaning of s. 244, *qua* the decree, of the party to the suit under whom he, immediately, or by *mesne* assignment in writing, or by operation of law, has derived title to the decree in the suit. In our opinion, it is the assignment in writing from the decree-holder, and not the recognition by a Court of him as a representative, which makes such transferee a representative of a party to the suit. A Court upon the application of such a transferee for execution of a decree may wrongly decide that he is not a transferee within the meaning of s. 232, or that, although he is a transferee within the meaning of that section, he is not a representative of a party to the suit, or that by reason of limitation he is not entitled to obtain execution of the decree, and, if the Court has so decided, it has, in our opinion, determined a question or questions mentioned or referred to in s. 244 of Act No. XIV of 1882, but not specified in s. 588, and an appeal lies under s. 540 of that Act.

It is quite clear from the dates that the application now in question is not barred by limitation, and that the dismissal of Badri Narain's application as barred by limitation was not justified in law or fact.

The applicant in this case is entitled, if it is disputed that he is a transferee of the decree in this case within the meaning of s. 232, to have that question determined under s. 244 by an order of the Court under that section, or to have the proceedings on his application stayed until that question is determined in a separate suit. In such a case as this, in which, in order to determine that question, it would not be necessary to go into a lengthy and difficult inquiry, the Court would probably determine that question by an order under s. 244 and would not relegate the parties to the expenses of a separate suit.

[493] We allow this appeal, and, setting aside the decree of our brother Burkitt and that of the Additional Subordinate Judge, we remand

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(4) 11 B. 506.

(2) 12 M. 511.
(5) 9 A. 46.

(3) 14 M. 478.
(6) 13 A.W.N. (1893) 106.

1894 JULY 25. this case under s. 562 of Act No. XIV of 1882 to the first Court to be disposed of upon the merits. The costs of the appeals in this case will follow the result.

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Appeal decreed and cause remanded.

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16 A. 493.

APPELLATE CIVIL.

Before Mr. Justice Burkitt.

REFERENCE UNDER THE COURT FEES ACT, 1870, s. 5.*
[9th August, 1894.]

Act No. VII of 1870, (Court fees Act), ss. 5, 7, cls v. (d), vi—Court-fee—Suit for pre-emption of separate plots of land not being a fractional share of a revenue-paying unit.

Held that in a suit for pre-emption in respect of separate plots of land which did not constitute any definite fraction of a distinct revenue-paying area and were not themselves separately assessed to revenue, the court-fee should be paid on the market value of the land in suit, and not, as is the case where the suit is for a definite fractional share, on five times the Government revenue.

[R., 6 O.C. 255 (257); 46 P.R. 1908 = 172 P.L.R. 1908 = 94 P.W.R. 1908.]

THIS was a reference under s. 5 of the Court-fees Act, 1870. In the first instance the officer whose duty it was to see that the fees payable under the Act in question were paid reported a deficiency of Rs. 45-2-0. The vakil for the appellant objecting to the report, the matter was referred to the taxing-officer of the Court, a further report was submitted by the officer who had reported in the first instance, and this report was adopted by the taxing-officer, who, however, in view of the general importance of the question involved, referred it to the Judge appointed under s. 5 to decide questions relating to court fees. The report and the subsequent order thereon are as follows:—

"In this case the plaintiff sued to recover possession of specific plots bearing Nos. 878, 882 and 1662 measuring 5 bighas and 11 biswas of land, out of area of *Khewat* No. 101, by right of pre-emption, on payment of Rs. 400, on the basis of a sale-deed.

"The defendant-vendee contended that the sale price was Rs. 600 and not Rs. 400.

[494] "The first Court decreed plaintiff's claim on payment of Rs. 400.

"The lower appellate Court on appeal had, under a *Rubkar*, dated 23rd January 1894, held that the land in suit is not a definite share of an estate, nor is it separately assessed to Government revenue, and that therefore the court fee was payable on the market value (Rs. 600) of the land under s. 7, cl. v. (d) of Act No. VII of 1870, and not on five times the revenue (Rs. 24-10-7). It realized the court-fee on Rs. 600.

"The lower appellate Court reversed the decree of first Court and dismissed plaintiff's suit. The plaintiff has now appealed to this Honorable Court and has valued his appeal at Rs. 24-10-7 for purposes of Court fee.

* Reference in Second Appeal, No. 772 of 1894, under s. 5 of the Court-fees Act, 1870.

"I think the court fee should be paid on Rs. 600, the found market value under s. 7, cl. v. (d), i.e., Rs. 45. Re. 1-14 having been paid, there is a deficiency of 43 2-0 to be paid by the plaintiff-appellant."

Dated the 10th of July 1894.

"In continuation of my report, dated the 10th of July 1894, I beg to submit as follows :—

"(1) Under cl. vi of s. 7 of the Court Fees Act in suits to enforce a right of pre-emption the fee is payable on the value computed in accordance with clause v of the same section.

"(2) Under cl. v (b) of that section, if the subject-matter of the suit is land which 'forms an entire or a definite share of an estate paying revenue to Government, or forms part of such an estate and is recorded in the Collector's Register as separately assessed with such revenue,' the value on which the fee is payable, is five times the revenue so payable where the land is not permanently settled.

"(3) By cl. (d) of the same sub-s. v, 'where the land forms part of an estate paying revenue to Government, but is not a definite share of an estate or is not separately assessed as above-mentioned, the fee is payable, on the market value.

[495] "(4) By cl. (a) 18 of Notification No. 4650, dated the 10th of September 1889, printed at page 88 of the new Rules and Circular Orders for the subordinate Courts, where the suit is for a fractional share of a part of an estate recorded as separately assessed to revenue, the value on which the fee is payable is not to exceed *five times such portion of the revenue separately assessed on that part as may be rateably payable in respect of that share.*

"(5) The effect of these rules is that Court fee is payable on five times the Government revenue where the subject-matter of the suit is :—

(a) An entire estate or definite share of an estate paying revenue to Government; or,

(b) part of an estate recorded as separately assessed, or,

(c) a fractional part of a part recorded as separately assessed by virtue of the notification.

In all other cases the fees is payable on the market value.

"(6) The principle of these rules seems to be this :—Where the revenue is separately assessed and the suit in respect of a fractional part, say $\frac{1}{4}$ or $\frac{1}{5}$, the fee may be paid on five times the $\frac{1}{4}$ or $\frac{1}{5}$ of the revenue assessed on that part.

"But where the suit is not for a fractional part, but for *distinct plots*, the fee must be paid on the market value. Where a fractional share is sold, it conveys to the vendee the same fraction in all the plots in that part (whether these plots be of good, bad, or waste and valueless lands). Where, however, entire fields or plots are sold, the fields or plots so sold may be the most valuable portion of an estate assessed to revenue and the rest of it may be valueless land. The revenue assessed on such an estate would be assessed chiefly with reference to the valuable portion.

"(7) In this case the suit is in respect of fields Nos. 878, 882 and 1662 (area 5 bighas and 11 biswas) of a part of an estate (No. 101 of the *Khewat*) recorded assessed separately to revenue of Rs. 14-7-0. The entire area of the *Khewat* No. 101 is 13 bighas 17 biswas. The plaintiff assumes that every bigha of *Khewat* No. 101 is equally [496]

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valuable and that the rateable revenue payable on 5 bighas 11 biswas is $5\frac{11}{20}$ of Rs. 14-7-0.
 $13\frac{17}{20}$

"As noted above, these fields may have been the most valuable portion of the *Khewat* No. 101, and in assessing the revenue on it at Rs. 14-7-0, the Settlement Officer may have considered, say, Rs. 14 as the revenue assessable on these fields and annas 7 on the rest of *Khewat* No. 101.

"(8) To meet cases of this kind the law lays down that the rules as to payment of fee on five times the Government revenue is to be limited to cases where the suit relates to the entire *mahal* or part separately assessed, or a *fractional share of it*.

"(9) The suit in this case being for particular plots, under s. 7, cl. v (d) the fee is payable on the market value, *i.e.*, Rs. 600."

OPINION.

BURKITT, J.—In my opinion the decision of the taxing-officer is correct. I affirm it. The deficient stamp duty must be made good by appellant before the 14th instant.

16 A. 496 = 14 A.W.N. (1894) 180.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

ONKAR SINGH AND ANOTHER (*Applicants*) v. BHUP SINGH
(*Opposite-party*).^{*} [9th August, 1894.]

Civil Procedure Code, s. 492—Execution of decree—Application to Civil Court for stay of sale in execution of a decree of a Court of Revenue.

The term "decree" as used in the Code of Civil Procedure does not include the decree of a Court of Revenue.

Held therefore that an application under s. 492 of the Code of Civil Procedure for stay of sale in execution of a decree of a Court of Revenue in a suit under s. 93 of Act XII of 1881, cannot be entertained by a Civil Court.

[*Diss.*, 36 C. 252 (254) = 13 C.W.N. 791 (792) = 9 C.L.J. 125 ; 1 Ind. Cas. 933 (934); R., 21 A. 405 ; 22 A. 182 ; 16 C.L.J. 555 (556) = 15 Ind. Cas. 614 (615).]

THE facts of this case sufficiently appear from the judgment of the Court.

The Hon'ble Mr. Colvin and Munshi Ram Prasad, for the applicants.

JUDGMENT.

[497] BLAIR and BURKITT, JJ.—This is an application under s. 492 of the Code of Civil Procedure to obtain an injunction of a temporary character to restrain the sale of certain property which is alleged by the applicants to be in danger of being wrongfully sold in execution of a decree. The suit in which this application was made is a First Appeal in this Court. In it the plaintiffs desire to establish their title to certain property, that property being the property attached and within measurable distance of sale under an execution under the decree of the Collector passed in a

* Application under s. 492 of Civil Procedure Code in First Appeal No. 18 of 1894.

suit under s. 93 of Act No. XII of 1881. In that case the father of the present applicants was the defendant, and the issue of the suit was a decree against him, in execution of which the property claimed in the present suit was attached. The suit was one against the father for profits, and the land seized was seized as being his personal and exclusive property. The applicants commenced a suit in the Civil Court to establish their right to an equal interest in the property attached in the Court of first instance. They were defeated, and it is in the first appeal from that decree that the present application was made. The words of s. 492, so far as they apply to this case, are these:—"If in any suit it is proved by affidavit or otherwise (a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree," the Court may, by order, grant a temporary injunction to prevent the evil apprehended. Now the word "decree" is defined in the second section of Act No. XIV of 1882 as being the formal adjudication in a Civil Court. The execution in the present case is an execution arising out of a decree in the Court of the Collector. We were invited by Mr. *Ram Prasad* to put upon the word "decree" in s. 492 an interpretation larger than that which it bears in the definition clause in the same Act so as to include the Revenue Court in the category of Civil Court. No judicial authority in these provinces has been cited in support of that contention, and the different constitution of the Courts dealing with suits such as are provided by the N.W. P. Rent Act, renders impossible the drawing of any sound inference from cases cited from the Calcutta Reports. We are of opinion that "decree" in the Code of Civil Procedure means [498] a decree in a Civil Court, and that a Civil Court does not include a Revenue Court. We find in Revenue Courts that when the Civil Procedure Code is to be applied it is expressly so provided, so that as a general rule they are outside the scope of the Code of Civil Procedure.

We need not examine the cases in which the question has been raised whether the property can be said to be in danger of being wrongfully sold in execution of a decree when that decree is a good and legal decree. We find that the application under s. 492 of the Code of Civil Procedure is an application to us to exceed our jurisdiction; we decline to do so, and the application is dismissed.

We are confirmed in the view we have taken because we are satisfied that in the Revenue Courts themselves an adequate remedy can be obtained by the present applicants.

Application dismissed.

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17 A. 1 (P.C.) = 4 M.L.J. 272 = 21 I.A. 148 = 6 Sar. P.C.J. 489.

PRIVY COUNCIL.

PRESENT :

Lords Hobhouse, Macnaghten and Morris, and Sir R. Couch.
[On appeal from the High Court at Allahabad.]

DEO KUAR (*Plaintiff*) v. MAN KUAR (*Defendant*).

[15th and 19th June and 14th July, 1894.]

Voluntary transfer alleged to have been made by a Hindu widow—Burden of proving her knowledge of her rights—Construction of the Pensions Act (Act No. XXIII of 1861), sections 3 and 4—Certificate to precede suit for malikana payable by Government.

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Where a voluntary transfer by a Hindu widow is alleged, the burden of proving that it was a free gift, made with knowledge by her of her rights, is on the donee.

The plaintiff, widow of the only son who survived his father, who was the owner of village lands and other property, had become on her husband's death without issue entitled, as his widow, to the estate which he had inherited. But she obtained possession of only half of it. The other half was in the recorded possession, when this suit was brought, of the widow of her late husband's younger brother, who died in his father's lifetime.

The case which the latter widow, as defendant, now sought to make, was that she had become entitled to a share in the estate as the result of a series of transactions, by way of family arrangement, in which the two widows, and their mother-in-law, widow of the deceased father, had taken part. These included a reference to arbitration, a release, and dakhil kharij in settlement records. *Held*, that the plaintiff must succeed, in the absence of proof, of which the burden was on the defendant, that the plaintiff, when ceding half of the estate to which she was entitled, had knowledge of her right, as widow, to the whole, and had freely made what in effect was a gift.

A village, part of the estate, had been made over to the Government by the parties, who in consideration received a malikana in perpetuity, or, in other words, a grant of a portion of the revenue in lieu of their proprietary right. *Held*, that the [2] right to the malikana was on the construction of sections 3 and 4 of the Pensions Act, XXIII of 1871, in the absence of a certificate obtained under that Act, excluded from judicial cognizance in this suit. *Vasudev Sadashiv Modak v. The Collector of Ratnagiri* (1), and *Maharaval Mohan Singji Jeysingji v. The Government of Bombay* (2), referred to and approved.

[F., 29 B. 480 = 7 Bom.L.R. 497 ; 18 M. 187.]

APPEAL from a decree (25th June 1889) of the High Court, reversing a decree (29th March 1888) of the Subordinate Judge of Banda.

The plaintiff-appellant and the defendant-respondent were the widows of two Hindu brothers, under the Mitakshara. The father of the brothers, Pransukh Ram, a Gujrati Bania, originally of the Baroda State, came thence to Banda in the North-Western Provinces, where he lived till his death in February 1868. His son, Ganga Ram, the younger of the brothers and husband of the present defendant, died in 1863, before his father. The elder brother, Uttam Ram, the husband of the plaintiff, survived his father, and having inherited his shares in zamindari villages in

(1) 4 I.A. 119 = 2 B. 99.

(2) 8 I.A. 77 = 5 B. 408.

1894 the Banda and Hamirpur districts, land in the town of Banda, and other
JULY 14. family property, the subject of the present claim, died on the 30th October
 — 1875.
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COUNCIL. The principal question raised on this appeal was whether the plaintiff,
 upon whom the inheritance had devolved, had entered, with knowledge of
 her rights, into a series of transactions after her husband's death, ceding
 to the defendant as a free gift possession of a moiety of the estate to which
 she herself had become exclusively entitled during her life. These tran-
 sactions began when, after the death of Uttam Ram, his mother Jarao
 applied on the 20th December 1875, to have her, Jarao's, name entered as
 that of the malguzar of mauza Jeorahi, pargana Banda, in substitution for
 the name of her deceased son in the settlement record. Her name was so
 recorded; and also the malguzari of other villages, belonging to the estate,
 was entered in her name, as well as in that of the plaintiff; and of some
 villages all the three widows obtained dakhil kharij in their names. The
 facts relating to the assent of the [3] plaintiff to the first of these entries
 in the settlement record, when she was in Baroda, where she remained till
 1877, as well as all the matters material to this suit, are stated in their
 Lordships' judgment.

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In June 1876 the defendant left Baroda for Banda, and the plaintiff followed her in 1877. They lived with Jarao in Banda till the death of the latter on the 30th November 1877. Before she died, two persons gave what purported to be an award between the three widows, dated 9th October 1877. They apportioned one village of the family estate to Jarao for life, dividing the rest of the property in Banda and Hamirpur between the two other widows in equal shares. There was evidence that a partition among the widows made of family property at Barnagar in Baroda in 1878, was followed by the execution of farkhattis, or releases, supporting the above division.

Mauza Pachanahi, one of the villages as to which a joint possession by the widows was recorded, was shared by them with one Durga Prasad, who held half of it. By an agreement of the 10th September 1880, this village was made over to the Government on their making a malikana allowance to the former owners of Rs. 2,000 a year. Of this Durga Prasad sold his half share to the widows; and the malikana was included in the present suit. The principal charges in the plaint (19th April 1886), which claimed possession and mesne profits, valuing the claim at Rs. 2,17,985, were that the entries in the record, whereby it had been the object of Jarao and Man Kuar to exclude the plaintiff from her right, had been effected during her absence and without her knowledge. Until Sambat 1940, corresponding to 1884, she had known nothing of the matter.

The defendant by her written statement asserted that by the custom prevailing in Gujrat, the birthplace of both parties, she was entitled as a gotraja sapinda to a share in the family property, though her husband had died in his father's lifetime; and she asserted that Uttam Ram's name had been recorded as that of the owner in possession of the whole zamindari, not by right of exclusive inheritance, but because he was head of the family and held the [4] property in that character. On his death a dispute had arisen between the parties and Jarao Bai as to partition of the estate, and the widows had agreed to refer the question of their rights to arbitration. The arbitrators had on the 9th October 1877 made a just award declaring the defendant entitled to a half share. Even if the defendant's title was defective, according to Hindu law, the award

was conclusive and binding on all parties. The suit for malikana was not cognizable under the provisions of Act XXIII of 1871.

The issues raised questions as to the alleged custom, as to there having been an award, and as to its effect, if duly made, as to the partition alleged, and the release; and as to the application of Act No. XXIII of 1871 to the malikana allowance.

The Subordinate Judge, Pandit Ratan Lal, found no proof of the alleged custom. Whatever right the defendant might have could only be derived from the plaintiff, or from the award having made it over to her. On this point he found that the entries in the settlement record did not, in all cases, correspond with the assent alleged to have been given, nor yet with the division of the estate recommended in the so-called award. The latter was inoperative, as the submission of the parties had not been proved, they having, also, been absent, and the whole proceeding having been dictated by Jarao. When documents had been executed by parda women, proof had always been required that they had knowledge of the character and effect of the transaction; that they had some disinterested advice in the matter; and that they put their hands to the document or authorized its execution, understanding what they were about.

This proof being absent, the plaintiff was entitled to decree, but the malikana allowance could not be decreed, as it fell within the meaning of section 3 of Act No. XXIII of 1871, the Pensions Act, and no certificate had been obtained.

On appeal, the High Court (SIR J. EDGE, C. J., and BRODHURST, J.) reversed this judgment, and dismissed the suit.

Their view of the case rendered it unnecessary to consider the alleged custom. They decided in favor of the defendant as to the [5] fact that the plaintiff had ceded to her the half share, finding on the evidence that the defendant had obtained from the plaintiff, who well knew her own rights and who had the protection of her uncle Jia Ram, since deceased, when she was at Banda in 1877, the property of which the defendant had been in possession for nine years before this suit was brought. They were satisfied that the plaintiff, far from having made out a case of fraud or concealment, was acquainted from the first with what was being done, and that the arrangement was one that was carried out as an award made in accordance with the wishes of the three widows as to the settlement of their claims upon the estate. They observed that there was nothing to prevent the plaintiff from giving evidence to show the fact that she was in 1877, and down to 1882, in ignorance of her legal rights, or of what was being done. She was not strictly parda-nashin; she was not called either to show ignorance of law, if it could assist her, or ignorance of fact, if any existed. Nor was she called to show that she was ignorant of the acts of her own mukhtar, of the suit of 1878, which terminated in a decree against her and the present defendant. In conclusion, they were satisfied that the plaintiff was an assenting party to the arrangement which finally resulted in the mutation of names and in the defendant's obtaining the property claimed.

On this appeal Mr. J. H. A. Branson and Mr. W. A. Raikes, for the appellant, argued that the judgment of the High Court was erroneous. The *prima facie* case which the plaintiff had brought forward had been sufficient to throw the burden of proof on to the defence to establish that a clear assent from her, with knowledge on her part of her rights, had been given to transactions dividing among three persons the estate to which she was exclusively entitled. Arrangements were said to have

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apportioned it to her brother-in-law's widow and to her mother-in-law. But no proof, and hardly any attempt at evidence, was on the record to show that what had been nothing less than a free gift had been made by the plaintiff with knowledge of her rights.

An alienation purporting to have been made by a Hindu widow, not shown to have had independent advice, made for no consideration, and without an equivalent, could not be supported; and here, in addition, there was a complete absence of evidence as to her having had any knowledge of her rights, or of the extent to which she was giving them away. The so-called award could not support the gift. It was not an award at all, having been drawn up at the mere dictation of Jarao Bai; and even if properly made, upon submission proved, which it had not been, that award had never been acted upon. The entries in the settlement record did not correspond with it. Not one of the successive steps towards the alleged family settlement had been adequate, nor were they sufficient to support the defendant's case when taken altogether. The claim for malikana had been included.

Mr. *J. D. Mayne* and Mr. *G. E. A. Ross*, for the respondent, argued that the judgment of the High Court was right. It had been alleged on the plaintiff's original case that she had been absent, and unaware when matters had transpired to which she in fact assented. But now that all the evidence that could have been adduced was before the Court, the question, on whom fell the burden of proof was of less importance than the consideration whether the evidence, taken as a whole, did not establish that she was aware of her rights when she gave her assent. This issue, though lately developed, was readily accepted by the defence, which now insisted that the plaintiff was not in ignorance of her rights when she gave her assent to the entries in the settlement record, and to other steps in the transactions which had amounted to a family arrangement between the three widows. This widow had on the evidence a fair working knowledge of her rights, and how she was dealing with them. That was the strength of the case for the defence coupled with the reasonable and just character of the result, to which actual assent had been given. It was argued that the evidence, as a whole, showed that the plaintiff, with full knowledge of her rights, intended to cede to the defendant her right of management and possession over the villages now sued for. There had been no attempt to diminish or affect the rights of any reversioner after Uttam's widow; and she had been shown to have [7] been willing and competent to make a gift, whereby the widow of her brother-in-law, in pursuance of a family arrangement, would have possession for her life of a moiety of the former widow's estate.

Mr. *J. H. A. Branson*, in reply, maintained the want of proved knowledge on the plaintiff's part, citing *Ashgar Ali v. Delroos Banoo Begum* (1).

Afterwards, on the 14th of July, their Lordships' judgment was delivered by Lord HOBHOUSE.

JUDGMENT.

This is a family dispute. The defendant, who is the present respondent, has been placed in possession of half the family property, and the plaintiff, who is appellant and who is in possession of the other half, claims the whole. The family whose property is in question were Gujrati

Banias, who some time back migrated from Baroda to Banda, but retained some property in Baroda, and had relatives there. They were a joint Hindu family subject to the law of the Mitakshara. In the year 1868 Pransukh Ram, the then head of the family, died at Banda. He left surviving him his widow Jarao Bai, and one son Uttam Ram, and two daughters. He had another son Ganga Ram, who predeceased him, leaving no issue. Uttam Ram, who took the whole inheritance, died on the 30th October 1875, leaving no male issue. The plaintiff is his widow. The defendant is the widow of Ganga Ram.

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There is now no question but that on Uttam Ram's death the whole inheritance devolved on the plaintiff. She then thought she was pregnant and might have a son, but those hopes were delusive. In this suit it has been contended that the defendant was entitled to share in the inheritance on the ground of some local or caste custom applying to the family; but it has been found that there is no such custom, and there is no evidence that the plaintiff's right to inherit was ever seriously brought into question prior to this suit.

The plaintiff's claim is denied, and the defendant's title is rested on the ground that by a long series of transactions which [8] will be passed in review, the plaintiff transferred to the defendant a moiety of the plaintiff's property. The Subordinate Judge held that there was no such transfer and gave the plaintiff a decree. The High Court thought differently and dismissed the suit. From that decree the plaintiff now appeals.

The first transaction is an application by Jarao, the widow of Pransukh and the mother of Uttam, made on the 20th December 1875, to have her name substituted for that of her son in the settlement records. The evidence of proceedings on this application is contained in the recitals to an order dated the 25th November 1876, relating to the lambardarship of one of Uttam's mauzas.

It appears that the plaintiff was then in the family house at Barnagar in Baroda, and that the presiding Settlement Officer communicated with her through the British Agent at Baroda. On the 12th June 1876, the Settlement Officer received a letter from the Agent as follows:—

"I send herewith the original deposition, in Gujrati, of Musammatt Diwali Bai, widow of Uttam Ram, with an English translation thereof. She has given her consent to the entry of the name of the mother of Uttam Ram in the settlement papers in place of her deceased son, on the following conditions:—'I am with child, in the first place. In the event of a son being born his name shall be entered as the heir to the estate of Uttam Ram; secondly, if a son be not born, my name shall be entered after the death of the mother of Uttam Ram'."

Upon that he delivered the following opinion:—

"As Diwali Bai, the widow of Uttam Ram, deceased, does not relinquish her right it appears necessary that the names of both the Musammats, with a detail of their shares, be entered, but by way of precaution it may be ascertained from the Collector if there is any harm, in his opinion, in entering the names of both the Musammats. It is clearly to be stated that the whole management will rest with the mother of Uttam Ram. By the time the papers are prepared it will have been ascertained whether Musammatt Diwali Bai has given birth to a son."

On the 20th June 1876, the Collector sent an answer of a very extraordinary character. He said that in his opinion there was no harm in entering the names of Jarao and also that of the defendant. Why the Collector took upon himself to introduce, quite gratuitously it seems, the name of the defendant, is nowhere [9] explained. It appears to have been the beginning of a series of errors.

The Settlement Officer indeed acted correctly, for on the 4th July he directed that the office should make an entry of names according to the

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COUNCIL. “ Musammat Jarao Bai, the mother of Seth Uttam Ram, deceased, presented a petition to the Settlement Officer for the entry of her name alone in place of Seth Uttam Ram. The order passed thereon was that there were three heirs to this estate, viz.,
—
17 A. 1 (1) Musammat Jarao Bai, the widow of Pransukh Ram, deceased ; (2) Diwali Bai, the
(P.C.)=4 widow of Uttam Ram, deceased ; and Musammat Banke Bai, widow of Ganga Ram, deceased ; and that therefore it was expedient to enter the names of all the three with
M.L.J. 272= this condition, that the management of the whole estate should be entrusted to
21 I.A. 148= Musammat Jarao Bai for her life, and that when a new khewat would be prepared the
6 Sar. P.C.J. names should be entered according to this order in equal shares.”

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In this way it seems that the Revenue Court, misled by the Collector's letter, gave the defendant a position to which she had no right, which was not conceded to her by the plaintiff, and was not demanded either by herself or by Jarao on her behalf.

The order of the 25th November 1876, in the preamble of which the above stated proceedings, and some subsequent proceedings in September and November, are narrated, was made for the purpose of settling a dispute in the mauza of Jeorahi. The question was whether one Bhura, a shareholder, or the heirs of Uttam should be entered as lambardar. The Settlement Deputy Collector decided in favour of the heirs ; in entering the heirs he followed the error of the order of August. In his judgment he states that the heirs are the three widows, and in his order he directs that their names should be entered in equal shares with the following conditions :—

“ That the whole management of the estate will be entrusted to Musammat Jarao Bai during her lifetime, and that in the event of a son being born to Musammat Diwali Bai, who was with child at the time of the death of Seth Uttam Ram, the name of the son would be entered as successor to Seth Uttam Ram, deceased, in respect of the property.”

It is not clear upon the record in how many of Uttam Ram's mauzas, 26 in all, the above procedure was followed when the [10] names were changed. It would seem that in some the name of Jarao alone was entered ; in some, the plaintiff says three, the names of Jarao and the plaintiff ; and in some, as in Jeorahi, the three names. That inquiry is not now of importance. The point is that the true heir, the plaintiff, was not in any case entered in lieu of Uttam. There is nothing to show that she knew her rights or received any independent advice. But even if she did know what she was doing when she made her deposition in May 1876, the orders of August and November 1876 were wholly at variance with her intentions as expressed in that deposition, and with the directions of the Settlement Officer made upon it on the 12th June and the 4th July. It is in the opinion of their Lordships beyond doubt that at this time the plaintiff might have maintained a suit for the correction of the records by the insertion of her own name as sole heir.

The next stage in the transactions took place during the year 1877, and is quite as extraordinary as the first stage. It terminated in a document dated the 9th October 1877, purporting to be an award of arbitration by Seth Kishan Chand and Lachman Shankar Bhat ; but the circumstances which led up to this award are left in deep obscurity. The arbitrators recite that the three widows have appointed them “ for the settlement of their respective contentions in respect of the right of ownership ” over Uttam's property. But they do not settle any such contention, nor do they intimate what contentions there were. They recite thus :—

"Musammat Jarao Bai was asked by us in what manner she wished the partition to be made; to which she replied that she wished mahal Pransukh Ram, situated in mauza Chhanon, pargana Sihonda, to be given to her for her maintenance, and that as regards the remaining zamindari villages and property and chattels held in common, she wished that they should be divided in two equal shares, and one-half given to each of her two daughters-in-law, and that this course would be agreeable to her."

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And then they go on to express Jarao's wishes in the form of an award; directing as to most of the mauzas that they shall be held by the two younger widows in equal moieties, and as to some giving them to one or to the other in entirety, but so as to give about the same value to each.

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[11] The agreement to refer has not been proved. A copy was tendered but rejected by both Courts. Both the arbitrators have given evidence in the suit, apparently with great candour. Neither of them mentions what the point of dispute was. According to both the award originated with Jarao. Neither of them had any communication with the two younger widows about the award, either before it or after. Kishun Chand says, "As to the arbitration I had asked Jarao Bai what was the award to be"; and then he did as she bid him. Lachmi Shankar says, "We, the arbitrators, did not make the award according to our own judgment. We made the award as asked by Jarao Bai." It is obvious that such a proceeding is not an award at all, but is entirely devoid of legal effect, as it was treated by the Subordinate Judge. The right which the plaintiff had to sue for her inheritance prior to the award remained to her undiminished by the award.

It is not indeed contended by the defendant's counsel that the award by itself can have any legal effect. Nor do their Lordships understand that the learned Judges of the High Court so treated it, though they lay a good deal of stress upon it. They hold that there was "family arrangement in settlement of the contentions between the ladies," and that this arrangement was "carried out in the way of an award in accordance with the wishes of the three ladies as to the settlement of their respective claims to the estate." That seems quite a legitimate use to make of the award, if only the evidence supports it.

But first, their Lordships cannot find what contentions or claims there were to be settled. They pressed the defendant's counsel on this point, and he could not point out any indication of any such contention or claim except the general statement in the award itself. What the evidence shows is that there was personal friction between the two younger widows, which they palliated by setting up separate domestic arrangements, but which the division of Uttam's property had no tendency to allay. They were not less likely, perhaps more likely, to fall out in taking accounts of the shares due to each, than in settling the maintenance to which the [12] defendant was entitled. And secondly, there is no evidence to connect the award with the wishes of the three ladies. It embodied the wishes of Jarao. But we know nothing of the plaintiff's wishes except by her deposition of May 1876, and that gives no countenance to the award.

In opening the defendant's case Mr. Mayne frankly admitted that there was no award in any legal sense, and that he could not find any consideration passing from the defendant to the plaintiff so as to support his client's case on the ground of contract. But he contended that the whole series of transactions between Uttam's death and the institution of this suit, of which the award is an important item, supports the conclusion that for some motive or other the plaintiff deliberately intended that her sister-in-law should have an equal share in the property. And he subjected the whole evidence to a very careful examination to prove that point. That

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in effect puts the defendant's case on the footing of a free gift by the plaintiff, and Mr. Mayne accepted that issue. This is not the issue raised by the pleadings, nor the issue presented to the Subordinate Judge; but as it may have been in the mind of the High Court their Lordships have considered this view of the evidence. In order to succeed upon it the defendant must show that the plaintiff, knowing her rights and knowing that she was making a free gift to her sister-in-law, did so make it.

Their Lordships have already shown that prior to the award the evidence is not favourable but adverse to the theory of such a gift. The award itself adds to the adverse evidence; for if the plaintiff wished to make a gift, why should Jarao set up the fictitious machinery of an arbitration? If their Lordships are to find evidence for a gift they must find it in circumstances subsequent to the award. And that brings us to the third stage of the history.

On the 13th November 1877, Jarao died. During her life no mutation of names was made in pursuance of the award; but that period was so short that no importance can be attached to the omission. On the 25th November the karinda of Jarao applied to the Settlement Court stating that she was the zamindar of mauza [13] Malathu, one of Uttam's mauzas, and that the plaintiff and defendant were the heirs; and he asked that their names should be entered in lieu of hers as mortgagees of a large number of parcels. That mutation was ordered accordingly; "by right of inheritance" as the order expresses it. On the 7th December 1877, one Khan Muhammad, calling himself karinda and mukhtar of the two widows, applied for mutation of names in Semaria, another of Uttam's mauzas. He puts into their mouths the statement that Jarao was proprietor and owner of the entire 16 annas, and that her daughters-in-law are her heirs. Similar applications were made in other mauzas by other karindas. So far as they are given in the record they are to the same effect as the two just stated. The result of the evidence is that the names of the plaintiff and defendant came to be entered jointly in respect of the properties now sued for within a few months of Jarao's death, on the statement that she was the owner and that they were her heirs.

Pausing again, we may ask how the mutations of names in 1878 support the theory of a gift by the plaintiff, or if it is preferred so to put it, of the existence of wishes on the part of the three widows which the award correctly expressed. The answer is, that the mutations are not in accordance with the award, and instead of supporting it throw discredit on it.

Take for instance mauza Baragaon, which is one of those now held in moieties, and is put in suit accordingly, but the award gives it to the plaintiff in entirety. So mauza Keri was awarded to the defendant in entirety, but is held in moieties. There is at least one other mauza in the same position, probably more, but it is not easy to trace the whole list.

Independently of those variations, not material as regards value, but material as showing that it was not the award which the agents of the parties took for their guide, the whole claim for the mutations of 1878 was founded on statements which differ as widely from the award as they do from the truth. The statement that Jarao was owner and proprietor contradicts everything that preceded it. By the plaintiff's consent in 1876 Jarao was let in to be joint owner [14] and manager; possibly for such an interest as would be ascribed to the widow of Pransukh if he had died without male issue. By the award she took no interest in any

part of the property except in one mauza for life. Lachmi Shankar is quite right in saying, "The arbitration award was not acted upon. Mutation of names was not made according to it.....the names of Man Kuar and Deo Kuar were entered in respect of equal shares by right of inheritance. The names were entered by right of inheritance from Jarao Bai."

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Now those who allege that a gift is to be inferred from a series of transactions should be able to show a reasonable amount of consistency in the transactions on which they rely. We have seen that the mutations of 1876 were contrary to the plaintiff's wishes expressed in her deposition, of that year, and that the award was equally contrary to the deposition and to the mutations of 1876. Now it appears that the mutations of 1878 were just as contrary to the deposition and to the former mutations and to the award. So far the evidence appears to their Lordships to be destructive of the theory now put forward on behalf of the defendant.

An attempt is made to support the award or the arrangement expressed in it by showing that Chunni, a daughter of Jarao, who was awarded an annuity of Rs. 50, sued the plaintiff and defendant for it and got a decree. But supposing those proceedings to be evidence in this suit, the answer is that the suit was undefended and the decree made *ex parte* and there is neither proof nor probability that the plaintiff knew anything about them. Lachmi Shankar, who acted for her, says that he did not tell her about the suit. He adds, "all the suits were brought in consultation with me and Gobind Das. It was a work connected with the shop. There was no occasion to refer to Deo Kuar and Man Kuar." The same kind of observation applies with nearly as much force to the two documents filed in the Tahsildar's Court in 1880. One is said to bear the plaintiff's mark, the other her full signature. But no proof is offered that any explanation of the documents was given [15] to her, or that she gave any intelligent assent to them. The Subordinate Judge observes of all this class of evidence that the whole affair is the work of agents and mukhtars, and that no care appears to have been taken such as the law requires in the case of pardanashin ladies. Their Lordships think that those remarks are justified by the evidence.

Great reliance has been placed upon the fact that in the year 1878 a partition was effected, through a panchayat acting on behalf of the two younger widows, of a family house and some chattels in Barnagar. This operation, it is argued, is exactly in accord with the doings in Banda, —and not only so, but by the farkhati, or deed of release made between the parties, the partition in Banda is expressly affirmed. Certainly if all this was brought home to the plaintiff, and it were shown that with full information and intelligence she authorized such a partition and signed such a deed, it would tell for the defendant. But there is no evidence to that effect. The plaintiff's name was signed by one of her uncles; and the deed of release sets out with a serious mis-statement. The property is represented as that of Pransukh, who stood in an equal relation to his two daughters-in-law. But it was in fact the property of Uttam, the plaintiff's husband. Whatever may be the local customs of Baroda (and none are proved) it is impossible to suppose that the descent from Pransukh to Uttam ought to be passed over in silence, or that the plaintiff understood her true position. Indeed, it is a most remarkable phenomenon in this case, that wherever we come across statements or entries referring to title they are based on error. Their Lordships are of

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The real strength of her case is her possession, which appears to have continued for about eight years before suit. It is not long enough to afford a defence by mere lapse of time. It is one of the circumstances to be taken into consideration in estimating the theory of the plaintiff's wish to make a gift to her sister-in-law; a very important one doubtless, and such as might reasonably incline a [16] court of justice in the defendant's favour if the prior history of the case was in her favour. But their Lordships have shown reasons for concluding that the prior transactions are not only not favourable, but are decidedly adverse, to the defendant. In their judgment the evidence shows that, either from the influence of Jarao, or from carelessness or mistakes on the part of officials and of family agents, a number of unwarrantable liberties were taken with the plaintiff's name and interest; and that the defendant thereby gained a position to which she was not entitled. It is clear to them that, at least as recently as the mutations of 1878, the plaintiff might have sued to have her property restored to her, and that to such a suit there could have been no substantial defence. Her inaction is not explained except by her statement in the plaint that she had only then discovered what had been done. Very likely that is an exaggerated statement of her ignorance. But even supposing that she learned the defendant's position in the course of 1878, and that she was supine for eight years, that is no sufficient reason for imputing to her wishes and intentions which all the other circumstances of the case contradict.

There is a minor point respecting the malikana of mauza Pachanahi, which amounts to Rs. 1,500 per annum. As between the plaintiff and defendant, it stands in exactly the same position as the other property, but the Subordinate Judge considered that the jurisdiction of the Civil Court is taken away by the Pensions Act, 1871. The plaintiff made it the subject of appeal to the High Court, but of course it was there merged in the larger issue decided adversely to her. She has raised the question again on this appeal. Mr. *Mayne* declined to argue it on the defendant's behalf. Mr. *Branson* submitted rather than argued it on behalf of the plaintiff; but he cited no authority, and their Lordships have not been able to find any bearing directly upon the subject.

The Pensions Act, 1871, enacts that:—"Except as hereinafter provided, no Civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government, whatever may have been [17] the consideration for any such pension or grant, and whatever may have been the nature of the payment, claim or right for which such pension or grant may have been substituted." The expression "grant of money or land revenue" is interpreted to include anything payable on the part of Government in respect of any right, privilege, perquisite or office.

Mauza Pachanahi was taken into the hands of the Government and held khas in or before the year 1880, and by a deed dated in September of that year the plaintiff and defendant formally made over to Government their proprietary rights on consideration of receiving Rs. 2,000 per annum as malikana in perpetuity. Malikana is the allowance made to proprietors so dispossessed. By Regulation VII of 1822 it might vary from 5 to 10 per cent. of the income realized. That Regulation was repealed as regards the North-Western Provinces by Act XIX of 1873, and fresh provisions for allowances to dispossessed proprietors were substituted. It

does not appear under what circumstances the mauza was taken into khas management, but it cannot be doubted that the allowance stipulated for and granted was of the nature indicated by the term *malikana*, i.e., a grant of a portion of the revenue in lieu of pre-existing proprietary rights.

It is at first somewhat surprising that a property which has been the subject of bargain and of formal grant should be excluded from the cognizance of Civil Courts. But it cannot be denied that it falls within the literal construction of the words of the Pensions Act, i.e., it is something payable on the part of Government in respect of a right. And the decision of this Committee in *Vasudev Sadashiv Modak v. The Collector of Ratnagiri* (1) and again in *Maharaval Mohansingji Jeysingji v. The Government of Bombay* (2) shows that the language of the Act applies to cases in which the grant has been made in consideration of prior rights vested in the grantee. In the former case the subject of the suit was a grant made by the Peishwa to an hereditary *deshmukh* authorizing him to levy dues from the ryots, which dues were subsequently collected [18] by the British Government and paid over to the *deshmukh*. In the latter case the subject was a *toda garas huk*, which, though originating in blackmail, had long been recognised as property capable of alienation and of seizure and sale in execution; and the liability for which had been assumed by the British Government. In both cases it was held both by the Courts below and by this Committee that the Civil Courts were incapacitated by the Pensions Act from entertaining suits. It is not for their Lordships to examine into the relations between the Government, the farmers, the ryots and the grantees of *malikana*, or the previous state of the law, or the other considerations which may have dictated the policy of the Pensions Act. It is enough if its effect is expressed in clear terms. The plaintiff might have applied for a certificate which would have enabled the Court to make some declaration of right as between her and the defendant, but she did not do so, and must submit to the disability which the Act imposes upon the Court.

The plaintiff fails to get the decree of the Subordinate Judge altered in her favour in this respect, but it does not appear that her claim to do so has had any effect on the costs of this appeal. Their Lordships will humbly advise Her Majesty to discharge the decree of the High Court, except in so far as it disallows with costs the objections of the plaintiff to the decree of the Subordinate Judge; to dismiss the defendant's appeal to the High Court with costs; and to restore the decree of the Subordinate Judge. The defendant must also pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant:—Mr. T. C. Summerhays.

Solicitors for the respondent:—Messrs Barrow and Rogers.

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(1) 4 I.A. 119.

(2) 8 I.A. 77.

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17 A. 19=14 A.W.N. (1894) 193.

[19] APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.*CHUHI BIBI (*Plaintiff*) v. SHAMS-UN-NISSA BIBI AND OTHERS
(*Defendants*).^{*} [20th July, 1894.]*Muhammadan Law—Dower—Mortgage by widow in possession in lieu of dower.*

A Muhammadan widow in possession of immoveable property of her late husband in lieu of her dower has no power to mortgage such property.

THIS was a suit for the recovery of possession of certain immoveable property and for cancellation of a mortgage deed, executed by the first defendant (a Muhammadan widow in possession in lieu of her dower debt) in favour of the second and third defendants.

The plaintiff alleged that one Shaikh Sajjad Husain, own brother of the plaintiff, was the proprietor of certain immoveable property; that Sajjad Husain died in 1885, leaving a childless widow, Musammat Shams-un-nissa Bibi, defendant No. 1; that defendant No. 1 in lieu of an alleged dower debt of Rs. 1,000 took possession of the immoveable property of her late husband, and subsequently sold part of it for Rs. 1,500, the whole of which she retained, and again mortgaged another portion to defendants Nos. 2 and 3 for Rs. 400, in spite of the plaintiff having informed the said mortgagees of her claim against the property. The plaintiff claimed as above cancellation of this mortgage and possession of the mortgaged property.

The first defendant pleaded that the dower debt was Rs. 51,000 and not Rs. 1,000 as stated in the plaintiff; that the plaintiff was therefore not entitled to sue upon satisfaction only of Rs. 1,500 out of the above amount; and that the plaintiff had in fact acquiesced in her possession and allowed her name to be entered in the Government papers as proprietor.

The second and third defendants set up their title as mortgagees in good faith from the defendant No. 1, and pleaded that [20] they could not be ejected without payment to them by the plaintiff of the mortgage money advanced by them to defendant No. 1.

The Court of first instance (Munsif of Jaunpur) found that the dower debt was Rs. 1,000 and not Rs. 51,000, as alleged by defendant No. 1; and that it had been more than satisfied by the sale by the said defendant of a portion of the property for Rs. 1,500. It also found that the defendants-mortgagees might and should have been aware of the nature of the title of their mortgagor, and it decreed the plaintiff's claim in full.

The defendants appealed. The lower appellate Court (Subordinate Judge of Jaunpur) found that the dower debt was in fact Rs. 51,000, and as a consequence of this finding decided that the defendant No. 1 was entitled to retain possession, and that the plaintiff's suit was premature. It accordingly decreed the appeal and dismissed the plaintiff's suit without deciding any of the other issues.

The plaintiff appealed to the High Court.

Mr. T. Conlan and Babu Becha Ram Bhattacharji, for the appellant.

^{*} Second Appeal No. 539 of 1893, from a decree of Rai Anant Ram, Subordinate Judge of Jaunpur, dated the 29th of March 1893, reversing a decree of Babu Pramotha Nath Banerji, Munsif of Jaunpur, dated the 9th of March 1892.

Maulvi Ghulam Mujtaba and Pandit Sundar Lal, for the respondents.

JUDGMENT.

EDGE, C. J., and BANERJI, J.—This was a suit for possession of immoveable property and for the cancellation of a mortgage. The suit was brought against a Muhammadan widow and two men who held as mortgagees under her. She was in possession of the property in lieu of her Muhammadan dower, and had no other title to it. She, however, granted a mortgage to the other two defendants. The plaintiff would be the person entitled to possession of the property, if the widow had no right to possession in lieu of her dower.

The Privy Council have held that where a Muhammadan widow is lawfully in possession in lieu of her dower, her possession cannot be disturbed except on payment of the dower debt: consequently [21] this suit, so far as it claims possession, must fail, the dower debt being still due.

It has been held on several occasions in this Court that a Muhammadan widow in possession in lieu of her dower cannot sell any portion of the property. She cannot give a good title to any portion of the property, inasmuch as her position is only that of a widow in possession in lieu of her dower. It has never been held, so far as we are aware, that a Muhammadan widow, under such circumstances, can grant a valid mortgage of any portion of the property in her possession in lieu of dower, and the principle of the decisions in which it has been held that she may not sell, appears to us to apply equally to the case of her attempting to mortgage.

We allow this appeal to the extent of giving the plaintiff a decree declaring that the mortgage is inoperative and passes no title to the male defendants.

In other respects we dismiss the appeal. Each party will bear its own costs.

Decree modified.

17 A. 21 (F.B.) = 14 A.W.N. (1894) 187.

FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox,
Mr. Justice Blair, Mr. Justice Banerji and Mr. Justice Burkitt.*

AMRIT RAM AND ANOTHER (*Defendants*) v. DASRAT RAM AND OTHERS
(*Plaintiffs*).^{*} [27th July, 1894.]

Civil Procedure Code. ss. 525, 526—Arbitration—Objection to application to file an award in Court that one party had not agreed to refer any matter to arbitration—Jurisdiction of Court to determine whether the parties had or had not referred the matter in question to arbitration.

An objection to an application made under s. 525 of the Code of Civil Procedure that the parties had not agreed to refer to arbitration any matter, or had agreed to refer some only of the matters determined by the award, or that the document alleged to be an award was not an award of the arbitrators, is an objection which must be considered and determined under s. 526 upon evidence by the Court to which the application is made. *Chowdhri Murtaza Hossein v.*

^{*} Reference to the Full Bench in First Appeal No. 244 of 1892, decided on the 7th November 1894.

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Mussumat Bibi Bechunnissa (1); *Samal Nathu v. Jaishankar Dalsukram* (2); *Venkatesh Khando v. Chanappavda* (3); [22] *Lalla Isharee Parshad v. Harbajan Tewaree* (4); *Hussaini Bibi v. Mohsin Khan* (5); *Surjan Raot v. Bhikari Raot* (6); and *Muhammed Nawaz Khan v. Alam Khan* (7) referred to.

[Not F., 20 B. 596; F., 84 P.R. 1901 = 112 P.L.R. 1901; Rel. on., 11 C.L.J. 131 = 5 Ind. Cas. 98 (199); R., 29 A. 621 = (1906) A.W.N. 136; 28 B. 287; 25 C. 757 (F.B.); 33 C. 757 = 3 C.L.J. 450 = 10 C.W.N. 609; 18 M. 423 (F.B.); 20 M. 99; 13 C.P.L.R. 53; 2 C.L.J. 153 = 10 C.W.N. 601; 9 Ind. Cas. 173 (180) = 21 M.L.J. 263 (280) = 9 M.L.T. 251 (257) = 1 M.W.N. (1911), 151 (164); 1 S.L.R. 149 (151)].

THE facts of this case are as follows:—

One Salig Ram applied under s. 525 of the Code of Civil Procedure to the Court of the Additional Subordinate Judge of Ghazipur praying that an award, which he alleged had been made on the 9th of September 1888, between himself and the opposite parties, his father and two brothers, might be filed in Court.

The opposite parties, Amrit Ram the father and Raja Ram the brother of the applicant, both filed written statements, in which they severally denied that any arbitration had taken place to their knowledge, and asserted that the whole property, the subject of the arbitration set up by the applicant, belonged solely to Amrit Ram. Amrit Ram also pleaded that if there had been a reference to arbitration the reference was invalid as not being in writing and registered.

The Additional Subordinate Judge held that it was not necessary that the reference to arbitration should have been registered, and that there had in fact been a reference to arbitration as alleged by the applicant and a valid award made thereon. He also held that no ground such as is mentioned in s. 520 or s. 521 of the Code of Civil Procedure had been shown against the award, and accordingly ordered that the award should be filed in Court.

No judgment, however, was passed and no decree was drawn up by the Court in accordance with this last mentioned order; and subsequently the sons of Salig Ram, who had meanwhile died, applied to the Court that a decree might be drawn up in accordance with the award and in pursuance of the Court's order.

Amrit Ram and Raja Ram resisted this application on various technical grounds, but the Court overruled their objections and passed judgment in the terms of the award, likewise ordering a decree to be prepared in accordance with those terms.

[23] Amrit Ram and Raja Ram appealed to the High Court urging the following pleas:—

"(1) Because there was no reference and consequently no valid award to form the basis of a decree; (2) because the evidence shows that there was no reference whatsoever; it was also bad for not being in writing and registered; and (3) because the award is also bad under ss. 520 and 521 of the Code of Civil Procedure."

On the appeal coming before a Division Bench it was referred to a Full Bench of the whole Court for consideration of the question raised, as stated in the opening words of the judgment of the Full Bench.

Babu Viddya Charan Singh, for the appellants.

Munshi Gobind Prasad, for the respondents.

The judgment of the Court (EDGE, C. J., KNOX, BLAIR, BANERJI and BURKITT, JJ.) was delivered by EDGE, C. J.:—

(1) 3 I.A. 209.
(5) 1 A. 156.

(2) 9 B. 254.
(6) 21 C. 213.

(3) 17 B. 674.
(7) 18 I.A. 73.

(4) 15 W.R. (F.B.) 9.

JUDGMENT.

The question which we have had to consider in this reference to the Full Bench is—when an application is made to a Court under s. 525 of Act No. XIV of 1882, that an award be filed in Court, does an objection by the other party, defendant, that he had not agreed to refer any matter to arbitration oust the jurisdiction of the Court to which the application is made to proceed further in the matter, or has that Court jurisdiction to proceed, and should it proceed to try the issue as to whether the parties had referred to arbitration the matter as to which the award purports to have been made?

In support of the contention that such an objection deprives the Court of jurisdiction, *Bijadhur Bhugut v. Monohur Bhugut* (1), and the judgments of Prinsep, Pigot and Macpherson, JJ., in *Surjan Raot v. Bhikari Raot* (2) were relied upon. In support of a contention raised before us that when such an objection is not obviously frivolous the jurisdiction of the Court to proceed is ousted, *Samal Nathu v. Jaishankar Dalsukram* (3) and *Venkatesh Khando v. [24] Chanapgavda* (4) were relied upon. In further support of those contentions it was argued that we ought to conclude that the Legislature, in order to give effect to the views expressed in the judgment of Lock, Kemp, and Paul, JJ., in *Lalla Isharee Parshad v. Har Bhanjan Tewaree* (5) and in the judgment of Spankie, J., in *Hussaini Bibi v. Mohsin Khan* (6), which were that a Court had no jurisdiction under section 327 of Act No. VIII of 1859 to file an award where one of the parties denied or did not admit that he had referred any dispute to arbitration or that an award had been made, had introduced s. 526 into Act No. X of 1877, and had re-enacted that section in Act No. XIV of 1882. As to the latter contention, it was much more probable that the Legislature in enacting s. 526 of Act No. X of 1877 had acted on the suggestion thrown out by their Lordships of the Privy Council in *Chowdhri Murtaza Hossein v. Mussumat Bibi Bechunnissa* (7) at p. 213, and that the intention was to widen the scope of the inquiry upon which a Court could enter on an application to file an award when the reference to arbitration had been made without the intervention of a Court of justice. Their Lordships in that case, referring to Act No. VIII of 1859, had said:—“Their Lordships are of opinion that upon the construction of the Act the earlier sections are not incorporated into the s. 327, as they are expressly incorporated into the s. 326, and that the words ‘sufficient cause’ should be taken to comprehend any substantial objection which appears upon the face of the award or is founded on the misconduct of the arbitrator or on any miscarriage in the course of the proceedings, or upon any other ground which would be considered fatal to an award on an application to the Courts in this country.” It may be noticed that Norman, C. J., and Jackson, J., in *Lalla Isharee Parshad v. Har Bhanjan Tewaree* (5), apparently considered that a Court could, under s. 327 of Act No. VIII of 1859, go into the question and decide, but subject to a right of appeal, that the parties had referred the matter in dispute to arbitration and that an award on such matter had been made. As the decision of their Lordships of the Privy Council in *Chowdhri [25] Murtaza Hossein v. Mussumat Bibi Bechunnissa* (7) was reported in the volume of the Law Reports, Indian Appeals, which was published in 1876, and as ss. 525 and 526 of Act No. X of 1877 apparently give

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(1) 10 C. 11.

(2) 21 C. 213.

(3) 9 B. 254.

(4) 17 B. 674.

(5) 15 W. R. (F.B.) 9.

(6) 1 A. 156.

(7) 3 I.A. 209.

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substantial, although possibly not full, effect by legislation to the suggestion of their Lordships at page 213 of the Report, it certainly seems probable that ss. 525 and 526 of Act No. X of 1877 were enacted with the intention of giving effect to the suggestion of their Lordships and not with the intention of affirming by legislative enactment the views of Lock, Kemp and Paul, JJ., as to the scope of s. 327 of Act No. VIII of 1859. However that may have been, we must decide the question before us upon the construction of ss. 525 and 526 of Act No. XIV of 1882.

Before proceeding to consider ss. 525 and 526 of Act No. XIV of 1882 it may be observed that West and Nanabhai Haridas, JJ., in *Samal Nathu v. Jaishankar Dalsukram* (1) and Sir Charles Sargent, C.J., and Candy, J., in *Venkatesh Khando v. Chanapgavda* (2) apparently considered that an objection to an application under s. 525 to file an award that the parties had not agreed to a reference to arbitration did not oust the jurisdiction of the Court in the matter, if the objection was obviously unfounded, which, as it appears to us, involved the proposition that the Court has jurisdiction to consider to a limited extent the evidence for and against such an objection. Even that limited jurisdiction a Court would not have if the opinions on this subject expressed in the judgment of Prinsep, Pigot and Macpherson, JJ., in *Surjan Raot v. Bhikari Raot* (3) are correct according to which the denial or non-admission that the parties had agreed to a reference to arbitration deprives a Court of jurisdiction to do otherwise than refuse to file the award.

There can be no doubt that s. 525 of Act No. XIV of 1882 applies only when a matter has been referred to arbitration without the intervention of a Court of justice and an award has been made thereon. There must have been a matter referred to arbitration, there must have been an award on the matter referred, and the reference [26] must have been made without the intervention of a Court of justice. These facts must exist as the foundation of the jurisdiction of a Court under ss. 525 and 526 to order the award to be filed. In other cases, when a question as to the jurisdiction of a Court arises, the Court has to hear and determine the question of jurisdiction, and for that purpose, when the question of jurisdiction depends on questions of fact upon which the parties are not agreed, the Court has to take and consider evidence. In our opinion when a Court is in certain events given by statute a jurisdiction, and it is not expressly provided that it shall not exercise that jurisdiction except on the mutual admission of the parties or with their consent, the Court, if its jurisdiction is disputed by a party, must ascertain and determine whether the facts do or do not exist upon which the question of its jurisdiction in the particular matter depends. That we consider to be a matter of general principle. Is that general principle curtailed or made inapplicable by anything contained in s. 525 or s. 526 of Act No. XIV of 1882, or is it by either of those sections recognised?

The application under s. 525 is to be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants, and the Court shall direct notice to be given to the parties to the arbitration other than the applicant requiring them to show cause within a time specified why the award should not be filed. It has been held, notwithstanding some decisions to the contrary, in *Dandekar v. Dandekars* (4), *In the matter of the petition of Dutto Singh* (5), *Jones v. Ledgard* (6).

(1) 9 B. 254.
(4) 6 B. 663.

(2) 17 B. 674.
(5) 9 C. 575.

(3) 21 C. 213.
(6) 8 A. 340.

Surjan Raot v. Bhikari Raot (1) and in *Jagan Nath v. Mannu Lal* (2), and in our opinion rightly, that the term "to show cause" does not merely mean to allege cause, nor even to make out that there is room for argument, but both to allege cause and to prove it to the satisfaction of the Court.

By s. 526 it is enacted:—"If no ground such as is mentioned or referred to in s. 520 or s. 521 be shown against the award, the [27] Court shall order it to be filed and such award shall then take effect as an award made under the provisions of this chapter." It appears to us that if the Legislature had intended by s. 526 to confine the grounds which might be shown to the filing of the award to the precise grounds mentioned or referred to in s. 520 or s. 521, it would have said so, and not used the words "*such as* is mentioned or referred to." It appears to us from the use of the words "such as" that the Legislature intended that the grounds which might be shown should be those mentioned or referred to, or grounds *ejusdem generis* with those mentioned or "referred to in s. 520 and in s. 521." One of the grounds mentioned in s. 520 is—" (a) when the award has left undetermined any of the matters referred to arbitration, or when it determines any matter not referred to arbitration." S. 525 applies as well to a parol or oral agreement referring matters in dispute to arbitration as to an agreement in writing referring matters in dispute to arbitration. For the purpose of illustrating what in our opinion is the construction and an application of s. 526 we take the case of a person coming into Court with three documents. One of them he alleges to be an agreement in writing made between him, A., and another person, B., by which questions *a*, *b* and *c*, purport to have been referred to arbitration; another of those documents he alleges to be an award made under that agreement of reference which purports to decide the questions *a*, *b* and *c*; the third document being his application to the Court under s. 525. Notice under s. 525 having been given to B. to show cause why the award shall not be filed, he, B., alleges that he did not agree to refer questions *a*, *b* and *c*, or that he did not agree to refer any question to arbitration. It appears to us that that is the same as if B. had said in other words—"the matters determined by the award were not referred to arbitration," or—"the award determines *a*, *b* and *c*, matters not referred to arbitration." That objection, however it was expressed, would not only be *ejusdem generis* with, but would be one of the precise grounds mentioned and referred to in cl. (a) of s. 520, and consequently would be a ground which, if taken, a Court would have to consider and adjudicate upon under s. 526, whether the decision of the Court would depend merely upon the construction of the agree-[28]ment, or upon evidence on the one side that the agreement in writing was in fact the agreement of the parties, and upon evidence on the other side that the defendant never had entered into the agreement and that it was a forged document, or that the acceptance of the agreement by the defendant had been obtained by a fraud of the plaintiff which would avoid the agreement. In a similar case defendant might say:—"I agreed to refer questions *a* and *b*, but I never agreed to refer question *c*. The plaintiff, after I executed the agreement of reference, fraudulently inserted in it without my knowledge or consent question *c*, and the award has determined question *c*, which was a matter which was never referred to arbitration, and has left undetermined questions *a* and *b*, which were

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(1) 21 C. 213.

(2) 16 A. 231.

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matters referred to arbitration." Those two grounds of objection would in our opinion clearly be within cl. (a) of s. 520. Assume again that the alleged award determined only one matter. We can see no distinction, except in phraseology, between a defendant saying, in showing cause to the application to file the award,—“the award sought to be filed determines a matter not referred to arbitration,” and his saying, so far as it was pertinent to the issue,—“I never agreed to refer any matter to arbitration.” The issue would be the same, namely, “did the parties agree to refer to arbitration the matter determined by this award,” and, unless the objection depended solely upon the construction of an admitted agreement of reference in writing, the Court would, under cl. (a) of s. 520 as applied by s. 526, have to determine whether any and what agreement of reference was made orally or in writing as the case might be between the parties.

An appeal would lie from the decree which followed the judgment given on the award, even if the decree was in accordance with and not in excess of the award, if the appeal was on the ground that there was no agreement to refer, or on the ground that the award was not the award of the persons to whom the matter was referred. Either of those grounds would question the validity of the award, and, if sustained, would show that the Court which ordered the award to be filed had no jurisdiction under ss. 525 and 526 to [29] make the order to file the award. Our answer to this reference is that an objection to an application made under s. 525 that the parties had not agreed to refer to arbitration any matter, or had agreed to refer some only of the matters determined by the award, or that the document alleged to be an award was not an award of the arbitrators, is an objection which must be considered and determined under s. 526 upon evidence by the Court to which the application is made. How far and under what circumstances a decision upon such an application might operate as *res judicata* may be gathered from the judgment of their Lordships of the Privy Council in *Muhammad Nawaz Khan v. Alam Khan* (1).

17 A. 29 = 14 A.W.N. (1894) 190.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

DURGA DIHAL DAS AND OTHERS (*Plaintiffs*) v. ANORAJI AND ANOTHER (*Defendants*).^{*} [31st July, 1894.]

Civil Procedure Code, ss. 562, 564, 566, 622—Remand—Refusal of Court of first instance to record evidence tendered—Refusal of lower Appellate Court to record additional evidence.

The plaintiffs in the Court of first instance produced both documentary and oral evidence in support of their claim. The Court being satisfied with the documentary evidence produced by the plaintiffs declined to record the evidence of the witnesses tendered by them. The defendants appealed, and the lower appellate Court reversed the decree of the Court of first instance, but in its turn

^{*} Second Appeal No. 1068 of 1893 from a decree of Kuar Mohan Lal, Additional Subordinate Judge of Gorakhpur, dated the 1st September, 1893, reversing a decree of Munshi Tara Prasad, Munsif of Bausgaon, dated the 12th April, 1893.

declined to allow the plaintiffs—respondents to produce fresh evidence before it. On appeal by the plaintiffs to the High Court, it was *held* that, though there was no section of the Code of Civil Procedure strictly applicable to the circumstances of the case, the Court was warranted *ex debito justitiae* in setting aside all proceedings of both Courts below and in directing the Court of first instance to re-try the case, admitting all admissible evidence which had previously been tendered to the Court of first instance and which that Court had refused to record.

[R., 23 A. 167 (170) ; 33 C. 927 = 3 C.L.J. 67 ; P.L.R. 1900, p. 202 ; 91 P.R. 1904 = 5 P.L.R. 1905.]

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THE facts of this case sufficiently appear from the judgment of Blair, J.

[30] Maulvi *Muhammad Ishaq*, for the appellants.

Maulvi *Ghulam Mujtaba*, for the respondents.

JUDGMENT.

BLAIR, J.—This is a case of considerable difficulty, because it is certainly not explicitly provided for by the Code of Civil Procedure. There was one issue, and one only, in the case, and that was whether or not a certain deceased Hindu had, up to the time of his death, continued to be a member of a joint Hindu family. The parties appeared before the Munsif and the plaintiff produced a quantity of documentary evidence which was admitted and acted upon by the Judge. The plaintiff had also present in Court to the knowledge of the Court a number of witnesses, whose oral evidence he was prepared to tender had it been necessary. The learned Munsif was satisfied with his own construction of the documentary evidence, and passed a formal order that it was unnecessary to have oral evidence upon either side. So far the plaintiff, seeing that the Munsif was prepared to decide it in his favour, should not have suffered injury ; but the Munsif's decisions are appealable, and, except under the circumstances specified in s. 568 of the Code of Civil Procedure, he would be excluded from adding as a matter of right such evidence as had been tendered before and admitted by the Munsif. The defendant was clearly wronged, because he certainly ought to have had a hearing for his witnesses before the Munsif passed a decision against him. He might fairly say—"My case has not been tried at all," and the plaintiff may very properly say—"My case has not been properly tried, in so far as I have not been allowed to put in oral evidence, which I was entitled to do in the case." The matter passed to the appellate Court. It seems to me that the Munsif's action amounted to no trial at all. In the case of a formal, but wholly unreal trial and adjudication, there is not, as far as I am aware, any express power conferred upon this Court to compel him to perform his duty ; but I cannot infer, having regard to the wide-reaching and most necessary duties imposed upon us as the highest judicial authorities in these provinces, that the High Court would be stepping outside its duty in compelling [31] the Munsif to the performance of his duties. There are cases to which my attention has been called, one decided by my predecessor, in which a case was sent back practically for a re-trial under circumstances which do not bring it within either s. 562 or s. 566 of the Code of Civil Procedure. There are cases which have been decided so lately as the present year, and which are reported in the Weekly Notes as having been decided by the learned Chief Justice, accompanied in one instance by a Judge now upon this Bench, and upon another occasion by another Judge. My brother Burkitt felt himself bound in the current year to

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apply a remedy in the cases which fall outside those sections of the Code of Civil Procedure to which I have referred. It seems to me that we must assume that the Code of Civil Procedure is not exhaustive. There are cases of misfeasance on the part of Judges below grosser than anything provided for in that Act. I decline to believe that those are cases where a High Court must fold its hands and allow obvious injustice to be done. In this case that which took place in the Court below seems to us the mockery of a trial, and when we come to the appellate Court we must confess that the treatment of the case, partly possibly by reason of the extreme defects which had characterised the hearing below, is very far from satisfactory. The appellate Court, it seems to us, ought not to have allowed itself to deal with the case upon the fragmentary materials before it, but ought, *ex debito justitiæ*, to have required evidence other than unexplained papers before coming to its decision. It matters little in point of view of the decision at which we have arrived that the learned Judge should have formed wholly erroneous notions about the inferences to be drawn by the entry in the Revenue papers of a Hindu woman's name. Oral evidence would have been a proper corrective for such a misconception as that. The observation, which we apply to the action of the Court of appeal as well as to the Court of the Munsif, is that we conceive that in this case trial on paper evidence only falls far short of what we understand to be a trial in a Court of Justice. The result is that I would quash the whole of the proceedings, both in the first appellate Court and in the Court of first instance, and direct the Munsif to restore this [32] case to his list and try it upon the merits according to law, admitting for the purposes of that trial all admissible evidence tendered by either party. I would allow this appeal without costs, because it is not clear that any of the parties is substantially to blame in this matter.

BURKITT, J.—I concur in the order proposed by my learned brother and would only add that, notwithstanding the provisions of s. 564 of the Code of Civil Procedure, I do not see how any other course can be adopted in this case. That the plaintiffs-appellants have suffered palpable injustice at the hands of the lower Courts is manifest. The Court of first instance refused to hear their witnesses, not because it considered their depositions to be inadmissible, but because, having formed a strong opinion in favour of the plaintiffs on their documentary evidence, that Court considered it unnecessary to hear their witnesses. The Court of appeal, in what I am bound to say is in many ways a flippant and most unsatisfactory judgment, reversed the finding of the first Court on the only issue in the case, and remarked as to a point relating to that issue that the plaintiffs should have "proved it like any other issue," totally disregarding the fact that the plaintiffs had tendered evidence and that their evidence had not been put on record. This action of the lower Court did undoubtedly amount to a substantial error of procedure such as would allow of an appeal to this Court under s. 584 of the Code of Civil Procedure, and that error is the ground on which this appeal has been admitted. The difficulty we have felt is as to the way we should treat the appeal. It is not one to which the provisions of s. 562 of the Code of Civil Procedure apply. No preliminary point was decided by the lower Court and reversed by us in appeal, nor is it one in which we can remedy the defect of the lower Court under s. 566, as it is impossible to say that the Court below has omitted to frame and try an issue. S. 568 is also inapplicable, inasmuch as, sitting as a Court of second appeal in this case, we have no power to come to any

finding of fact. S. 622 is also inapplicable, as this is an appeal and not an application for revision. Nor indeed would any application for revision be [33] admissible. The case thus falls outside of all the sections of the Code which treat of the procedure to be observed in remanding a case or in procuring additional evidence in second appeals, and therefore, though I am most unwilling to go beyond the provisions of s. 564, still I am constrained to hold, concurring with my learned brother, that, *ex debito justitiæ*, we are bound to make the order proposed by him.

Cause remanded.

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APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

SHANKAR LAL AND OTHERS (*Plaintiffs*) v. DALIP SINGH (*Defendant*).^{*}
[6th August, 1894.]

Act XII of 1881, s. 9—Occupancy-tenant—Succession to occupancy tenant—Collateral—Sharer in cultivation.

Where a collateral relative claims to be entitled to succeed to an occupancy-holding on the death of the occupancy-tenant without direct heirs it is incumbent on him to prove, both that he is the heir according to the law to which he is subject, and also that he shared in the cultivation of the occupancy-holding during the lifetime of the deceased occupancy-tenant. But *non sequitur* that if there is a more remote collateral who was a sharer in the cultivation of the occupancy-holding, he is entitled to succeed in preference to a nearer collateral who did not so share in the cultivation. *Badri Das v. Debi Das* (1), referred to.

[R., 15 C.P.L.R. 89.]

THIS appeal was referred to a Division Bench by an order of Banerji, J., dated the 10th of March 1894. The facts of the case sufficiently appear from the referring order, which is as follows:—

"In this case the property in suit formed the occupancy holding of a person of the name of Lalji. He died leaving the respondent, a collateral relative of his, who has been found by the Court below to have shared with him in the cultivation of his holding. He had also a nearer collateral relative, *viz*, the father of the respondent, who did not share with him in the cultivation of his holding. The question which arises in this case is—whether the respondent was entitled to inherit the holding, his father, who is a nearer collateral relative of the deceased, being alive. This question is one of im-[34]portance and is not covered by authorities. I therefore refer the case to a Bench of two Judges."

Babu Jogindro Nath Chaudhri, for the appellants.

Mr. Abdul Majid, for the respondent.

JUDGMENT.

BLAIR, J.—This case has been referred to a Bench of two Judges on account of the importance of the question involved. It is substantially the same question as was raised in the first Bench before the learned Chief Justice and myself in Letters Patent Appeal No. 40 of 1893, dated

^{*} Second Appeal No. 1104 of 1893, from a decree of Pandit Raj Nath, Subordinate Judge of Moradabad, dated the 28th July 1893, confirming a decree of Babu Shiva Prasad, Munsif of Bijaor, dated the 22nd March 1893.

(1) 8 A.W.N. (1888) 200.

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the 24th July 1894. The judgment does not in terms rule upon the disputed question. The hearing of that case ended in an order of remand directing the Court below to find who, according to general Hindu Law, was the heir of the deceased occupancy-tenant. That remand is only comprehensible upon the supposition that we consider no person was qualified as successor in the occupancy-holding who did not combine with his claim as a sharer in the cultivation the further title as heir; and indeed in the course of the argument the interpretation which we put upon s. 9 of the N. W. P. Rent Act, XII of 1881, was abundantly manifest. The question raised is this:—"Is a collateral who has shared in the cultivation of land subject to occupancy-tenure entitled on the decease of the tenant whose cultivation he has shared to inherit the occupancy-right in preference to a nearer collateral, who would be heir to the deceased under the ordinary Hindu Law, but who has not shared in the cultivation of the land in question?"

I have no doubt upon the wording of the section that one construction, and one only, can be put upon it. The first provision is that on the death of a person entitled to occupancy-tenure that right shall devolve as if it were land. That is precedent to every other condition. It means that the person to inherit must be one who would inherit if the property were immoveable property of a totally different kind. Then is added a sentence of disqualification and not of qualification. The section goes on:—"Provided that no collateral relative of the deceased who did not then share in the [35] cultivation of his holding shall be entitled to inherit under this clause." It seems to me upon the plain and ordinary construction of this section that it first of all specifies a class out of whom the successor must be taken, and then, in the case of some of such persons not having shared in the cultivation, it excludes them from the benefit they would otherwise derive as heirs. By a ruling to which my brother Burkitt has called my attention—*Badri Das v. Dabi Das* (1), my predecessors Straight and Mahmood, JJ., were both of them quite clear as to the interpretation to be put upon this section. I would, therefore, decree the appeal of the plaintiff, and set aside the decrees of both the lower Courts with costs, and give a decree for the plaintiff in the terms of the prayer in his plaint.

BURKITT, J.—I concur fully in the order proposed by my learned brother, and in the reasons given for it. Where a collateral relative claims to be entitled to succeed to an occupancy-holding on the death of the occupancy-tenant without direct heirs, it is, in my opinion, incumbent upon him to prove two things, viz., first, that he is the heir according to the law to which he is subject, and secondly, that he shared in the cultivation of the occupancy-holding during the life-time of the deceased occupancy-tenant. Unless these two requisites be joined in one and the same collateral, such person cannot succeed to an occupancy-holding. The facts here are that the more remote collateral shared in the cultivation, while the nearer collateral (who, it so happens, is the father of the more remote collateral) did not so share, and the contention is that, to use a phrase of Hindu Law, the more remote collateral therefore excludes the nearer, which is a strange proposition. To this proposition I cannot accede. Under the words of s. 9 the right shall devolve as if it were land. I hold, therefore, that the person on whom that right devolves is the person indicated as heir by the law to which he is subject, and not a

(1) 8 A.W.N. (1888) 200.

person more remote in the line of succession who may have shared in the cultivation with the deceased occupancy-tenant. As has been very properly remarked by [36] my learned brother, the condition requiring the collateral who claims succession to have shared in the cultivation is a disqualification which disentitles the nearest collateral if he has not fulfilled the condition. But it does not confer any right of succession to the occupancy-tenure on a more remote collateral, even though he may have shared in the cultivation. For these reasons I concur in the order of my learned brother setting aside the judgment of the two lower Courts and giving plaintiff a decree as prayed for in his plaint.

Appeal decreed.

17 A. 36 (F.B.) = 14 A.W.N. (1894) 195.

FULL BENCH.

Before Mr. Justice Knox, Mr. Justice Blair and Mr. Justice Burkitt.

QUEEN-EMPRESS v. FAZL AZIM. [7th August, 1894.]

Criminal Procedure Code, s. 531 — Sessions Court—Jurisdiction—Appeal presented within, but heard outside the local limits of the jurisdiction of a Sessions Court.

A criminal appeal was presented to the Sessions Judge of the Bijnor-Budaun Division at Bijnor within the said Sessions division, but was heard by the said Judge at Moradabad, at which place he was empowered to exercise civil but not criminal jurisdiction. *Held* that the trial of the appeal at Moradabad was an irregularity, but, no failure of justice being shown to have been occasioned thereby, the irregularity was covered by s. 531 of the Code of Criminal Procedure and did not render the trial of the appeal a nullity.

[R., 26 M. 640 (643) = 1 Weir 190.]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. D. Banerji for the applicant.

The Public Prosecutor (for whom Mr. W. K. Porter), for the Crown.

JUDGMENT.

KNOX, BLAIR and BURKITT, JJ.— This is an application calling upon us to set aside an order passed by the Sessions Court of Bijnor-Budaun dismissing an appeal presented by one Fazl Azim who was convicted of offences under ss. 265 and 266 of the Indian Penal Code. The main contention urged upon our notice was that the order of the Sessions Judge was a nullity, it having been passed at Moradabad, a place outside the local limits of the Sessions division known [37] as the Bijnor-Budaun Sessions Division. It appears from the record that the appeal was presented at Bijnor, and there can therefore be no doubt whatever that the learned Sessions Judge had jurisdiction to entertain the appeal. The question therefore remaining for our decision is whether the order dismissing the appeal was a valid order or a nullity.

The Sessions division of Bijnor-Budaun was constituted by an order of Government, No. 545, dated the 12th of May 1880. Under that order and under s. 13 of Act No. X of 1872, the Local Government, from the 15th of May 1880, withdrew the district of Bijnor from the Moradabad Sessions Division and the district of Budaun from the Bareilly and Shahjahanpur Sessions divisions, and constituted the two districts thus

* Criminal Revision No. 325 of 1894.

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withdrawn a new Sessions division to be called the Bijnor-Budaun Division. By a subsequent order a Sessions Judge was duly appointed to this division under s. 16 of Act No. X of 1872, and the Sessions division thus constituted continues to exist up to the present time.

It is an undisputed fact that Moradabad is situated without the local area of the Sessions division, and it is also undisputed that this appeal, though presented at Bijnor, was heard and orders on it passed at Moradabad. We have no hesitation in saying that the Sessions Judge did commit an irregularity in hearing the appeal outside the local area which constitutes his Sessions division, for it is a general and well-known rule that all judicial acts exercised by persons whose judicial authority is limited as to locality should be done within the locality to which such authority is limited. It is an irregularity which should not be allowed to recur. The further question which now arises is whether we are obliged by law to set aside the proceedings on the trial of the appeal, and the order on the appeal, as absolutely void by reason of that irregularity. The case *Empress of India v. Jagan Nath* (1) was cited to us as an authority for holding that the proceedings are void. It is a precedent which has been followed by several other cases decided by this Court, but, with all due deference to the learned Judge who decided that case, it appears to us that [38] his judgment involved a confusion between ss. 70 and 33 of Act No. X of 1872, sections which have now been replaced by ss. 531 and 532 of the present Code. Our attention was also called to the case of *Queen-Empress v. James Ingle* (2), in which we think the law has been very correctly laid down by Mr. Justice Farran in the following words:—

Referring to s. 531 that learned Judge said:—

“ This section, I think, must be read as complete in itself and not as in any way cut down or limited by the proviso contained in the latter part of s. 532. Section 531 applies solely to cases in which there is no jurisdiction by reason of the inquiry, trial or other proceeding being held in the wrong local area; but s. 532 seems to refer to cases in which the Magistrate is competent to deal with the offences as having taken place within the local limits of his jurisdiction but has no power to commit to the High Court or Court of Sessions, either because he is only a second class Magistrate, or for some reason other than that of local jurisdiction.”

We understand that the meaning of the learned Judge is that s. 531 refers to irregularities arising out of the fact that the finding, sentence or order had been passed outside the geographical area of its jurisdiction by a Court otherwise competent, whilst s. 532 refers to a personal disability irrespective of area of jurisdiction. We have no doubt that the trial of this appeal in the Court of Sessions and the order dismissing it passed by the Sessions Judge come within the words “ inquiry, trial or other proceeding.” The present case therefore falls within s. 531, and under that section no finding, sentence or order should be set aside unless it appears that the error occasioned a failure of justice. It is not contended in the present application that any failure of justice was caused. No other point was pressed upon us; and we therefore order that this application stand dismissed.

The order admitting Fazl Azim to bail will therefore be discharged, and Fazl Azim will be committed to prison to work out the rest of the sentence passed upon him on the 31st of March 1894.

(1) 3 A. 258.

(2) 16 B. 200.

17 A. 39=14 A.W.N. (1894) 191.

[39] APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.*MUHAMMAD SULEMAN KHAN (*Judgment-debtor*) v. MUHAMMAD YAR KHAN AND OTHERS (*Decree-holders*).^{*} [7th August, 1894.]*Execution of decree—Decree as originally framed incapable of execution—Amendment of decree—Limitation—Act No. XV of 1877 (Indian Limitation Act), Sch. ii, Arts. 178, 179.*1894
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Where a decree as originally framed was found by the High Court to be incapable of execution and was not finally amended by that Court, so as to become capable of execution, until nearly twelve years after it was passed, it was held that an application to execute such decree which was made within three years from the date of the amendment of the decree was within time, the rule of limitation applicable being that prescribed by art. 178 of sch. ii, Act No. XV of 1877.

The first paragraph of the third column of Art. 179 only applies where there is a decree or order which can at its date be executed. That paragraph necessarily contemplates the existence of a decree capable of being executed at the date of the decree.

[Not F., 10 Ind. Cas. 187 (188)=14 O.C. 100 (103); R., 24 A. 300=22 A.W.N. 60; 24 A. 542=22 A.W.N. 160; 36 B. 368 (372)=14 Bom.L.R. 381 (384); 26 M. 780=13 M.L.J. 412; 5 A.L.J. 403=A.W.N. (1908) 191; 11 O.C. 22.]

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Jogindro Nath Chaulhri and Maulvi Ghulam Muftaba, for the appellant.

Pandit Sundar Lal, for the respondents.

JUDGMENT.

EDGE, C. J., and BANERJI, J.—This is a somewhat peculiar case. The respondents in this appeal from an order on an application in the execution of a decree obtained in the Civil Court on the 24th of December, 1878, a decree, which was affirmed in this Court in 1882, in a suit for possession of property. In 1883, on an application to execute that decree, possession was delivered to these respondents. In 1884 this Court held, on appeal from the order putting the respondents in possession, that the decree as it stood was incapable of execution. The decree in question was the decree in appeal of this Court. In 1884 an application was presented to this Court, for the amendment of the decree by bringing it into accordance with the judgment. That application was refused in 1884. In 1885 these respondents applied to the Court below to amend the decree. On that application an order to amend was [40] made by the lower Court in 1885, but that order was set aside on appeal to this Court in 1889 on the ground that the decree in question being a decree by this Court, this Court was the only Court which could amend it. Thereupon, on the 5th of March 1889, these respondents applied to have the judgment of this Court, refusing the application to amend which was made in 1884, reviewed, and prayed that the decree might be amended. On the 6th of May 1890 the decree was amended on that application and brought into accordance with the judgment. On the 6th of May 1893, the application to execute the decree out of which this appeal has arisen was filed. The Subordinate Judge made an order for the execution of the decree.

^{*} First Appeal No. 311 of 1893, from an order of Babu Ganga Saran, Subordinate Judge of Aligarh, dated the 9th September 1893.

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It has been contended here, on behalf of the appellant, the judgment-debtor, that art. 179 of sch. ii of the Indian Limitation Act, 1877, applies, and that even if the proceedings taken by these respondents on and prior to the 5th of March 1889 might be regarded as applications to take steps in aid of the execution of the decree, yet that this application is time-barred as not having been made within three years of the 5th of March 1889. It was also contended on behalf of the appellant that an application to amend a decree is not an application to take a step-in-aid of the execution of the decree, and that, although the decree was amended as late as the 6th of May 1890, the "date of the decree" mentioned in art. 179 is the date which the Code of Civil Procedure enacts shall be the date of the decree, namely, the date of the judgment, which is that of the original judgment where there has been no review of judgment.

The following cases have been cited to us:—*Kailu Rai v. Fahiman* (1), *Tarsi Ram v. Man Singh* (2), *Darbo v. Kesho Rai* (3) and *Thakur Das v. Shadi Lal* (4).

The question is not devoid of difficulty. On the one hand we have art. 179, which is the only article which apparently expressly relates to the period of limitation for applications for execution of decrees. On the other hand there are undoubtedly cases of appli-[41]cations to execute decrees to which art. 179 could not possibly apply. One such case was that of *Muhammad Islam v. Muhammad Ahsan* (5). It appears to us that the first paragraph of the third column of art. 179 must necessarily apply only where there is a decree or order which can at its date be executed. It appears to us that that paragraph necessarily contemplates the existence of a decree capable of being executed at the date of the decree. In our opinion it would apply to a decree capable of being executed at its date, even though such decree might not be in accordance with the judgment, and although subsequently it might be necessary to make an application to bring the decree into accordance with the judgment. In our opinion, so long as there was, at the date of the decree, a decree capable of execution, the first paragraph of the third column of art. 179 would apply. This Court in 1883 rightly or wrongly held that the decree of this Court of 1882 on appeal was, by reason of a defect in it, incapable of execution. That decision is binding on us, and for present purposes we must assume that the decree passed in appeal in 1882 affirming the decree of the lower Court of 1878 was, by reason of an infirmity in drawing it up, incapable of execution. Consequently it appears to us that until the 6th of May 1890, there was no decree in the suit between these parties which was capable of being executed. If art. 179 were to apply to such a case as this, the decree-holder's power to obtain the fruits of a judgment in his favour might be defeated through no fault of his own by a Court delaying for more than three years from the date of its decree to bring the decree into accordance with its judgment and give the decree-holder a decree which he could execute. Article 179 applies not only to an application to execute an original decree, but it applies where there has been an appeal from that decree, and it applies also to a case in which there has been a review of judgment after decree. There is no provision in Art. 179 to meet a case in which at the date of the decree the decree, through the fault of a Court or the fault of an officer in drawing it up or passing it, is

(1) 13 A. 124.

(4) 8 A. 56.

(2) 8 A. 492.

(5) 14 A.W.N. (1894) 61.

(3) 9 A. 364.

incapable of execution. It appears to us that under these circumstances we must apply art. 178, and we apply it because this Court [42] had decided that the decree of 1882 was absolutely incapable of execution. Under art. 178 the respondents' application now under consideration is within time, for it was made, although on the last day of limitation, within three years from the time when the right to apply to execute the decree accrued on the amendment of the decree. No doubt with regard to any future application paragraph 4 of the third column of art. 179 contains the limitation which will be applicable. We dismiss this appeal with costs.

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Appeal dismissed.

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APPELLATE CIVIL.

Before Mr. Justice Burkitt.

KISHAN SINGH AND OTHERS (*Decree-holders*) v. AMAN SINGH
(*Judgment-debtor*).^{*} [10th August, 1894.]

Civil Procedure Code, s. 258—Execution of decree—Limitation—Uncertified payment of part of decretal amount—Decree-holder entitled to give evidence of such uncertified payment in answer to a plea of limitation against execution of the decree.

Section 258 of the Code of Civil Procedure will not debar a decree-holder from giving evidence of uncertified payments made to him out of Court in partial satisfaction of the decree by the judgment-debtor where the judgment-debtor has, in answer to an application for execution of the decree against him, put forward a plea of limitation. *Fakir Chand Bose v. Madan Mohan Ghose* (1), *Purmananddas Jiwindas v. Vallabdas Wallji* (2), *Sham Lal v. Kanahia Lal* (3), *Zahur Khan v. Bakhtawar* (4) and *Harri Pershad Chowdhry v. Nasib Singh* (5), referred to.

[F., 26 A. 36 = 23 A.W.N. 170 ; R., 11 A.L.J. 224 (228).]

THIS was an appeal arising out of an application by the present appellants to execute a decree dated the 10th of September 1885. The decretal debt was to be paid in twenty instalments. The first instalment was payable in Phagun, Sambat 1942, and the subsequent instalments in the months of Baisakh and Katik in each year. The decree-holders came into Court alleging that the first eight instalments had been paid at the stipulated dates, but that the [43] judgment-debtor had made default in payment of the ninth instalment, which was payable in Katik, Sambat 1946, the last day of which corresponded to the 7th of November 1889. The application for execution was made on the 2nd of November 1892.

The judgment-debtor objected to this application that he had not paid any of the instalments as agreed, and that the execution of the decree was time-barred.

The Court of first instance (Munsif of Etah) found that, even if default was made in payment of the instalments, execution of the decree was not barred, because, in case of default in payment of any of the instalments, the decree-holder was given an option to execute the decree for the realization of the whole sum remaining due, but that it was not

* Second Appeal No. 485 of 1894, from a decree of Maulvi Syed Siraj-ud-din, Sub-ordinate Judge of Mainpuri, dated the 26th February 1894, reversing a decree of Maulvi Syed Muhammad Abbas Ali, Munsif of Etah, dated the 17th December 1892.

(1) 4 B.L.R. (F.B.) 130.

(2) 11 B. 506.

(3) 4 A. 316.

(4) 7 A. 327.

(5) 21 C. 542.

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necessary for him to do so, and it accordingly disallowed the judgment-debtor's objection.

The judgment-debtor appealed, and the lower appellate Court (Additional Subordinate Judge of Mainpuri) decreed the appeal, on the grounds, first, that inasmuch as the payments pleaded by the decree-holder had admittedly not been certified under s. 258 of the Code of Civil Procedure, they could not be taken cognizance of by the Court, and, secondly, that the decree-holder was by the terms of the decree bound to take out execution of the decree for the whole amount due thereunder within three years from the happening of the first default.

The decree-holders thereupon appealed to the High Court.

Mr. J. N. Pogose, for the appellants.

Munshi Madho Prasad, for the respondent.

JUDGMENT.

BURKITT, J.—This is an appeal in an execution of decree case. The decree was one which directed the payment of the decretal amount by twenty half-yearly instalments on certain fixed dates, and it gave the decree-holders a power to execute the whole decree, or so much of it as was unpaid, on the occurrence of default in the payment of any instalment. The decree-holders have now applied, in pursuance of the power reserved to them, for execution in respect of the amount remaining due after the payment of the eighth [44] instalment. Their allegation is that the judgment-debtor paid eight instalments regularly and then ceased paying, and they apply for execution for the whole sum remaining due under the decree. The judgment-debtor in reply denies that he paid any of the first eight instalments and sets up limitation as a bar. The lower Court has rejected the application for execution, chiefly on the ground that payment of eight instalments alleged by the decree-holders to have been paid was not certified to the Court as required by s. 258 of the Code of Civil Procedure. The decree-holders appeal, contending that they were entitled to give proof of the payment of the eight instalments, even though those payments were made out of Court. For the respondent the last clause of s. 258 is relied on. On this point there is a long line of decisions, commencing with the Full Bench decision of the Calcutta High Court, reported in IV, Bengal Law Reports, Full Bench, page 130. It is true that that decision was passed under Act No. VIII of 1859, but, as remarked recently by the Bombay High Court, in the case of *Purmananddas Jiwandas v. Vallabdas Wallji* (1)—“it is a distinct decision of a Full Bench of the Calcutta Court presided over by Sir Barnes Peacock that a judgment-creditor, seeking to enforce his decree, may avail himself of uncertified payments made by the judgment-debtor as an answer to a plea of limitation, and we are not aware that it has ever been questioned, nor has any change been introduced into the present Civil Procedure Code which militates against the grounds of the decision. We must therefore hold that effect may be given to the payments which have been admittedly made to the applicant for the purpose of evading the plea of the limitation.” The Calcutta Full Bench case has also been followed by this Court in *Sham Lal v. Kanahia Lal* (2) and in *Zahur Khan v. Bakhtawar* (3) and still more recently by the Calcutta High Court in the case of *Hurri Pershad Chowdhry v. Nasib Singh* (4), where the same view is expressed as by the Bombay High Court

(1) 11 B. 506.

(2) 4 A. 316.

(3) 7 A. 327.

(4) 21 C. 542 (549).

in the case above cited. This is a very strong current of authority, and, sitting as a single Judge of this Court, I think I am bound to follow it. Indeed, it seems to me [45] that the object of the prohibition in the last clause of s. 258 is to compel the *judgment-debtor* to be careful to apply to the Court to have recorded as certified any payment he may have made on account of the decree if he desire that such payment should be recognised by the execution Court as against the decree-holder executing the decree. That prohibition does not, in my opinion, apply to a case like the present. For these reasons I am of opinion that the decree-holders ought to have been allowed to prove payment. There was on that point a distinct issue before the lower Court, as the decree-holders had asserted and the judgment-debtor had denied the payments. That issue ought to have been tried and decided. I remand the following issue under s. 566 to the lower appellate Court, *viz* :—

Did the judgment-debtor pay all or any, and if so which, of the first eight instalments due on the decree, dated the 10th September 1885?

The lower Court will allow the parties to produce evidence on this point. After receipt of the finding ten days will be allowed for objections.

Issue referred under s. 566 of the Code of Civil Procedure.

17 A. 45 = 14 A.W.N. (1894) 196.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

HAIDRI BEGAM (*Plaintiff*) v. NATHU (*Defendant*).^{*}
[11th August, 1894.]

Act No. IV of 1882 (Transfer of Property Act) s. 106—Landlord and tenant—Suit in ejectment—Notice to quit—Denial of landlord's title by defendant before suit.

In a suit by a landlord for ejectment of a tenant, no notice of determination of tenancy, under s. 106 of Act No. IV of 1882, is necessary where the defendant has, prior to the suit being brought, denied the plaintiff's title as landlord and that there was any contract of tenancy between them. *Unhamma Devi v. Vaikunta Hegde* (1) and *Dodhu v. Madhavrao Narayan Gadre* (2) referred to.

[F., 13 Ind. Cas. 323 (324) = 76 P.R. 1911; R., 33 C. 339 = 3 C.L.J. 274.]

THE facts of this case are as follows :—

The plaintiff sued for the ejectment of the defendant from a house and for rent, alleging that the defendant had taken the house [46] on rent executing a lease on the 12th of July 1874, but, since the 12th of July 1889, had declined to pay the rent. The plaintiff had therefore sued the defendant for rent in the Small Cause Court, but the defendant denied that he was a tenant of the plaintiff, and, as the suit involved a question of ownership, it was dismissed by the Small Cause Court.

The defendant pleaded that the lease was inadmissible in evidence, not having been registered, and that, having been held to be concocted, the question of its genuineness could not be re-opened. He also pleaded that the claim for rent was *res judicata*, and that the house belonged to the defendant's brother; and lastly that the suit was unmaintainable, inasmuch as no notice, as required by s. 106 of Act No. IV of 1882, had been served upon him.

* Second Appeal No. 447 of 1894, from a decree of Maulvi Jabar Husain, Subordinate Judge of Bareilly, dated the 19th February 1894, confirming a decree of Maulvi Ahmed Ali, Munsif of Bareilly, dated the 25th January 1892.

(1) 17 M. 218.

(2) 18 B. 110.

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17 A. 45=
14 A.W.N.
(1894) 196.

The Court of first instance (Munsif of Bareilly) dismissed the claim for ejectment, holding that the service of notice under s. 106 of the Transfer of Property Act, 1882, was essential, but decreed the claim for such portion of the rent as had not been the subject of the previous suit in the Court of Small Causes.

The plaintiff appealed; and the lower appellate Court (Subordinate Judge of Bareilly) dismissed the appeal upon grounds similar to those upon which the Munsif's judgment was based.

The plaintiff then appealed to the High Court.

Mr. *Abdul Raoof* and *Maulvi Ghulam Mujtaba*, for the appellant.
Munshi Madho Prasad, for the respondent.

JUDGMENT.

ELGE, C. J., and BANERJI, J.—The suit, out of which this appeal arose, was one for ejectment and also for arrears of rent. As to the claim for arrears of rent, that was barred under s. 13 of Act No. XIV of 1882 by the decision in a prior suit brought in a Court of Small Causes. It was contended here that as a Court of Small Causes could not have tried the suit for ejectment, its decision did not operate as *res judicata qua* the claim for rent. That is a mistaken contention. A Court of Small Causes is competent to [47] try this suit so far as it relates to the cause of action with reference to the rent, and the fact that the Court of Small Causes is not competent to try this suit so far as it is a suit for ejectment, does not make s. 13 of the Act inapplicable on the question of the rent. The suit, so far as the claim for rent was concerned, was rightly dismissed, and we dismiss this appeal, so far as it relates to the claim for rent, with proportionate costs.

The suit for possession of the house by ejectment of the defendant was dismissed on the ground that no notice determining the tenancy as required by s. 106 of Act No. IV of 1882 had been given. A notice was not necessary in this case, as, in the prior suit to which we have referred, this defendant had denied the plaintiff's title and denied that there was any contract of tenancy between them. The question as to whether in such a case a notice is necessary has been considered in several cases in this Court: but we think that the law is now well settled, and we cannot better express it than by quoting the judgment of Muttusami Ayyar and Best, JJ., in *Unhamma Devi v. Vaikunta Hegde* (1). What those learned Judges said was:—"Nor is there any doubt that the tenant forfeits this right to notice by denying the landlord's title prior to suit. It is also settled law that the denial of title for the first time in the suit does not entitle the tenant to notice, for the reason that the plaintiff is bound to show that at the date of suit he had a complete cause of action; and subsequent denial of title, even if false, does not release the landlord from proving his case or amount to a waiver by the defendant of his right to notice." The same subject is referred to in the judgment in *Dodhu v. Madhavrao Narayan Gadre* (2). We set aside so much of the decisions of both the lower Courts as dismissed the plaintiff's suit for possession of the house, and we remand this case under s. 562 of Act No. XIV of 1882, to the Court of first instance for trial of the suit, so far as it relates to the house, on the merits. Costs of this appeal and in the Court below are allowed to the parties in proportion to their success.

Cause remanded.

(1) 17 M. 218.

(2) 18 B. 110.

17 A. 48 = 14 A.W.N. (1894) 199.

[48] APPELLATE CIVIL.

*Before Mr. Justice Blair and Mr. Justice Burkitt.*KALI CHARAN AND ANOTHER (Plaintiffs) v. AHMAD SHAH KHAN
(Defendant).* [15th August 1894.]*Mortgage—Suit by second mortgagees against purchaser of equity of redemption who had paid off a prior mortgage—Second mortgagees ignoring lien of purchaser of equity of redemption.*1894
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(1894) 199.

One A. S. purchased the equity of redemption of a property subject to two mortgages, and as part of the transaction paid off the prior mortgage. The mortgagees under the second mortgage sued to bring the mortgaged property to sale, making the original mortgagor and the purchaser of the equity of redemption defendants, but omitting any mention of the lien acquired by such purchaser. *Held* that such omission was not a valid reason for dismissing the plaintiff's suit altogether. *Salig Ram v. Harcharan Lal* (1) distinguished.

[F., 21 A. 272; R., 27 A. 75 = 1 A.L.J. 476 = (1904) A.W.N. 166.]

THE facts of this case were as follows:—

The plaintiffs brought their suit against two persons, Marjad Singh and Ahmad Shah Khan, alleging that the father of Marjad Singh had, on the 12th of April 1877, executed in their favor a bond for Rs. 200, hypothecating certain zamindari property, and subsequently on the 10th of January 1880, had executed a sale-deed by which he conveyed to the second defendant, Ahmad Shah Khan, the property mortgaged to them; and they prayed for realization of the mortgage debt, principal and interest, by sale of the mortgaged property.

Ahmad Shah Khan, the vendee-defendant, put in a written statement, in which he pleaded that he had bought the property in good faith and for an adequate consideration, without knowledge of the plaintiffs' mortgage, the sale having been made for the purpose of satisfying a mortgage on the property of a prior date to that of the plaintiffs. He alleged that the plaintiffs' suit was brought in bad faith with knowledge of the prior mortgage. He also pleaded adverse possession for more than 12 years, and that the plaintiffs' mortgage was a fictitious and collusive transaction.

[49] The Court of first instance (Munsif of Farukhabad) found the issues as to limitation and fraud against the defendant. It found that the sale to the defendant Ahmad Shah was a valid transaction, and that the plaintiffs, though entitled to a decree for sale on their mortgage, could not bring the property to sale without first discharging the defendant's prior incumbrance, and gave the plaintiffs a decree accordingly. The defendant Ahmad Shah Khan appealed.

The lower appellate Court (Subordinate Judge of Farukhabad), finding that the defendant had paid off the prior mortgage as alleged by him and that the plaintiffs had wilfully omitted mention of this fact in their plaint, reversed the decree of the Munsif and dismissed the plaintiffs' suit.

The plaintiffs thereupon appealed to the High Court.

Babu Ratan Chand, for the appellant.

Pandit Sundar Lal, for the respondent.

* Second Appeal No. 1107 of 1893, from a decree of Maulvi Mubammad Anwar Husain Khan, Subordinate Judge of Farukhabad, dated the 14th June 1893, reversing a decree of Munshi Bakhtawar Lal, Munsif of Farukhabad, dated the 24th April 1893, (1) 12 A. 548.

JUDGMENT.

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17 A. 48=
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1894) 199.

BLAIR and BURKITT, JJ.—This is a suit by the holders of a second mortgage duly registered to recover by sale of the mortgaged property principal and interest due to them upon a bond executed in their favor by the second defendant. The first defendant and sole respondent here is the purchaser from the second defendant of the equity of redemption, and a certain amount of the purchase money was left with the vendee for the payment of a mortgage debt due under a mortgage of older date than that of the plaintiffs. It must be taken to be the fact that the plaintiffs had knowledge of such prior incumbrance. The second defendant by his purchase became full owner of the hypothecated land, subject to plaintiffs' mortgage; that is to say, the equity of redemption had passed to him, and the further equity arising out of his payment of the money due under the prior mortgage by which it had become extinguished. By virtue of his equity of redemption he had become entitled to relieve the land of the plaintiffs' second mortgage by payment, and by this payment, which extinguished the first mortgage, he was entitled to protect himself against a suit for sale instituted by the plaintiffs upon their second mortgage, [50] because such payment unquestionably gave him a right to have, in priority to them, satisfaction of his lien, as though he stood in the shoes of the first mortgagee. But it would be incorrect to say that he was ever a mortgagee. The plaintiffs in their suit impleaded the mortgagor and his assignee, but made no mention of the lien acquired by defendant No. I. The lower appellate Court, reversing the decree of the Munsif, has refused on a plaint so drawn to allow the claim of the plaintiffs, subject to the re-payment of the lien of defendant No. I, as decreed by the Munsif. The only question before us is whether upon account of the omission of all mention of the respondent's lien the suit ought to have been dismissed, although on a properly drawn plaint the plaintiffs would have been entitled to the decree given by the Munsif. Upon this preliminary point the plaintiffs' suit has been dismissed. The lower appellate Court acted upon the authority of the case of *Salig Ram v. Har Charan Lal* (1). The head-note correctly sums up the ruling in that case:—"Where a second mortgagee coming into Court and denying or ignoring the title of a prior mortgagee asks to have the property sold as if there were no prior incumbrance, the suit should be dismissed, and should not be decreed with words of limitation reserving the rights of the prior mortgagee." The *ratio decidendi* is thus expressed in the judgment:—"It is a suit brought on a false statement of facts or upon a suppression of material facts." In that case the defendant had been mortgagee prior to his purchase of the equity, and, had such purchase never taken place, must necessarily have been impleaded by a second mortgagee suing his mortgagor for enforcement of lien. The existence of such a mortgage must have been known to the second mortgagee and the rights of the first mortgagor perfectly understood. But the rights of the purchaser of an equity of redemption who had never been a mortgagee at all, but had obtained a right by re-payment to use the first mortgage as a shield, are much less generally known and understood. Indeed the Munsif remarks that "it is likely that the plaintiffs' knowledge of the prior incumbrances and [51] of their discharge by the defendant-vendee caused to the plaintiffs doubt and uncertainty." This case does not appear to us to fall strictly

(1) 12 A. 548.

within the ruling above quoted, and we are unable to lay down, as a rule of universal application, the principle that a plaintiff who claims too much or fails to admit reasonable deductions from his claim is therefore to be deprived of that to which he is legally entitled. It seems to us that each case should be dealt with on its own merits. We reverse the finding of the lower appellate Court on the preliminary point, and remand the case to that Court under s. 562 of the Code of Civil Procedure with directions to restore it to its place on the register of first appeals and dispose of it upon the merits. This appeal is decreed with costs.

Appeal decreed.

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17 A. 48 =
14 A.W.N.
(1894) 199.

17 A. 51 = 14 A.W.N. (1894) 201.

REVISIONAL CRIMINAL

Before Mr. Justice Blair.

GANGA DEI v. SHER SINGH.* [22nd October, 1894.]

Criminal Procedure Code. s. 195—Sanction to prosecute—Sanction in respect of an offence committed in the course of a Civil suit of over Rs. 5,000 in value—Appeal.

Where sanction to prosecute is granted in respect of one of the offences referred to in s. 195 of the Code of Criminal Procedure, such offence having been committed in the course of a civil suit, the valuation of such civil suit is immaterial to the question of the Court to which an application under s. 195 of the Code of Criminal Procedure for revocation of the order granting sanction will lie.

THE facts of this case are as follows:—

One Sher Singh, plaintiff in a civil suit before the Subordinate Judge of Shahjahanpur, applied to the Subordinate Judge's Court for permission to prosecute the defendant in the suit, Ganga Dei, for making false statements in, and not giving proper answers to, interrogatories administered under s. 121 of the Code of Civil Procedure. On this application the Court gave sanction for the prosecution of the defendant in the following terms—"Under the reasons given in this Court's judgment, dated 27th June 1893, the Court grants permission to the plaintiff to prove in the Criminal Court the defendant's false statement or the offence under s. 188 of the Indian Penal Code, or both offences, against her."

[52] The defendant applied to the District Judge for revocation of the above order, but the Judge, holding that, inasmuch as the suit in the course of which sanction had been granted was valued at more than Rs. 5,000, he had no jurisdiction in the matter, dismissed the application.

The defendant thereupon applied to the High Court for revision of the Subordinate Judge's order.

Mr. J. Simeon, for the applicant.

The Government Pleader (Munshi Ram Prasad) for the Crown.

JUDGMENT.

BLAIR, J.—This is an application to this Court in the exercise of its revisional jurisdiction. In a civil suit before a Subordinate Judge for a sum largely in excess of 5,000 rupees certain interrogatories were alleged to have been falsely answered, or not properly answered, or not answered at all within the meaning of the Code of Civil Procedure. The learned Subordinate Judge who heard the suit granted sanction for the prosecution

* Criminal Revision No. 584 of 1894.

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OCT. 22. of the present applicant in terms which it is irrelevant here to discuss.
— Against that order the present applicant appealed to the District Judge.
REVI- The learned District Judge rejected the appeal upon the ground that he had
SIONAL no jurisdiction to hear it. That order was based upon the impression
CRIMINAL. that, the amount in dispute in the civil suit being such that an appeal in
— the civil suit was outside his jurisdiction, the learned Judge's Court was
17 A. 51= not the Court to which an appeal from the Subordinate Judge ordinarily
14 A.W.N. lay within the meaning of s. 195 of the Code of Criminal Procedure. The
(1894) 201. learned Judge is mistaken. The amount at issue in the civil suit is wholly
irrelevant. His Court was the ordinary Court of appeal from the decision
in criminal matters made by the Subordinate Judge. The sanction in
question was a sanction for criminal prosecution. The District Judge there-
fore was the proper tribunal to revoke or confirm such sanction. The order of
the Judge dismissing the appeal is quashed. Let the cause go back to the
District Judge to hear and dispose of the appeal according to law. For
the guidance of the District Judge he is referred to the Indian Law Reports,
2 Bombay, p. 384, and I. L. R., 2 Bom., p. 481.

17 A. 53 = 14 A.W.N. (1894) 201.

[53] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

BEHARI LAL PAL (*Defendant*) v. SRIMATI BARAN MAI DAS
(*Plaintiff*).^{*} [1st November, 1894.]

Civil Procedure Code, ss. 373, 43.—Withdrawal of suit with permission to bring a fresh suit on the same cause of action—Effect of such withdrawal.

Where a suit is withdrawn with permission under the first paragraph of s. 373 of the Code of Civil Procedure the effect is to leave the parties in the same position as that in which they would have been if the suit had never been brought.

A plaintiff, therefore, who has obtained an order under s. 373 of the Code will not be debarred by s. 43 from claiming in a subsequent suit a relief which he might have included, but did not, in the suit which he was permitted to withdraw. *Venkata Shetti v. Ranga Nayak* (1) followed.

[F., 9 Ind. Cas. 956 = 37 P.L.R. 1911 = 176 P.W.R. 1911; R., 2 C.L.J. 480; 14 C.P.L.R. 104 (106).]

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Durga Charan Banerji, for the appellant.

Babu Jogindro Nath Chaudhri and Babu Becha Ram Bhattacharji, for the respondent.

JUDGMENT.

EDGE, C. J., and BANERJI, J.—The suit in which this appeal has arisen was instituted on the 3rd November 1892, for rent due in respect of a village for the years 1297, 1298 and 1299 Fasli. The suit was brought upon a lease which reserved a lump yearly rent for the village. In the lease the village is described as containing 7,323 bighas, but the rent was not fixed per bigha. The plaintiff in the lower appellate Court

^{*} Second Appeal No. 797 of 1893, from a decree of J. Denman, Esq., District Judge of Banda, dated the 20th June 1893, modifying a decree of Munshi Syed Muhammad Jawad, Assistant Collector of Banda, dated the 28th February 1893.

(1) 10 M. 160.

obtained a decree for rent for the three years in question. One of the grounds in this appeal by the defendant is that the village in fact contained only 7,003 bighas, and he claims a proportionate deduction in respect of 320 bighas. It appears to us that the reference to 7,323 bighas was not intended or expressed as a warranty that the village contained in actual measurement 7,323 bighas. The rent was fixed irrespec- [54] tive of the number of bighas and for the village *en bloc*. In our opinion the misdescription of the number of bighas in the village does not, under the circumstances, entitle the defendant to any deduction.

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17 A. 53 =
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(1894) 201.

A prior suit had been brought by the plaintiff against the defendant upon the same lease to recover the rent of the village for 1296, 1297 and 1298 Fasli. At the time when that prior suit was brought the rent for 1299 Fasli had accrued due and was payable, and could have been claimed in that suit. That prior suit was withdrawn by the plaintiff on an application for that purpose, and liberty was granted to him to bring a fresh suit. That application was made, and that permission was granted, under s. 373 of Act No. XIV of 1882. It appears that the defendant had no notice of that application, and that the order giving permission to withdraw and bring a fresh suit was made behind the back and without the knowledge of the defendant and without his having an opportunity of being heard. The order, however, was made and is final. In our opinion the defendant cannot, in this suit, question the validity of that order. It is true that the order was apparently not appealable, but the defendant was not left without his remedy if he wished to challenge that order by proper procedure.

We now come to the more difficult question in this appeal. Part of the claim in this suit is for rent for 1299 Fasli, which might have been included by the plaintiff in his prior suit, and, no doubt, if the plaintiff had obtained a decree in that prior suit, the illustration to s. 43 of Act No. XIV of 1882 would have covered the present claim for rent for 1299 Fasli, and it could not have been maintained in this present suit. It appears to us that if the prior suit had been withdrawn without permission granted under the first paragraph of s. 373 of Act No. XIV of 1882, section 43 of that Act would have applied and would have barred any remedy in the present suit for rent for 1299 Fasli. It has been held by the Madras High Court in *Venkata Shetti v. Ranga Nayak* (1) that where a suit is withdrawn under s. 373 with permission to bring a fresh suit, the [55] effect of such permission is to leave matters in the position in which they would have stood if no such suit had been instituted. Our attention has also been drawn to the decisions of this Court in *Ilahi Bakhsh v. Imam Bakhsh* (2) and in *Mul Chand v. Bhikari Das* (3).

The question is not free from difficulty, but we are not inclined to differ from the view expressed by the Madras High Court in the case to which we have referred, and we think that it is most probable that the Legislature intended that when a suit was withdrawn with permission under the first paragraph of s. 373 of Act No. XIV of 1882, the effect should be to leave the parties in the same position as that in which they would have been if the suit had never been brought. This view is supported by s. 374 of Act No. XIV of 1882.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 10 M. 160.

(2) 1 A. 324.

(3) 7 A. 624.

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14 A.W.N.
(1894) 204.

17 A. 55 (F.B.) = 14 A.W.N. (1894) 204.

FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice
Knox and Mr. Justice Banerji.*REFERENCE UNDER ACT No. I OF 1879 (INDIAN STAMP
ACT). s. 49.* [16th November, 1894.]*Act No. I of 1879 (Indian Stamp Act), s. 3, cl. (13) s. 7—Stamp—Lease or mortgage.*

A zamindar leased certain land in his village to some cultivators at a rent of Rs. 365 per annum in cash and of certain cart-loads of straw and grass by a document which also contained an agreement by the lessees hypothecating certain other property belonging to them for the purpose of securing the payment of the agreed rent and for the performance of the engagement for the delivery of the other articles: *Held* that the document above referred to should be stamped as a mortgage-deed according to the definition contained in s. 3, cl. 13 of Act No. I of 1879, and also that it fell within the second paragraph of s. 7 of the above Act. *Ex parte Hill* (i) referred to.

THIS was a reference under s. 49 of Act No. I of 1879, made by the Munsif of Saharanpur, for the purpose of obtaining a decision as to the correct stamp to be placed upon a certain document.

[56] The document in question was thus described in the Munsif's order of reference:—"The lease provides for the payment of Rs. 365 per annum in cash, and a cart-load of straw and a cart-load of grass as zamindari dues for eight years, and also provides that for the amount payable every year under the lease the property described below is pledged and hypothecated (*maqful aur mustagharaq*) and that the said property will not be transferred to any one in any manner, and, if transferred, such a transfer would be regarded as void."

The document was stamped as a lease with a stamp of the value of Rs. 4 and the question referred was whether the document ought to have been stamped as a lease or as a mortgage-deed or as both, and what was the amount of stamp duty with which it was chargeable.

The following order was passed on this reference:—

ORDER.

EDGE, C. J., KNOX and BANERJI, JJ.—This is a reference by the Munsif of Saharanpur under s. 49 of the Indian Stamp Act of 1879. The question is whether a document produced before him at the trial was chargeable with duty as a lease or was chargeable with duty as a mortgage deed. There was a further question submitted to us, namely, in case the document was a lease and also a mortgage-deed, did it fall within paragraph 2 of s. 7 of the Indian Stamp Act, that is, was it chargeable with duty only as a mortgage-deed, that being the higher duty?

The document in question was stamped as a lease. The document in question was a document by which the zamindar leased certain land in his village to some cultivators at a rent of Rs. 365 per annum in cash and of certain cart-loads of straw and of grass, valued by the Munsif at Rs. 10 per annum, for eight years, as zamindari dues. The lessees by the deed hypothecated certain other property belonging to them for the purpose of securing the payment of the agreed rent and for the performance of the

* Miscellaneous No. 135 of 1894.

(1) 8 C. 254.

engagement for the delivery of the articles valued by the Munsif at Rs. 10 per annum. It appears to us that the document was certainly a [57] mortgage-deed, as a mortgage-deed is defined in clause 13 of s. 3 of the Indian Stamp Act of 1879. It is an instrument by which, for the purpose of securing a future debt, that is, the rent to be paid, and for securing the performance of an engagement, that is, the engagement to pay the rent and to deliver the other articles yearly, the lessees created in favour of the lessor a right over specified property.

As to the second question, in our opinion the document in question cannot be regarded as an instrument comprising or relating to several distinct matters. The matter to which the instrument relates was the terms upon which the lessors let the land and the lessees took the holding. The mortgage was not a distinct matter from the lease. It was as much the matter of the lease as an ordinary covenant to pay would be part of the matter of the lease. We are consequently of opinion that paragraph 2 of s. 7 of Act No. I of 1879 applies to this case. We are fortified in this opinion by the decision of the Calcutta High Court in *Ex parte Hill* (1). The papers will be returned to the Munsif through the District Judge with this expression of our opinion. There are some independent papers which have been sent up with the document we have expressed our opinion upon, but there is nothing to show whether those papers are relevant or not. The opinion which we express is simply on the document in question.

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14 A.W.N.
(1894) 204.

17 A. 57 = 14 A.W.N. (1894) 208.

APPELLATE CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

QUEEN-EMPRESS v. TAJ KHAN AND OTHERS.* [17th November 1894.]

Criminal Procedure Code, ss. 161, 162 — Use at trial in Sessions Court of statements made to Police officer investigating case—Evidence.

Though, speaking generally, statements, other than dying declarations, made to a Police officer in the course of an investigation under Chapter XIV of the Code of Criminal Procedure may be used at the trial in favour of an accused person, such statements can only be so used when they are legally brought as evidence before the Court, that is to say, a witness having been cross-examined as to a statement, it may [58] be shown by the evidence of the Police officer that he did make a statement favourable to the accused, which the witness denies having made; and if the statement was at the time reduced into writing by the Police officer he would be allowed to refresh his memory by referring to it; but the written statement itself, when the statement has been reduced into writing (according to the section it must not be signed by the person making it) cannot be used as direct evidence of what was stated by the witness to the Police officer.

Such statements as above described made as to the presence of an accused person at the commission of an offence and not being statements to which the second paragraph of s. 162 of the Code of Criminal Procedure applies, cannot legally be used as evidence against the accused.

[R., 19 A. 390 (411).]

THE facts of this case are fully stated in the judgment of the Court.
Babu Satya Chandar Mukerji, for the appellants.
The Public Prosecutor (Mr. A. Strachey), for the Crown.

* Criminal Appeal No. 810 of 1894.
(1) 8 C. 254.

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JUDGMENT.

Nov. 17.

APPEL-

LATE

CRIMINAL.

17 A. 57 =

14 A.W.N.

(1894) 208.

EDGE, C.J., and BANERJI, J.—Eighteen men were convicted of the offence punishable under s. 302 of the Indian Penal Code by the application of s. 149 of that Code. Those eighteen men have appealed.

The undoubted facts are that there was ill-feeling existing between the Muhammadans of the village of Sewanpur and those of the village of Kanoi. Some time before the date on which the murder in question was committed, one of the Muhammadans of Sewanpur had been killed by Muhammadans from the village of Kanoi. The man who was killed was the uncle of Taj Khan who is one of the men convicted in this case. For that murder some of the Kanoi Muhammadans have been punished. On the 8th of April last, the Muhammadans of the neighbouring villages assembled on the occasion of the *Id-ul-fitr* at the *Idgah* of the mosque at Sahawar. On that occasion about fifteen men from the village of Kanoi and a large number, estimated at from sixty to seventy, of the Muhammadans of Sewanpur also assembled. The evidence shows that of the large crowd of Muhammadans assembled at the mosque the men from Sewanpur were the only men armed with *lathis*. The Kanoi men were unarmed. It is also beyond dispute that on that occasion, and close to the *Idgah*, the men from Sewanpur, or some of them, attacked with their *lathis* the men from Kanoi, and that that attack was made without any provocation. It is [59] further beyond dispute that Chaddan Khan, one of the Kanoi men, was severely beaten by the Sewanpur men with *lathis* and that he died from the results of the injuries which he received. It is also beyond doubt that several others of the Kanoi Muhammadans received injuries more or less severe from *lathi* blows inflicted by the Sewanpur Muhammadans on that occasion.

There were nineteen men from Sewanpur put on their trial before the Sessions Judge: one was acquitted, the others were convicted. We have now to decide what was or what were the offence or offences committed on that occasion, and which of these eighteen men were proved to have been guilty of committing an offence on that occasion.

Before dealing shortly with the evidence, as we propose to do, it is necessary to refer to some evidence which was made use of against some of these men at the Sessions trial. It so happened that the Sub-Inspector who was in charge of the neighbouring thana was present when the attack on the Kanoi men was made. Immediately after that attack he asked the wounded men for information. Whether it was for information as to the particular men who assaulted them, or whether it was for information as to the Sewanpur men who were taking part in the attack generally, is not very clear. Each of the wounded men made to the Sub-Inspector a statement, and each of those men who happened to be examined at the Sessions trial very considerably enlarged in his evidence at the trial on the statement made to the Sub-Inspector by giving more names of assailants.

The Sessions Judge in convicting these eighteen men appears to have relied, as against some of them at least, on the fact that they had been mentioned to the Sub-Inspector on the 8th April, by the wounded men of Kanoi. Mr. Satya Chandar Mukerji, who appeared here for these eighteen appellants, contended, and we think rightly, that the statements, with the exception of that of Chaddan Khan, which were statements other than dying declarations, fell within the prohibition of the first paragraph of s. 162 of the Code of Criminal Procedure. The

last paragraph of that section did not apply to these statements. These statements were made to the [60] Sub-Inspector by persons in the course of an investigation by him under Chapter XIV of the Code of Criminal Procedure, and, as the second paragraph of s. 162 did not apply to them, we are of opinion that they cannot legally be used as evidence against the accused.

Mr. *Satya Chandar Mukerji* also contended, and we think rightly, that the first paragraph of that section does not prohibit using in favour of an accused person the statements to which that paragraph relates. Generally, we agree with that contention, but the statements can only be used in favour of an accused person when the statements are legally brought as evidence before the Court, that is to say, a witness having been cross-examined as to a statement, it may be shown by the evidence of the Police officer that he did make a statement favourable to the accused, which the witness denies having made; and if the statement was at that time reduced into writing by the Police officer, the officer would be allowed to refresh his memory by referring to it; but the written statement itself, when the statement has been reduced into writing (according to the section it must not be signed by the person making it), cannot be used as direct evidence of what was stated by the witness to the Police officer. We mention this, as Mr. *Satya Chandar Mukerji* has relied upon the fact that with regard to some of these men the evidence given by them at the trial varied from their statements made to the Sub-Inspector or went considerably beyond them. He has asked us not to attach credit to the evidence of those witnesses.

The first case with which we propose to deal is that of *Ewaz Khan*. It appears that the only one of the *Kanoi* men who mentioned to the Sub-Inspector at the time that *Ewaz Khan* was one of the attacking party was *Fajju Khan*. *Fajju Khan* was examined before the Magistrate, but does not appear to have been examined at the Sessions trial, and further, his deposition before the Magistrate does not appear to have been made part of the record of the Sessions trial. Owing to that omission we are of opinion that it is safer to give *Ewaz Khan* the benefit of the doubt and to acquit him, although he was spoken to by some of the witnesses at the Sessions trial.

[61] We set aside the conviction and sentence passed upon *Ewaz Khan*, and acquit him of the charge of which he was convicted, and direct that he be forthwith released.

One of the witnesses examined at the Sessions trial who had made a statement to the Sub-Inspector was *Nur Khan*. He mentioned to the Sub-Inspector, on the 8th of April, the names of seven men as having been engaged in the attack. At the Sessions trial he swore positively that the whole nineteen men then on trial were engaged in the attack. It seems to us that *Nur Khan*, by the time the Sessions trial arrived, had made up his mind to swear to men having been present on the 8th of April, whom, on the 8th of April, he had not seen in the attack. Three of the convicted men, *viz.*, *Naim Khan*, *Bhure Khan* and *Asad Khan*, were named on the 8th of April, by *Nur Khan* only to the Sub-Inspector. At the Sessions trial, other men of the *Kanoi* witnesses, who had not mentioned those men's names to the Sub-Inspector, swore to them as having been of the attacking party.

There was another witness examined at the Sessions trial who had made a statement to the Sub-Inspector on the 8th of April, to whom we shall now refer. This witness was *Man Khan*. He was the only

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one of the Kanoi men who, on the 8th of April, mentioned the convict Sallu Khan as one of the attacking party. Man Khan told the Sub-Inspector that four men had attacked him with *lathis* and that the first blow was given by Taj Khan. At the Sessions trial he mentioned the names of two men as having attacked him with *lathis*, and he did not suggest that Taj Khan had struck him at all, or had ever been nearer to him than a distance of eight or ten yards. We do not think that it would be safe to rely on the evidence of Man Khan or Nur Khan, and, as the four men last named by us, *viz.*, Naim Khan, Bhure Khan, Asad Khan and Sallu Khan, were at the time mentioned only by one or another of those two witnesses, we give them the benefit of the doubt and, acquitting them of the offences of which they have been convicted, we set aside the convictions and sentences, and direct that they be forthwith released.

[62] We have now to deal with the case of Taj Khan, Muhammad Ali Khan, Nazar Muhammad Khan and Jangi Khan.

It is proved to our satisfaction that Taj Khan was the man who gave the order to his fellow-villagers to attack the Kanoi men, and that he, Muhammad Ali Khan, Nazar Muhammad Khan and Jangi attacked Chaddan Khan of Kanoi with their *lathis* and inflicted on him such serious injuries as to result in his death. We have no doubt that these four men were properly convicted of murder and sentenced under s. 302 of the Indian Penal Code. We dismiss the appeals of Taj Khan, Muhammad Ali Khan, Nazar Muhammad Khan and Jangi Khan.

There remain nine men whose cases have to be disposed of. We do not believe that the common object of the Muhammadans of Sewanpur was to commit murder, nor do we think that any one of these nine men knew that murder was likely to be committed in the attack on the men of Kanoi. We believe that the common object was to attack the Kanoi men with *lathis* and to inflict on them serious injury, such bodily injury as might be likely to cause death, but we do not think that common object was to commit the offence of murder as defined in s. 302 of the Indian Penal Code.

We alter the convictions of these men to convictions under s. 304, read with s. 149 of the Indian Penal Code. Although we do not believe that the common object of this unlawful assembly was to commit murder, we believe the undoubted object was to inflict serious injury on the Kanoi men. The Sewanpur men took their opportunity of having their revenge. The Sewanpur men came to the *Idgah* armed with *lathis*, probably knowing that the Kanoi men would be unarmed. They obeyed the order of their leader and joined in the attack which resulted in the offence committed by these nine men.

We think, however, that it is not necessary that these men should be transported for life, and altering their convictions we also alter their sentences, and sentence Daraz Khan, Badulla Khan, Shahamat Khan, Amanat Khan, Badal Khan, Chunni Khan, Dilawar Khan, Ghafur Khan and Man Khan to be rigorously imprisoned for seven years.

17 A. 63 = 15 A.W.N. (1895) 6.

[63] APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.*LACHMI NARAIN AND OTHERS (*Defendants*) v. MUHAMMAD YUSUF
(*Plaintiff*).^{*} [6th December, 1894.]1894
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—*Mortgage—Act No. IV of 1882 (Transfer of Property Act), s. 60—Breaking up of security—Mortgagee allowing mortgagor to pay a portion of the mortgage debt and releasing part of the mortgaged property.*17 A. 63 =
15 A.W.N.
(1895) 6.

A mortgagee by allowing his mortgagor to pay a portion of the mortgage-debt and releasing a proportionate part of the mortgaged property does not thereby entitle the mortgagor or his representative to redeem the rest of the mortgaged property piece-meal. *Marana Ammanna v. Pendyala Perubotulu* (1) and *Subramanyan v. Mandayan* (2) not followed.

[R., 18 A. 189; 28 A. 155 = A.W.N. (1905) 225; 2 O.C. 344 (348); D., 31 A. 335 = 6 A.L.J. 387 (392) = 1 Ind. Cas. 779 (780).]

THE facts of this case as stated in the judgment of the Court of first instance are as follows:—

One Mukand Singh was owner of $2\frac{1}{2}$ biswas in mauza Chhalesar and of shares in a large number of other villages.

He first, on the 12th of February, 1878, jointly with his nephews, Jawahar Singh and Karan Singh, mortgaged the $2\frac{1}{2}$ biswas in mauza Chhalesar, together with shares in other villages, to Lachmi Narain and others for Rs. 40,000 and executed a mortgage-deed. Again on the 31st of May, 1878, Mukand Singh mortgaged the same $2\frac{1}{2}$ biswas share in mauza Chhalesar with shares in other villages to Sukh Ram for Rs. 4,480, and executed a mortgage-deed. Subsequently, on the 20th of March, 1880, Mukand Singh mortgaged for the third time the $2\frac{1}{2}$ biswas in mauza Chhalesar to the plaintiff, Muhammad Yusuf, the mortgage-deed being written in the name of Jani Bijai Shankar. The first and second mortgagees sued for sale on their mortgages and obtained decrees in their favour on their respective mortgages. The plaintiff sued for redemption of the share in mauza Chhalesar above mentioned upon payment by him of the proportionate amount which might be considered to have been decreed in respect thereof in the prior mortgagees' suits, and for sale of the [64] share in satisfaction of the amount due to him and the sums which he would have to pay to the first and second mortgagees. The plaintiff also impleaded certain subsequent mortgagees of the same property.

The first set of mortgagees pleaded that the plaintiff's mortgage was fictitious and collusive and without consideration. They alleged that Mukand Singh, Kharan Singh, Jawahar Singh, Sher Singh and Naubat Singh had mortgaged 10 biswas of mauza Chhalesar to them, and that Sher Singh and Naubat Singh had paid half of the mortgage money and redeemed half the property, and that in consequence of this transaction the claim to redeem by payment only of a proportionate share of the mortgage money, and not a moiety thereof and interest, was improper. They also pleaded that the account and the proportionate shares of the mortgage money had been wrongly calculated by the plaintiff; that the claim was bad for misjoinder of defendants, and that the claim for interest after due date was bad in law.

^{*} First Appeal No. 47 of 1893, from a decree of Maulvi Muhammad Mazhar Husain, Additional Subordinate Judge of Aligarh, dated the 8th November, 1892.

(1) 8 M. 230.

(2) 9 M. 453.

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The representatives of the second mortgagee pleaded that his claim was prior to that of the plaintiff; that as the mortgage was a joint mortgage the whole amount due under it should be paid by the plaintiff; and that the amount of the proportionate share stated by the plaintiff was incorrect.

The remaining defendants did not appear.

The Court of first instance (Additional Subordinate Judge of Aligarh) found on the various issues as to the genuineness of the plaintiff's mortgage that the bond sued on was a genuine bond executed by Mukand Singh in the name of Jani Bijai Shankar, but in reality for the benefit of the plaintiff; and, as to the issue whether the plaintiff was entitled to redeem upon payment of a proportionate part of the mortgage money, that, as to the first mortgage, Sher Singh and Naubat Singh had in fact, as alleged, paid half the mortgage money and redeemed half the property, and, as to the second mortgage, that Sukhram, the original mortgagee, had in execution of his decree on the mortgage brought [65] to sale a part of the mortgaged property only and purchased it himself. The Court therefore came to the conclusion that both the prior mortgages had been broken up so as to admit of the plaintiff claiming redemption on payment of a proportionate share only of the mortgage money.

On the question of the proportionate amounts due on the two mortgages, the Court found that Rs. 1,447-8-0 was due on the first mortgage and Rs. 6,445 on the second mortgage and passed a decree in favour of the plaintiff.

The first set of mortgagees appealed to the High Court.

Pandit *Sundar Lal* and Babu *Ratan Chand*, for the appellants.

Mr. *Hameed-ullah* and Mr. *Abdul Majid*, for the respondent.

JUDGMENT.

EDGE, C.J., and BANERJI, J.—The only question before us in this appeal is whether the defendants-appellants, having received from the mortgagor a moiety of the mortgage-debt, and having, on that payment, released a moiety of the mortgaged property, have thereby broken up their mortgage so as to allow the plaintiff to redeem that portion of the mortgaged property in which he is interested by payment of a proportion of the mortgage-debt still due to these defendants-appellants. The rule as to the redemption of a portion of mortgaged property on payment of a proportion of the mortgage-debt which has been acted on in these provinces since the passing of Act No. IV of 1882 is to be deduced from the last paragraph of s. 60 of that Act. We may say that before the passing of Act No. IV of 1882, the principle to be deduced from the last paragraph of s. 60, to which we have referred, was the principle, so far as we are aware, which was applied in these provinces, and the right to redeem adversely a portion of the mortgaged property by payment of a proportionate part of the mortgage-debt was, when not stipulated for in the contract, confined to cases in which the mortgagee or mortgagees had acquired, in whole or in part, the share of a mortgagor. Mr. *Abdul Majid*, for the respondent, has contended that whenever the mortgagee receives payment of a portion of the mortgage-debt, and in consideration of such payment [66] releases from the mortgage part of the property mortgaged, he breaks up the contract of mortgage and the mortgagor or any person interested in the mortgaged property becomes entitled

to redeem a portion or portions piece-meal by payment of a proportionate amount of the debt remaining due; and he cited as authorities for that proposition, *Marana Ammanna v. Pendyala Perubotulu* (1) and *Subramanyan v. Mandayan* (2). All we need say as to the case of *Marana Ammanna v. Pendyala Perubotulu* is that it was decided before the coming into force of Act No. IV of 1882. The decision in the case of *Subramanyan v. Mandayan* apparently followed the decision in *Marana Ammanna v. Pendyala Perubotulu*. In our opinion it would be contrary to public policy to hold that a mortgagee, by allowing a mortgagor to pay off a portion of the mortgage-debt and so release a portion of the mortgaged property, broke up the mortgage contract so as to allow the mortgagor or any one else interested to redeem the remainder of the mortgaged property piece-meal. If such were the law, a hardship would be imposed on mortgagors, for mortgagees would undoubtedly refuse to receive from mortgagors part payment of a debt on condition of releasing a part of the mortgaged property. In this case the plaintiff must redeem the mortgage of these defendants-appellants,—he is a puisne mortgagee. The Court below ascertained that on the 19th March 1892, which was the day on which the suit was instituted, the total amount remaining due to these defendants-appellants on their mortgage was Rs. 98,989-12-0, and on that basis arrived at a sum of Rs. 4,997-8-0 which was fixed as the proportionate amount to be paid by the plaintiff. The plaintiff has not challenged the correctness of those figures as ascertained by the Court below, and consequently we take them as the basis of our decree.

We vary the decree of the Court below so far as the plaintiff and these defendants-appellants are concerned by decreeing that the plaintiff shall be entitled to redeem the mortgage of the 11th February 1878, at present vested in these defendants-appellants, by [67] payment into Court on or before the 5th June 1895, of the sum of Rs. 98,989-12-0 with interest thereon at the rate of six per cent. per annum from the 19th March 1892 to date of payment, and that on such payment these defendants-appellants shall deliver up to the plaintiff, or to such person as he may appoint, all documents in their possession or power relating to the mortgaged property, and shall assign to the plaintiff the mortgage of the 11th February 1878, free from all incumbrances created by the defendants-appellants or any person claiming under them, or by those under whom they or any of them claim as mortgagees, and that if such payment be not made on or before the 5th June 1895, the plaintiff shall be absolutely debarred from all right to redeem these defendants-appellants or to sell any portion of the property mortgaged to them.

The defendants-appellants shall have their costs of this appeal and their costs in the Court below to be paid by the plaintiff.

Appeal decreed.

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17 A. 63 =
15 A.W.N.
(1895) 6.

(1) 3 M. 230.

(2) 9 M. 453.

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Nov. 6.

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17 A. 67=14 A.W.N. (1894) 202.

REVISIONAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

QUEEN-EMPRESS v. ISHRI.* [6th November, 1894.]

17 A. 67=
14 A.W.N.
(1894) 202.*Criminal Procedure Code, ss. 106, 423—Security to keep the peace—Appellate Court not competent to require such security—Sentence, powers of appellate Court in respect of.*

The Magistrate of a district acting as an appellate Court in criminal cases cannot make an order under s. 106 of the Code of Criminal Procedure. *Aslu v. The Queen-Empress* (1) and *Queen-Empress v. Lachman* (2) referred to.

Where a District Magistrate acting as an appellate Court in a Criminal case altered a sentence of four months' rigorous imprisonment to one of three months' rigorous imprisonment, but imposed a fine of Rs. 10 or in default a further term of six weeks' rigorous imprisonment; *held* that as the latter sentence might involve an enhancement of the former such sentence was in excess of the powers of the Magistrate having regard to s. 423 of the Code of Criminal Procedure.

[F., Rat. Unrep. Crim. Cas. 906; R., 27 C. 175 (176); 30 M. 103=16 M.L.J. 560=1 M.L.T. 375=5 Cr. L.J. 36; 12 Cr. L.J. 547 (548)=12 Ind. Cas. 523 (524)=10 M.L.T. 383 (384)=(1911) 2 M.W.N. 413 (414); D., 23 B. 439 (441).]

THIS was a reference made under s. 438 of the Code of Criminal Procedure by the Sessions Judge of Agra. The facts of the case sufficiently appear from the judgment of the Court.

[68] The Government Pleader (Munshi *Ram Prasad*) for the Crown.

JUDGMENT.

EDGE, C.J., and BLAIR, J.—A Deputy Magistrate convicted Ishri and others of the offences punishable under ss. 225-B and 342 of the Indian Penal Code, and for the offence under s. 225-B he sentenced the accused to three months' rigorous imprisonment, and further he sentenced them to four months' rigorous imprisonment in respect of the offence under s. 342. They appealed. The appeal was heard by the District Magistrate of Agra. He maintained the convictions, but altered the sentences. He sentenced them to three months' rigorous imprisonment and a fine of ten rupees, or, in default, 6 weeks' rigorous imprisonment for the offence under s. 225-B, and to three months' rigorous imprisonment and a fine of ten rupees, or, in default, 6 weeks' rigorous imprisonment for the offence under s. 342. He also ordered the accused to enter into their personal recognizances in Rs. 100 with two sureties in Rs. 50 each to keep the peace for one year, or, in default, to undergo simple imprisonment for one year. It has been rightly held by the High Court of Calcutta in *In re Aslu v. The Queen-Empress* (1), and by this Court in *Queen-Empress v. Lachman* (2) that the Magistrate of a district when acting as an appellate Court in criminal cases cannot make an order under s. 106 of the Code of Criminal Procedure. Consequently the orders in respect to recognizances are bad, and, so far as the recognizances are concerned, they are quashed. The bonds, if given, are to be returned.

It appears to us that the Magistrate of the district exceeded his jurisdiction under s. 423 of the Code of Criminal Procedure in respect of the sentences under s. 225-B of the Indian Penal Code in this way. He

* Criminal Reference No. 531 of 1894.

(1) 16 C. 779.

(2) 10 A.W.N. (1890) 201.

maintained the sentence of three months' rigorous imprisonment under that section, and added to it a fine of ten rupees, or in default six weeks' rigorous imprisonment. That was clearly an enhancement of the sentence. The Magistrate also, in our opinion, enhanced the sentences passed under s. 342 of the Indian Penal Code. It is true that he reduced the sentence of four months' rigorous imprisonment to one of three months' rigorous imprisonment, but he added to the sentence a sentence of a fine of ten rupees, or in default six weeks' rigorous imprisonment. The result might be that, if the ten rupees were not paid, each of these men would have to undergo practically four months' and two weeks' rigorous imprisonment instead of four months' rigorous imprisonment for the offence under s. 342. We set aside so much of the orders of the District Magistrate as related to the fines, and the fines, if paid, must be returned at once.

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17 A. 67 =
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(1894) 202.

17 A. 69 = 15 A.W.N. (1895) 3.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Banerji.

DWARKA DAS (*Plaintiff*) v. KAMESHAR PRASAD AND ANOTHER
(*Defendants*).^{*} [11th December, 1894.]

Civil Procedure Code, s. 283—Jurisdiction—Valuation of suits—Act No. XII of 1887 (Bengal, &c, Civil Courts Act), ss. 19, 21—Act No. I of 1887 (General Clauses Act), s. 3, cl. (13).

When the only parties to a suit under s. 283 of Act No. XIV of 1882 are the execution-creditor or his representative on one side, as plaintiff or as defendant, and the claimant-objector or his representative on the other, and the sole question in the suit between such parties is the question whether the property attached in execution of the decree of the execution-creditor is or is not liable to be attached and sold in execution of the decree of the execution-creditor, the value of the suit, within the meaning of ss. 19 and 21 of Act No. XII of 1887, which, by cl. (13) of s. 3 of Act No. I of 1887, means "the amount or value of the subject matter of the suit," is the value of the property sought to be sold in execution of the decree, when the amount of the decree exceeds the value of the property, and the value of so much of the property sought to be sold as will on a sale satisfy the amount sought to be realized by the sale, when the value of the property attached exceeds the amount sought to be realized, and that in such latter case the amount which it is sought to realise by a sale under the decree may be taken as the value of that portion of the property the sale of which will theoretically, although possibly, not in practice, be sufficient to satisfy the amount sought to be realised by a sale.

But when in a suit under s. 283 of Act No. XIV of 1882 the claimant-objector makes the judgment-debtor or his representative party as defendant to the suit, the property attached must be regarded as the subject matter of the suit, and the value of the suit, within the meaning of ss. 19 and 21 of Act No. XII of 1887 [70] must be the value of the property attached, whether such value exceeds or is less than the amount which is sought to be realized by the sale of the property in execution of the decree.

Gulzari Lal v. Jadaun Rai (1), *Durga Prasad v. Rachla Kuar* (2), *Krishnama Chariar v. Srinivasa Ayyangar* (3), and *Modhusudun Koer v. Rakhal Chunder Roy* (4), distinguished. *Mahabir Singh v. Behari Lal* (5) and *Madha Das v. Ramji Patak* (6) referred to.

^{*} First Appeal, No. 291 of 1893, from a decree of Babu Nilmadhub Rai, Sub-ordinate Judge of Benares, dated the 14th March 1893.

(1) 2 A. 799.
(4) 15 C. 104.

(2) 9 A. 140.
(5) 13 A. 320.

(3) 4 M. 339.
(6) 16 A. 286.

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17 A. 69=
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(1895) 3.

[F., 17 Ind. Cas. 196=269 P.W.R. 1912=41 P.R. 1913=14 P.L.R. 1913; R., 27 A. 440=2 A.L.J. 115=A.W.N. (1905) 37; 15 C.P.L.R. 162; 18 Ind. Cas. 820 (821); 89 P.L.R. 1913=38 P.W.R. 1913; 2 N.L.R. 87; 57 P.R. 1907=66 P.W.R. 1907; 94 P.R. 1908=212 P.L.R. 1908=74 P.W.R. 1908; D., 30 M. 335=17 M.L.J. 95=2 M.L.T. 116 (F.B.).]

THE facts of this case are fully stated in the judgment of the Court.
Munshi *Madho Prasad*, for the appellant.
Babu *Jogindro Nath Chaudhri*, for the respondents.

JUDGMENT.

EDGE, C.J., and BANERJI, J.—This is an appeal brought by Babu Dwarka Das, the plaintiff in the suit, from the decree of the Subordinate Judge of Benares dismissing the suit with costs.

The memorandum of appeal had been originally presented to the Court of the District Judge of Benares. The District Judge returned the memorandum of appeal to the plaintiff for presentation to this Court, holding that the appeal lay to this Court and not to the Court of the District Judge. The plaintiff thereupon presented the memorandum of appeal to this Court; the memorandum of appeal was admitted and the appeal was registered under section 548 of Act No. XIV of 1882.

Upon the appeal being called on for hearing, Mr. *Madho Prasad*, vakil for the appellant, contended that the appeal lay to the Court of the District Judge, and not to this Court, and that we should return the memorandum of appeal to the appellant for presentation by him to the Court of the District Judge of Benares. On the other hand Mr. *Jogindro Nath Chaudhri*, for the respondent, contended that the appeal lay to this Court.

The facts material to the question of jurisdiction are as follows:—

The respondent Babu Kameshar Prasad had obtained, on the 20th of August 1881, in the Court of the Subordinate Judge of [71] Benares a decree for money against Puran Chand, since deceased, and Daru Mal, and in execution of that decree he obtained, on the 13th of December 1889, attachment of a house and a bungalow, which, he alleged, had been the property of Puran Chand in his lifetime and were, according to him, then in the possession of the respondent Sahudra Bibi as the representative of Puran Chand. Babu Dwarka Das filed an objection to the attachment alleging that the property was his, and was not liable to be attached and sold in execution of the decree of Babu Kameshar Prasad.

The Subordinate Judge disallowed the claim of Babu Dwarka Das, and thereupon Babu Dwarka Das, under section 283 of Act No. XIV of 1882, brought the suit in which this appeal has arisen, making Babu Kameshar Prasad, as the execution-creditor, and Musammatt Sahudra Bibi, as the representative of Puran Chand, deceased, defendants.

In his plaint Babu Dwarka Das alleged that, by a registered sale-deed made by Puran Chand on the 22nd of March 1882, Puran Chand had sold the house and bungalow in question to him for the price of Rs. 7,500 and that he, the plaintiff, having paid the entire purchase money, got proprietary possession of the house and bungalow and still held the house and the bungalow as his property. He stated the fact that Babu Kameshar Prasad had obtained the decree under which the property was attached, the fact of the attachment, of his objection and of the disallowance of his objection, and prayed that:—

“(1) It may be declared by the Court that by virtue of the aforesaid purchase the plaintiff is the owner and in possession of the brick and stone

built house consisting of four sections, and the bungalow built after English fashion, both the land and the building, situate in mohalla Nilkanth Mahadeo in the city of Benares, bounded as below, and that the property is not attachable or saleable in execution of the said decree. Value of suit Rs. 7,500.

"(2) The costs of the suit may be charged against the defendants with future interest."

[72] The plaintiff sought two substantial declarations within the ruling in *Moti Singh v. Kaunsilea* (1), the latter of which, on the facts alleged in the plaint, necessarily involved the former, although the former did not necessarily involve the latter.

The defendant, Musammat Sahudra Bibi, did not defend the suit. The other defendant, Babu Kameshar Prasad, filed a written statement and defended the suit. In the written statement he alleged, amongst other things, that the whole proceedings "connected with the sale-deed in question, dated the 22nd of March 1882, are fictitious. The sale-deed in question was not intended to transfer any property, nor was any property transferred by it to the plaintiff. It was executed and completed without any consideration with a view to protect the property of the deceased debtor Puran Chand *alias* Raja."

In support of the contention that this appeal lay to the Court of the District Judge—Mr. *Madho Prasad* for the plaintiff appellant relied upon *Gulzari Lal v. Jadaun Rai* (2), *Durga Prasad v. Rachla Kuar* (3), *Krishnama Chariar v. Srinivasa Ayyangar* (4), *Modhusudun Koer v. Rakhal Chunder Roy* (5) and *Daya Chand Nem Chand v. Hem Chand Dharam Chand* (6).

Mr. *Jogindro Nath Chaudhri*, for the defendant respondent, Babu Kameshar Prasad, in support of the contention that the appeal lay to this Court relied upon *Mahabir Singh v. Behari Lal* (7) and *Madho Das v. Ramji Potak* (8).

It appears to us that the decision in *Daya Chand Nem Chand v. Hem Chand Dharam Chand* (6) has little or no bearing on the question which we have to decide.

In *Gulzari Lal v. Jadaun Rai* (2) (the decision in which was explained in the case to which we shall next refer), *Durga Prasad v. Rachla Kuar* (3), *Krishnama Chariar v. Srinivasa Ayyangar* (4) and *Modhusudun Koer v. Rakhal Chunder Roy* (5) the suits, so far as we can gather from the reports, were either solely between [73] the execution-creditor and the claimant-objector on one side or the other, or, if the judgment-debtor was a party as defendant, the effect upon his title and that of all claiming through him of a decision in the suit that the property was not liable to the attachment of the execution creditor was not raised or considered.

It appears to us that when the only parties to a suit under s. 283 of Act No. XIV of 1882 are the execution-creditor or his representative on one side, as plaintiff or as defendant, and the claimant-objector or his representative on the other, and the sole question in the suit between such parties is the question whether the property attached in execution of the decree of the execution creditor is or is not liable to be attached and sold in execution of the decree of the execution-creditor, the value of the suit, within the meaning of ss. 19 and 21 of Act No. XII of 1887, which, by cl. 13 of s. 3 of Act No. I of 1887, means "the amount or value of the subject matter of the suit," is the value of the

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(1) 16 A. 308.
(5) 15 C. 104.

(2) 2 A. 799.
(6) 4 B. 515.

(3) 9 A. 140.
(7) 13 A. 320.

(4) 4 M. 339.
(8) 16 A. 286.

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property sought to be sold in execution of the decree, when the amount of the decree exceeds the value of the property, and the value of so much of the property sought to be sold as will on a sale satisfy the amount sought to be realized by the sale, when the value of the property attached exceeds the amount sought to be realized, and that in such latter case the amount which it is sought to realise by a sale under the decree may be taken as the value of that portion of the property the sale of which will theoretically, although possibly not in practice, be sufficient to satisfy the amount sought to be realized by a sale. To that extent we are of opinion that the rule deducible from the cases reported in I. L. R., 2 All. 799, I.L.R., 9 All. 140, I. L. R., 4 Mad. 339 and I. L. R., 15 Cal. 104 is correct, when the array of parties is confined to the execution-creditor or his representative on one side and the claimant-objector or his representative on the other, and the sole question to be decided is whether the property is liable to attachment and sale in execution of the decree of the execution-creditor.

In our opinion different considerations arise, which must be considered and given effect to, when in a suit under s. 283 of Act [74] No. XIV of 1882 the judgment-debtor or his representative is made a party as a defendant to the suit, and it is necessary to decide the question of jurisdiction as to the Court in which the suit or an appeal in the suit may be brought.

In a suit under s. 283 of the Act No. XIV of 1882 in which the claimant-objector is the plaintiff and the execution-creditor is the defendant and in which the judgment-debtor is not party as a defendant, the questions as to the title of the judgment-debtor which it may be necessary to decide are decided solely between the parties to the suit, and a decision of or involving those questions of title would not operate as *res judicata* under s. 13 of Act No. XIV of 1882, should the same title be in issue in any subsequent suit between either of the persons who was a party to the suit under s. 283 and the person who was the judgment-debtor in the proceedings to which the suit under s. 283 related, or those who claimed title through them respectively.

On the other hand, when the claimant-objector makes the judgment-debtor a defendant to his suit under s. 283, and does not limit his claim, he claims both in form and substance against the judgment-debtor a declaration of his title to the whole of the property the title to which is in issue in the suit. A decree in such a suit declaring that the property is liable or is not liable to attachment and sale in execution of the execution-creditor's decree must necessarily, unless the suit be decided on a ground which did not involve the decision of a question of title, decide and determine all questions of title upon which in that suit the plaintiff on the one side and the judgment-debtor on the other could then rely, and such decision would operate in any future suit between these two parties or those who claim title through them as *res judicata* under s. 13 of Act No. XIV of 1882 on those questions of title, although such subsequent suit might relate to property not in question in the suit under s. 283, provided that the Court in which the suit under s. 283 was instituted and decided was a Court of jurisdiction competent to try the subsequent suit. The present suit will illustrate our meaning. The plaintiff claims a declaration that the house and [75] bungalow in question are not liable to attachment and sale in execution of Babu Kameshar Prasad's decree. The other declaration which is claimed by the plaintiff, namely, that the house and bungalow became

vested in him by the alleged sale-deed of the 2nd of March 1882, is necessarily involved in the declaration that the house and bungalow are not liable to be attached and sold, as it appears that upon that sale-deed of the 22nd of March 1882 the plaintiff relies for his title and the right to a declaration that the property is not liable to attachment and sale in execution of Babu Kameshar Prasad's decree. A decree that the property was not liable to such attachment and sale would necessarily involve, there being no question of estoppel or limitation, the decision, on the question of title, that the sale-deed was a fictitious instrument under which no title passed from Puran Chand to the plaintiff, or that it was a genuine sale-deed effecting a genuine and unimpeachable transaction of sale, and by which title passed from Puran Chand to the plaintiff. The representative of the deceased Puran Chand being a defendant to this suit, and having regard to the jurisdiction of the Court in which the suit has been brought, a decree declaring that the property was not liable to attachment and sale in execution of Babu Kameshar Prasad's decree would, in any subsequent suit between the present plaintiff or any one claiming through him on the one side and Musammat Sahudra Bibi or any one claiming through her on her title derived from Puran Chand on the other, preclude Musammat Sahudra Bibi and all those claiming through her or her title as the representative of Puran Chand from disputing the validity and effect in passing title of the sale-deed; but it is to be observed that the plaintiff might be entitled to such a declaration as against Musammat Sahudra Bibi, although facts might possibly be proved which would estop the plaintiff from alleging as against Babu Kameshar Prasad that the property attached was not liable to attachment and sale in execution of Babu Kameshar Prasad's decree.

We are consequently of opinion that when in a suit under s. 283 of Act No. XIV of 1882 the claimant-objector makes the judgment-debtor or his representative a party as defendant to the [76] suit, the property attached must be regarded as the subject matter of the suit, and the value of the suit within the meaning of s. 19 and s. 21 of Act No. XII of 1887 must be the value of the property attached, whether such value exceeds or is less than the amount which is sought to be realised by the sale of the property in execution of the decree.

The opinions which we have above expressed in no way conflict with the decisions in *Mahabir Singh v. Behari Lal* (1), and *Madho Das v. Ramji Patak* (2). We have indicated what, in our opinion, is, for the purposes of jurisdiction, the value of a suit under s. 283 of Act No. XIV of 1882, when the judgment-debtor or his representative is made, and when he is not made, a party to the suit as a defendant. In either case the value of the suit for the purpose of jurisdiction is the value stated by the plaintiff in his plaint, provided that such value is not understated or overstated with the object of getting the suit admitted in a Court in which, by reason of the true value of the suit and s. 15 of Act No. XIV of 1882, the suit does not lie. In the present case, assuming, and it is not disputed, that Rs. 7,500 is the value of the property, this appeal lay to this Court and not to the Court of the District Judge.

At the conclusion of the arguments on the question of jurisdiction we asked Mr. *Madho Prasad*, to support his client's appeal on the merits; and he admitted that he could not do so. Under the circumstances it is not necessary for us to express any opinion as to whether or not the plaint

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disclosed any cause of action against Musammat Sabudra Bibi. We presume that the object of Mr. *Madho Prasad* in raising the question of jurisdiction and asking us to return the memorandum of appeal to his client was to avoid the appeal being dismissed with costs; and to enable his client to escape paying the costs of an appeal which could not be supported. It may be assumed, as the appeal cannot be supported on the merits, that the memorandum of appeal, if returned by this Court, would not be again presented to the Court of the District Judge.

We dismiss the appeal with costs.

Appeal dismissed.

17 A. 77 = 15 A.W.N. (1895) 7.

[77] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Banerji.

AMANAT-UN-NISSA AND ANOTHER (*Plaintiffs*) v. BASHIR-UN-NISSA
AND ANOTHER (*Defendants*).^{*}
[12th December, 1894.]

Muhammadian law—Widow—Dower—Lien of widow for dower—Such lien not acquired by widow taking possession against the consent of the other heirs.

If a Muhammadian widow entitled to dower has not obtained possession lawfully, that is, by contract with her husband, by his putting her into possession, or by her being allowed with the consent of the heirs on his death to take possession in lieu of dower and thus to obtain a lien for her dower, she cannot obtain that lien by taking possession adversely to the other heirs of property to the possession of which they, and she in respect of her share in the inheritance, are entitled.

Mussumat Bebee Bachun v. Sheikh Hamid Hossein (1), *Musummut Wahid-un-nissa v. Musummut Shabrattun* (2), *Syud Bazayet Hossein v. Dooli Chund* (3), *Mussumat Meerum v. Mussumat Najeebun* (4), *Ali Muhammad Khan v. Azizullah Khan* (5), and *Bibi Mehrun v. Musammat Kubeerun* (6) referred to. *Woomatool Fatima Begum v. Meerunmun-nissa Khanum* (7), *Ahmed Hossein v. Musammat Khodeja* (8) and *Balund Khan v. Mussumat Janee* (9) distinguished.

[*Diss.*, 32 A. 563 (564) = 7 A.L.J. 614 (615) = 6 Ind. Cas. 405; 38 C. 475 (479) = 13 C.L.J. 427 (429) = 9 Ind.Cas. 1031 (1033).]

THE facts of this case are as follows:—

The plaintiffs, Musammat Amanat-un-nissa and Musammat Mariam-un-nissa, respectively the mother and sister of a deceased Muhammadian, one Shaikh Khadim Husain, sued the two widows of the deceased Khadim Husain, Musammat Bashir-un-nissa and Musammat Khudayat-un-nissa for a declaration of their title, as heirs of the deceased, to 28 out of 72 sihams of the property left by him and for recovery of certain property, both moveable and immoveable, of which they alleged the widows to be in possession. The plaintiffs alleged that the defendants had taken possession of all except a small portion, specified in the plaint, of the property of the deceased shortly after his death, against the consent of other heirs, and had got their names entered in the Revenue papers in respect of the immoveable property. They offered, in case the defendants

^{*} First Appeal, No. 312 of 1893, from a decree of Shah Ahmad-ullah, Subordinate Judge of Saharanpur, dated the 8th September 1893.

(1) 14 M.I.A. 377 (384).

(2) 6 B.L.R. 54.

(3) 5 I.A. 211.

(4) N.W.P.H.C.R. (1867) 335 = (2 Agra 335).

(5) 6 A. 50.

(6) 13 W.R.C.R. 49.

(7) 9 W.R.C.R. 318.

(8) 10 W.R.C.R. 369.

(9) N.W.P.H.C.R. (1870) 319.

set up a claim that they were in possession of the property claimed from [78] them in lieu of their respective dower debts, without admitting the defendants' right, to pay such proportion of the dower debts as might be found due in respect of the sihams claimed by them.

The defendant Bashir-un-nissa, after filing a defence, subsequently admitted the plaintiff's claim.

The defendant Khudayat-un-nissa put forward the following pleas in defence to the suit :—That the suit was bad for misjoinder ; that without a prayer for settlement of the amount of dower due to her the suit was invalid ; that the claim for possession of entire houses without excluding her share was wrong ; that the moveable property claimed was not in her possession, and that the clothes had been given in charity with the permission of the plaintiffs ; that the defendant was in possession of the immoveable property in lieu of Rs. 11,000, her dower debt ; that she had spent Rs. 606-11-0 in the Fatiha ceremonies of Khadim Husain ; that Rs. 502-14-0 were due to her by Khadim Husain on account of her salary, and that unless all this money were paid off, the suit for the estate of Khadim Husain could not be maintained.

The Court of first instance (Subordinate Judge of Saharanpur) on the second issue framed by it, *viz.* :—"What is the amount of the dower of Musammât Khudaya, is she in possession of the immoveable property left by Kadim Husain in lieu of that dower, and can under such circumstances a suit be brought to enforce inheritance?"—found as follows :—"On the second issue it is admitted by the plaintiffs that Musammât Khudaya is a wife of Khadim Husain, deceased, and it is further admitted that Rs. 1,000 on account of her dower is still unpaid, though she has stated the amount of her dower to be Rs. 11,000. It is also admitted that the defendant has been in possession of the property left by her husband Khadim Husain ever since the day of his death. As the defendant says that her possession is in lieu of her dower-debt, which is still due by the deceased, it must be admitted that she is in possession of the property in lieu of her dower-debt. In such a case it must be admitted that, so long as her dower-debt is not paid, inheritance [79] cannot be enforced, nor can the plaintiffs get possession of their respective shares.

"It is suggested in the plaint that, if anything be proved to be due to the defendant, a conditional decree contingent on payment of the same may be passed in favour of the plaintiffs. As to this I say that the suit as it stands has not been instituted in a proper form ; that is, it has not been stated what the amount of the defendant's dower is, what is due to her according to account, and what amount of dower-debt the plaintiffs are willing to pay, but the plaintiffs have brought a suit for possession of their share in the ordinary manner. Under such circumstances a conditional decree on payment of the dower-debt cannot be passed."

The Court accordingly passed a decree dismissing the plaintiffs' suit. The plaintiffs thereupon appealed to the High Court.

Mr. *Abdul Majid* and *Maulvi Ghulam Muftaba*, for the appellants.

Mr. *Amir-ud-din*, for the respondents.

JUDGMENT.

EDGE, C. J. and BANERJI, J.—This appeal has arisen in a suit brought by two of the heirs of a deceased Muhammadan of the Sunni sect against two of the widows of the deceased to obtain possession of their share of the inheritance which came to them on the death of the deceased Muhammadan. In their plaint the plaintiffs expressed their willingness to pay a

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proportionate part of any dower-debt which might be found to exist in favour of the defendants. One of the defendants confessed judgment. The parties to the suit admitted that the dower-debt amounted to Rs. 1,000, in favor of Musammât Khudayat-un-nissa, but the Subordinate Judge dismissed the suit on the ground that "as the defendant (Musammât Khudayat-un-nissa), says that her possession is in lieu of her dower-debt, which is still due by the deceased, it must be admitted that she is in possession of the property in lieu of her dower-debt. In such case it must be admitted that so long as her dower-debt is not paid inheritance cannot be enforced, nor can the plaintiffs get possession of their respective shares." From that decree of dismissal this appeal has been brought.

[80] The Subordinate Judge with all his experience should have known better than to have stated in a judgment that he acted upon the statement of one of the parties as to a fact not admitted by the other side and not found on evidence to be true. As to whether Musammât Khudayat-un-nissa was in possession in lieu of her dower, that is, whether she was in the enjoyment of a lien for her dower, there is no evidence to show that either by contract with her deceased husband, or by any act of his or of the other heirs, or with their consent, she was put in possession of the property with the object of her having a lien on it for her dower. On her behalf some proceedings in a Court of Revenue were relied on as showing that she had an actually vested lien on the property for her dower. In those proceedings the Court of Revenue, adversely to the heirs, put Musammât Khudayat-un-nissa in possession in lieu of her dower. The Court of Revenue had no power or jurisdiction to put this lady or anyone else in possession in lieu of dower, or to adjudicate on the question of her alleged right of lien. So far as the question before us is concerned the order of the Court of Revenue is not only not decisive, but is beside the question which we have to decide.

What, according to the judgment of the Subordinate Judge, admittedly took place was this, the lady was not in possession at the time of her husband's death, but immediately on his death seized his property in order to have a lien for her dower. We cannot regard her possession as having been lawfully obtained within the meaning of the judgment of their Lordships of the Privy Council in case of *Mussumat Bebee Bachun v. Sheikh Hamid Hossein* (1). So far as we are aware neither a Muhammadan widow nor any other creditors can give themselves a lien by taking possession, without the consent or the authority of the persons entitled, of property to the possession of which those other persons are entitled. If a Muhammadan widow entitled to dower has not obtained possession lawfully, that is, by contract with her husband, by his putting her into possession or by her being allowed, with the consent of the heirs, [81] on his death to take possession in lieu of dower, and thus to obtain a lien for her dower, she cannot obtain that lien by taking possession, adversely to the other heirs, of property to the possession of which they, and she in respect of her share in the inheritance, are entitled. It would be otherwise if the heirs consented to her taking possession in order to acquire a lien. In such case the Muhammadan widow on taking possession would obtain a lien for her dower. Of course, whether she obtains a lien or not, she can, if her claim is not barred by limitation, obtain contribution from the heirs in satisfaction of such part of her dower as is

(1) 14 M.I.A. 377 (384).

not proportionately represented by the share of the inheritance which comes to herself.

We are led to the above conclusion from the inference to be drawn from the case of *Musummut Wahid-un-nissa v. Musummat Shabrattun* (1) and the approval of that decision by their Lordships of the Privy Council in the case of *Syud Bazayet Hossein v. Dooli Chund* (2). The view we have taken is supported by the decision of this Court in *Mussumut Meerun v. Musummat Najeebun* (3) and in *Ali Muhammad Khan v. Aziz-ullah Khan* (4) and also by the decision in *Bibi Mehrun v. Mussammatt Kubeerun* (5). We hold in this case that Musammatt Khudayat-un-nissa has failed to prove that she had any lawful lien on the property left by her deceased husband. We were referred by Mr. Abdul Raoof, who appeared for the respondent, to the cases of *Woomatool Fatima Begum v. Meerunmun-nissa Khanum* (6) and of *Ahmed Hossein v. Mussammatt Khodeja* (7) and *Balund Khan v. Mussumat Janee* (8), but it does not appear in those cases that the widow had taken possession without the consent or authority of the persons interested.

We set aside the decree of the Court below, and, the case having been decided on this preliminary point, we remand it under s. 562 of the Code of Civil Procedure to be decided on its merits.

Costs here and hitherto will abide the result.

Cause remanded.

17 A. 82 = 15 A.W.N. (1895) 14.

[82] APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Banerji.

CHEDI LAL AND OTHERS (*Defendants*) v. KUARJI DICHIT (*Plaintiff*).^{*}
[22nd December, 1894.]

Execution of decree—Civil Procedure Code, ss. 483, 484, 486—Attachment of money deposited in Court.

The term "property" as used in ss. 483 and 484 of the Code of Civil Procedure is wide enough to include property of every description, moveable and immoveable, whether in the actual possession of the defendant or of some other person on his behalf; and the words "the Court may require him . . . to produce and place at the disposal of the Court" only refer to such property as is capable of being produced in Court.

Where property ordered to be attached is deposited in the Court which made the order for attachment, that order is sufficient notice to itself that the property ordered to be attached is to be held subject to the further orders of the Court, and it is not necessary that a separate formal notice should be drawn up.

THIS was an appeal against an order of remand in a suit for the recovery of a sum of money which had been paid into the Court of the Subordinate Judge of Benares under the following circumstances:—

Five out of the seven defendants to the suit held a decree against the second defendant, Sheomangal Singh, and in execution of it attached certain money which had been paid in favour of defendant No. 2 in a redemp-

^{*} First Appeal, No. 89 of 1894, from an order of R.H. Macleod, Esq., District Judge of Benares, dated the 5th January 1894.

(1) 6 B.L.R. 54.

(2) 5 I.A. 211.

(3) N.W.P.H.C.R. (1867) 335 = 2 Agra 335.

(4) 6 A. 50.

(5) 13 W.R.C.R. 49.

(6) 9 W.R.C.R. 318.

(7) 10 W.R.C.R. 369.

(8) N.W.P.H.C. R. (1870) 319.

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tion of mortgage case at Mirzapur: the money in consequence of that attachment was transferred to the Subordinate Judge's Court at Benares.

While this money was in deposit, the plaintiff brought a suit against Jaimangal Singh (afterwards deceased) and defendants Nos. 1 and 2 (Harmangal and Sheomangal) and on the 8th of August 1888 applied for attachment before judgment of this money on the ground that it belonged to all three men. The Subordinate Judge's Court on the 8th of August 1888 passed an order attaching the money before judgment and ordering the then defendants to file security within twenty-four hours and to show cause by the 22nd of August why the attachment should not be maintained.

No notice was issued under this order, and on the 22nd of August the plaintiff got a decree against the defendants Nos. 1 and 2 and Jaimangal.

[83] On the 23rd of August, he applied for execution against certain property, including the deposit the subject of the present suit, which he described as already under attachment.

This application was, on the 1st of September 1888, rejected by the Subordinate Judge on the ground that "as the money attached was realized in execution of decree of Chedu Sahu and others before the application of Kuarji Dichit, the latter is not entitled to any portion of it."

The plaintiff accordingly filed a regular suit to recover the money deposited as above described.

This suit was dismissed by the Subordinate Judge on the ground that the order for attachment of the 8th of August 1888 was never perfected, and consequently that the plaintiff, not being an attaching creditor, had no right of suit.

The plaintiff appealed to the District Judge, who reversed the finding of the lower Court as to the validity of the attachment of the 8th of August 1888, and remanded the case for disposal on the merits under s. 562 of Act No. XIV of 1882.

From this order of remand the defendants Nos. 3, 4, 5 and 6 appealed to the High Court.

Pandit *Sundar Lal*, for the appellants.

Munshi *Jwala Prasad*, for the respondent.

JUDGMENT.

KNOX and BANERJI, JJ.—The appellants held a decree against one Sheomangal Singh, and in execution of it obtained an order from the Court of the Subordinate Judge of Benares for the attachment of some money which was deposited in the Court of the Subordinate Judge of Mirzapur. The amount so attached was transmitted to the Court of the Subordinate Judge of Benares and was deposited in that Court on the 31st of July 1888.

The respondent brought a suit in the Court of the Subordinate Judge of Benares against Sheomangal Singh and two other persons, and applied for attachment before judgment of the amount referred to above as the property of his defendants. On the 8th of August 1888, the Court made an order for attachment under the [84] second paragraph of s. 484 of the Code of Civil Procedure. The respondent obtained a decree on the 22nd of August 1888, and applied for payment of the money, for the attachment of which he had obtained an order on the 8th August 1888. His application was refused, and thereupon he brought the present suit claiming two-thirds of the money as the property of his debtors other than Sheomangal Singh.

The Court of first instance dismissed the suit on the ground that the order of attachment made on the 8th of August 1888 was not carried into effect and that there was no valid attachment of the money claimed by the respondent. The lower appellate Court has set aside the decree of the Subordinate Judge and remanded the case for trial on the merits. It is from this order of remand that this appeal has been brought.

We must observe that we are unable to accede to the contention of Mr. *Jwala Prasad* for the respondent, that the respondent was competent to maintain this suit even if there was no attachment of the money claimed by him. That money belonged, according to the allegation of the respondent, to his debtors, and he had no right to claim any portion of it, unless by reason of an attachment made before or after judgment he acquired a title to receive it. It must therefore be determined whether there was a valid attachment on the amount claimed by the respondent on the date on which he instituted his suit.

It is clear that on the 8th of August 1888, the Court made an order for the conditional attachment of the money in question under the last paragraph of s. 484 of the Code of Civil Procedure. Mr. *Sundar Lal*, on behalf of the appellants, has argued that there was no valid attachment for three reasons. He first contended that ss. 483 and 484 contemplated only the attachment of moveable property in the possession of the defendant, and not of property which is not in his possession, and he relied in support of his argument on the provisions of s. 484, which directs that the notice issued to the defendant under that section may require him to "produce and place at the disposal of the Court," the property sought to be attached. [85] We are of opinion that the word "property" as used in ss. 483 and 484 is wide enough to include property of every description, moveable and immoveable, whether in the actual possession of the defendant or in the possession of some other person on his behalf, and that the words in s. 484 relied upon by Mr. *Sundar Lal*, refer only to such property as is capable of being produced in Court.

Mr. *Sundar Lal* next contended that no notice to show cause as required by s. 484 was issued and therefore there was no valid attachment. The answer to this contention is that the conditional attachment referred to in the last paragraph of that section must precede the issue of a notice to show cause, and therefore the omission to issue the notice cannot invalidate the order for conditional attachment.

The third and main ground urged by Mr. *Sundar Lal* was that no attachment, conditional or otherwise, was made by the Court in the manner required by law. S. 272 of the Code of Civil Procedure, which, by reason of the provisions of s. 486, applies to the attachment of property deposited in a Court, directs that the attachment shall be made by a notice to such Court requesting that such property may be held subject to the further order of the Court which ordered the attachment. In our opinion where the property ordered to be attached is deposited in the Court which made the order for attachment, that order is sufficient notice to itself that the property ordered to be attached is to be held subject to the further orders of the Court and it is not necessary that a separate formal notice should be drawn up. It is no doubt desirable that in all cases a formal notice should be drawn up and placed on the file of the case to which the deposit relates, but we are of opinion that the absence of such a notice, where the property attached is deposited in the Court which ordered the attachment, does not vitiate the attachment. In this case an order for conditional attachment under the last paragraph of

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(1895) 14.

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15 A.W.N.
(1895) 14.

s. 484 was recorded by the Court. This was, in our opinion, sufficient to create a valid attachment on the money deposited in that Court, and we agree with the learned Judge below in holding that the respondent had a right of suit. We dismiss this appeal with costs.

Appeal dismissed.

17 A. 86 = 15 A.W.N. (1895), 12.

[86] APPELLATE CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

QUEEN-EMPRESS v. TEJA AND OTHERS.* [11th January, 1895.]

Act No. XLV of 1860 (Indian Penal Code), s. 396—Dacoity in the course of which murder is committed—Facts necessary to establish the offence provided for in s. 396.

When in the commission of a dacoity a murder is committed it matters not whether the particular dacoit charged under s. 396 of Act No. XLV of 1860 was inside the house where the dacoity is committed or outside the house, or whether the murder was committed inside or outside the house, so long only as the murder was committed in the commission of that dacoity. *Queen-Empress v. Umrao Singh* (1) distinguished.

[F., P.L.R. (1900) 44 (Cr.); R., 6 Bom. L.R. 248 (249).]

THE facts of this case sufficiently appear from the judgment of the Court.

Neither the appellants nor the Crown were represented.

JUDGMENT.

EDGE, C.J. and BANERJI, J.—Teja and Zaharia have appealed against sentences of death passed upon them for the offence of dacoity with murder, under s. 396 of the Indian Penal Code. It is clearly proved that on the 29th of April 1892, a dacoity was committed at the village of Hath Kant, in the commission of which dacoity a villager named Janki Prasad was shot dead by one of the dacoits. There is evidence showing that the person who fired the shot was Zaharia. Janki Prasad and the dacoits who actually killed him were outside the house. At the time Teja was inside the house, plundering it. The evidence leaves no doubt that these two men were members of the gang of dacoits engaged actually in that dacoity. As to Zaharia there can be no question that he has brought himself within s. 396 of the Indian Penal Code. But as to Teja it is necessary to consider whether the fact that the murder was committed outside the house at a time when he was inside the house takes his case out of s. 396. In the case of *Queen-Empress v. Umrao Singh* (1), a Bench of this Court said in its judgment:—"We are also of opinion that to establish a liability to the punishment provided in this section (s. 396) it is necessary to prove that the person said to be liable was one of the persons [87] who were conjointly committing dacoity, and was present when the act of murder in the dacoity was committed." Further on it was said:—"There is room for such doubt, particularly in the case of *Girwar Singh and Raghubar Singh*, for there is no evidence which places

* Criminal Appeal, No. 1065 of 1895.

(1) 16 A. 437.

them within the house of Hira Lal at the time when the murder was committed."

If those two statements to which we have referred are to be taken as of general application, we entirely dissent from their correctness as statements of law. It is probable that in that particular case in which that judgment was delivered Girwar Singh and Raghubar Singh were not proved to have been conjointly with the others committing dacoity. However, on that we need express no opinion. In our opinion it matters not, when in the commission of a dacoity a murder is committed, whether the particular dacoit charged under s. 396 was inside the house or outside the house, or whether the murder was committed inside or outside the house, so long only as the murder was committed in the commission of that dacoity. In our opinion these two men were properly convicted of the offence punishable under s. 396 of the Indian Penal Code. We dismiss their appeals, and, confirming the convictions and sentences, we direct that those sentences be carried into effect.

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17 A. 86 =
15 A.W.N.
(1895) 12.

17 A. 87 = 15 A.W.N. (1895) 10.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

KUAR SEN (*Plaintiff*) v. MAMMAN AND OTHERS (*Defendants*).^{*}
[10th January, 1895.]

Easement—Customary right—Facts necessary to establish the existence of a customary right.

The plaintiff sued for possession of a piece of land which, he alleged, formed part of the court-yard of his *kothi*, and for demolition of a *chabutra* thereon. The defendants denied the plaintiff's title and alleged that they always used the *chabutra* as a sitting place, and that during the *Moharram* the *tazias* and *alums* were exhibited upon the *chabutra* and a *takht* was placed upon it. The Court of first instance found that the defendants had a right to use the land in the manner claimed during the [88] *Moharram*. The lower appellate Court on the question of the defendants' right to use the said land in the manner claimed by them found as follows :—"That various *mirasis*, whose connexion with each other is not established, have within a period of twenty years or so placed *tazias* upon the land and sung there." *Held* that this finding of fact did not necessarily in law lead to the conclusion that there was a local custom by virtue of which the easement now claimed by the defendants was acquired.

Where a local custom excluding or limiting the general rules of law is set up a Court should not decide that it exists unless such Court is satisfied of its reasonableness and its certainty as to extent and application, and is further satisfied by the evidence that the enjoyment of the right was not by leave granted, or by stealth, or by force, and that it had been openly enjoyed for such a length of time as suggests that originally, by agreement or otherwise the usage had become a customary law of the place in respect of the persons and things which it concerned.

[F., 28 A. 434 = A.W.N. (1906) 80; 23 B. 666; 1 Ind. Cas. 604 (607) = 21 P.R. 1909 = 32 P.L.R. 1909 = 27 P.W.R. 1909; Appr., 20 M. 399; R., 33 A. 257 (258) = 8 A.L.J. 10 (11) = 9 Ind. Cas. 198; 2 A.L.J. 790 = A.W.N. (1905) 266.]

THIS was an appeal under s. 10 of the Letters Patent from the judgment of Aikman, J., in S. A. No. 388 of 1893, reported in the I. L. R., 16 All. 178. *q.v.* The facts of the case are fully stated in the judgment of the Court.

^{*} Letters Patent Appeal, No. 1 of 1894.

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Mr. *D. N. Banerji* and *Babu Jogindra Nath Chaudhri*, for the appellant.

Mr. *Amir-ud-din*, for the respondents.

JUDGMENT.

17 A. 87=
15 A.W.N.
(1895) 10.

EDGE, C.J. and BANERJI, J.—The plaintiff, who is the appellant in this appeal under s. 10 of the Letters Patent, brought his suit for the possession of a piece of land, which, he alleged, formed part of the court-yard of his *kothi*, and for the demolition of a chabutra thereon, which the defendants claimed the right to maintain and use. The defendants in their written statement denied the plaintiff's title, and alleged that they always used the chabutra as a sitting place, and that during the *Moharram* the *tazias* and *alums* were exhibited upon the chabutra and a *takht* was placed upon it. At the trial in the Court of the Munsif it was orally pleaded on behalf of the defendants that they had obtained a title to the land and chabutra by adverse possession.

The Munsif found that the land in question was the plaintiff's and was part of the court-yard of his *kothi* and that the defendants had not acquired any title to it by adverse possession. This is what [89] the Munsif said on the question of adverse possession in his judgment:—

"I am inclined to think that the defendants and other *mirasis* of the locality have been laying their *tazias* on this land during the *Moharram*. This is the only right which the defendants have acquired by long and uninterrupted usage. I cannot go so far as to hold that such possession amounts to adverse possession." Further on in the judgment the Munsif, after discussing some decisions, found as follows:—"I therefore hold that the defendants, by virtue of an old custom, have acquired right to lay their *tazias* on this spot during the *Moharram* only and perform the ceremonies incidental to it," and he gave the plaintiff a decree for possession of the land and for demolition of the chabutra, but reserved to the defendants a right to erect, two days prior to each *Moharram*, a temporary chabutra on the piece of land and to use such chabutra by laying upon it their *tazias* and performing upon it the incidental ceremonies from the 1st to the 12th days inclusive of the *Moharram* in each year. From that decree the plaintiff appealed, as did also the defendants, to the Court of the District Judge of Bareilly. The learned District Judge found that the land in question was the plaintiff's and that the defendants had acquired no right by prescription to use the land or the chabutra and that no custom to use the land or chabutra had been established. After stating his reasons, with which we agree, for holding that the defendants had acquired no easement by prescription, he thus discussed the question of a custom:—

"Have the defendants and other *mirasis* a customary right to use the land for stationing their *tazias* and *alums* at the time of the *Moharram*? Assuming that such rights might possibly be acquired against proprietors of land by a class only out of the public, I think proof is requisite that the use has been of right and had not a merely permissive origin, and that the right should be distinctly claimed as by custom. Now in the present case, beyond the mere fact that various *mirasis*, whose connexion with each other is not established, have, within a period of twenty years or so, placed *tazias* on the land and sung there, I find no evidence of a right. [90] The particular part of Bareilly does not seem to have been long inhabited and the only clue to the origin of the use is a suggestion by Chaudhri Shib Lal, witness for the defendants, that his ancestor may

have permitted it when he was zamindar. But besides this, the defendants do not set up a claim to customary user, but pleaded a proprietary right which they have failed to establish." The District Judge allowed the plaintiff's appeal, and varied the decree of the Munsif by directing that the chabutra be removed without permission to the defendants to re-build temporarily.

From the decree of the District Judge the defendants appealed to this Court. The appeal was heard by our brother Aikman. He was of opinion that the defendants had in their written statement claimed a customary right to use the land and chabutra for the ceremonies of the *Moharram*. Our brother Aikman in his judgment said:—"There was evidence in this case that the *mirasis*, to which caste the defendants-appellants belong, had for a period of twenty years or so placed *tazias* on the disputed plot and sung there. There was a suggestion that this was by leave of the zamindar, but there was no evidence in support of this. In my opinion the facts found by the District Judge are sufficient to establish the custom set up by the appellants," and he restored the decree of the Munsif. From that decree of our brother Aikman this appeal has been brought by the plaintiff.

It is obvious from the findings of the District Judge that no easement by prescription had been proved in this case. There was no dominant tenement. It was not proved that the defendants or any of them had as of right and without interruption and for twenty years enjoyed a right to use the land or the chabutra for any purpose whatsoever. All that was proved, according to the findings of the District Judge, was "that various *mirasis*, whose connexion with each other is not established, have within a period of twenty years or so placed *tazias* on the land and sung there." We are bound by the findings of fact of the lower appellate Court, but we are not bound by the conclusions of law of the lower appellate Court. What we have to consider is, does the fact which the District Judge [91] found—that various *mirasis* whose connexion with each other was not proved, had "within a period of twenty years or so placed *tazias* on the land and sung there,"—unexplained, necessarily in law lead to the conclusion that there was a local custom by virtue of which the easement now claimed by the defendants was acquired?

If that fact found by the District Judge and unexplained does not necessarily in law lead to that conclusion, the decree of the District Judge was by reason of ss. 584 and 585 of the Code of Civil Procedure final and non-appealable.

Section 18 of the Indian Easements Act, 1882 (Act No. V of 1882) leaves at large the question of law how a local custom may be established. As such a local custom as is now set up on behalf of the defendants excludes or limits the operation of the general rule of law that a proprietor or other person lawfully in the possession of land, and whose rights are not controlled or limited expressly or impliedly by Statute law, by grant, or by contract, has an exclusive right to the use or enjoyment of his land for all purposes not injurious to the rights of his neighbours, it is necessary that those setting up such a custom as that in the present case should be put to strict proof of the custom alleged by them.

A local custom to have the effect of excluding or limiting the operation of the general rules of law must be reasonable and certain. A local custom as a general rule is proved by good evidence of a usage which has obtained the force of law within the particular district, city, mohalla or village, or at the particular place, in respect of the persons and things which it concerns. Where it is sought to establish a local custom by

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which the residents or any section of them of a particular district, city, village or place are entitled to commit on land not belonging to or occupied by them, acts which, if there was no such custom, would be acts of trespass, the custom must be proved by reliable evidence of such repeated acts openly done, which have been assented and submitted to, as leads to the conclusion that the usage has by agreement or otherwise become the local law of the place in respect of the person or things which it concerns. In order to establish a customary right to do acts which would otherwise be acts of trespass on the property of another the enjoyment must have been as of right, and neither by violence nor by stealth, nor by leave asked from time to time. We cannot in these Provinces apply the principle of the English Common Law that a custom is not proved if it is shown not to have been immemorial. To apply such a principle as we have been urged by the counsel for the appellant to do would be to destroy many customary rights of modern growth in villages and other places. The Statute law of India does not prescribe any period of enjoyment during which, in order to establish a local custom, it must be proved that a right claimed to have been enjoyed as by local custom was enjoyed. And in our opinion it would be inexpedient and fraught with the risk of disturbing perfectly reasonable and advantageous local usages regarded and observed by all concerned as customs to attempt to prescribe any such period.

In our opinion a Court should not decide that a local custom, such as that set up in this case, exists, unless the Court is satisfied of its reasonableness and its certainty as to extent and application, and is further satisfied by the evidence that the enjoyment of the right was not by leave granted or by stealth or by force, and that it had been openly enjoyed for such a length of time as suggests that originally, by agreement or otherwise, the usage had become a customary law of the place in respect of the persons and things which it concerned.

As we understand the judgment of the District Judge, all which he found to have been proved by the evidence was that different *mirasis* had within a period of about twenty years before suit placed, during the *Moharram*, *tazias* upon the land and had sung there, but that it was not proved, at any rate to his satisfaction, that there was any connexion between such different *mirasis*, or that they represented the body of *mirasis* of Bareilly, or even of the particular mohalla or part of Bareilly in which the plaintiff's land is situate. We cannot say that in law the District Judge was bound, on the evidence before him in first appeal, to hold that a local custom under which the defendants could lawfully and adversely to the plaintiff [93] go upon his land or maintain or erect a *chabutra* there was established. Under such circumstances we allow this appeal with costs, and, setting aside the decree of this Court, we restore and affirm the decree of the District Judge.

Appeal decreed.

17 A. 93=15 A.W.N. (1895) 16.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

MUHAMMAD KARIM-ULLAH KHAN (*Plaintiff*) v. AMANI BEGAM
AND OTHERS (*Defendants*).^{*} [14th January, 1895.]

Muhammadian law—Dower—Widow's lien for dower—Suit by heir claiming possession without payment of proportionate share of dower—Burden of proof as to nature of widow's possession.

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15 A.W.N.
(1895) 16.

When a Muhammadan widow is in possession, and has been for some time in undisturbed possession of property which had been of her husband in his life-time, and dower is admitted or proved to be due to her, it lies upon the heir who claims partition without payment of his proportion of dower to prove that the Muhammadan widow was not let into possession by her husband in lieu of dower or did not obtain possession in lieu of dower after her husband's death with the consent or by the acquiescence of the heirs.

[R., 35 C. 120=8 C.L.J. 245=12 C.W.N. 16; 33 C. 475 (478)=13 C.L.J. 427 (429)=9 Ind. Cas. 1031 (1033); D., 1900 P.L.R. p. 335.]

THIS was an appeal under s. 10 of the Letters Patent from the judgment of Burkitt, J., in S. A. No. 940 of 1893, reported in I. L. R., 16 All. at p. 225. The facts of the case were as follows:—

The plaintiff sued as heir to one Mahmud Khan for partition of certain immoveable property alleged to have been of Mahmud Khan in his life-time. He impleaded as defendants Musammut Amani Begam and Musammat Moti Begam the two widows of Mahmud Khan, Musammat Mahbub Begam the widow of one Umar Khan deceased, brother to Mahmud Khan, and certain other persons who, he stated, with himself comprised the entire list of the heirs of Mahmud Khan. He claimed possession by partition of 21 sihams out of 128 sihams in two houses specified in the plaint, of which the widows were apparently in possession, but he did not offer to pay any portion of any dower-debt which might be due to the widows or any of them, nor did he mention that any such dower-debt was due.

[94] Amani Begam, the principal defendant, pleaded *inter alia* that the property claimed was in possession partly of herself, partly of Mahbub Begam and partly of one Husaini Begam, the widow of a brother of Mahmud Khan (who, she alleged, was a necessary party to the suit, which was therefore bad for misjoinder); the possession of herself and of Mahbub Begam being in lieu of the respective dower-debts due to them. She also pleaded that the suit was a collusive suit brought at the instance of one of the defendants, who had purchased the rights of some of the other defendants as a speculation, and further denied the plaintiff's title as an heir to Mahmud Khan.

The defendant Mahbub Begam also pleaded possession in lieu of her dower-debt and denied that the plaintiff or the defendants Nos. 4, 5 and 6 had any title by inheritance. Those defendants admitted the plaintiff's claim and prayed to be exempted from costs. The defendants Moti Begam and Abdul Rahman (the alleged vendee of a portion of the property in suit) entered no appearance.

The Court of first instance (Munsif of Sambhal) found that the pedigree given by the plaintiff was correct; that Husaini Begam was not a necessary party to the suit; that the three principal defendants were in possession in lieu of their respective dower-debts, and that the plaintiff

^{*} Letters Patent Appeal No. 23 of 1894.

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(1895) 16.

was not entitled to succeed on the plaint as framed. It accordingly dismissed the plaintiff's suit.

The plaintiff appealed, and the lower appellate Court (Subordinate Judge of Moradabad) made an order of remand for decision of the issue.—“Did the widows of Mahmud Khan get possession of his estate in lieu of their dower with the consent express or implied of his heirs?”

This order of remand was set aside on appeal by the High Court, and the appeal to the lower appellate Court again came on for hearing, when the Court recorded the following finding:—“From the evidence on the record it is not conclusively proved that the defendant (*i.e.*, the principal defendant Amani Begam) came into possession in lieu of dower-debt with the permission and consent of the [95] heirs of the husband. It is also worthy of consideration that the defendant (female) did not even consider the plaintiff as heir of her husband. Then there was no reason why she would have obtained his consent. The genealogical table filed by the plaintiff is proved to be correct, and it is also proved satisfactorily that the plaintiff is heir of Mahmud Khan. The sihams (shares) alleged by the plaintiff are correct according to Muhammadan law.” The lower appellate Court then proceeded to decree the plaintiff's appeal.

The defendants Amani Begam and others thereupon appealed to the High Court, and the appeal coming on for hearing before Burkitt, J., was decreed and the decree of the Court of first instance restored on the 15th of February 1894.

The plaintiff then appealed under s. 10 of the Letters Patent.

Muushi Madho Prasad, for the appellant.

Mr. Abdul Majid, for the respondents.

JUDGMENT.

EDGE, C. J. and BANERJI, J.—This appeal has arisen out of a suit brought for possession by partition by one of the heirs of a deceased Muhammadan. The property in dispute was a house in which the Muhammadan had lived. Two of the defendants-respondents were widows of the deceased Muhammadan, and after his death they continued to live in the house in undisputed possession for more than a year. They resisted the suit on the ground that they were in possession for their dower. It is found that dower in fact was due. The case came before our brother Burkitt on appeal on behalf of the defendants. He allowed the appeal and dismissed the plaintiff's suit. This appeal has been brought by the plaintiff. What the Subordinate Judge found in first appeal with regard to possession for dower was this—“From the evidence on record it is not conclusively proved that the defendants came into possession in lieu of dower with the permission and consent of the heirs.” It appears to us that when a Muhammadan widow is in possession and has been for some time in undisturbed possession, and dower is admitted or proved to be due to her, it lies [96] upon the heir who claims partition without payment of his proportion of dower to prove that the Muhammadan widow was not led into possession by her husband in lieu of dower, or did not obtain possession in lieu of dower after her husband's death with the consent or by the acquiescence of the heirs. The Subordinate Judge put the *onus* upon the wrong party in our opinion. We adhere to our judgment delivered in *Amanat-un-nissa v. Bashir-un-nissa*. (F. A. No. 312 of 1893, decided on the 12th of December, 1894, *supra* p. 77) on the question as to whether a Muhammadan widow who is proved not to have obtained possession in

lieu of dower either from her husband or with the consent or acquiescence of the heirs, has or has not a lien over the property. It appears to us that that judgment does not touch the present case. We have been again referred to a judgment of their Lordships of the Privy Council in *Mussumat Bebee Bachun v. Sheikh Hamid Hossein* (1), and it has been contended that it appears, as was assumed by our brother Burkitt in the present case, that in that case the Muhammadan widow had obtained possession in lieu of her dower after her husband's death. In our opinion that fact does not appear from the report. In 1851, the Muhammadan widow in that case instituted proceedings before the Collector to obtain mutation of names in her favour, her husband having died in the previous month. It is stated in the report—"She alleged in her petition that she was in possession by right of inheritance and also on account of her dower." It was argued from the passage that it necessarily follows that she claimed to have obtained possession in lieu of her dower after her husband's death. That does not follow in our judgment. If she had been put in possession by her husband in his lifetime in lieu of dower she would probably describe her possession after his death as a possession by right of inheritance and also on account of dower. In this case, it not having been found as a fact that these ladies had not obtained possession in lieu of dower with the consent or by the acquiescence of the heirs, the plaintiff failed to prove the right to partition without the payment of his proportionate share of dower.

[97] Although we do not agree with the propositions of law of our brother Burkitt, we, for the above reasons, dismiss this appeal with costs.

Appeal dismissed.

17 A. 97 = 15 A.W.N. (1895) 17.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

GENDA MAL AND ANOTHER (*Defendants*) v. PIRBHU LAL (*Plaintiff*).
[14th January, 1895.]

Civil Procedure Code, s. 373—"Order"—"Decree"—Appeal.

An order under s. 373 of the Code of Civil Procedure allowing a plaintiff to withdraw his suit with liberty to bring a fresh suit on the same cause of action is not appealable, not being a decree within the meaning of s. 2 of the Code, nor one of the orders from which an appeal is allowed by s. 588. *Kalian Singh v. Lekhraj Singh* (2), *Jagdish Chaudhri v. Tulshi Chaudhri* (3), *Zahuri v. Dina Nath* (4) and *Jogodindro Nath v. Sarut Sunduri Debi* (5) referred to *Ganga Ram v. Data Ram* (6) not followed.

[F., 1 Ind. Cas. 604 (607) = 21 P.R. 1909 = 27 P.W.R. 1909 = 32 P.L.R. 1909.]

THE plaintiff sued in the Court of the Munsif of Pilibhit for the demolition of a wall which, he alleged, the defendants had wrongfully constructed upon land belonging to him. While the suit was pending in the Munsif's Court, the plaintiff applied under s. 373 of the Code of Civil Procedure for leave to withdraw his suit with liberty to bring a fresh suit on the same cause of action, on the ground that since the filing of the plaint the defendants had made further erections upon land belonging to him. The

* Letters Patent Appeal No. 28 of 1894.

(1) 14 M.I.A. 377.

(2) 6 A. 211.

(3) 16 A. 19.

(4) 13 A.W.N. (1893) 204.

(5) 18 C. 322.

(6) 8 A. 82.

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JAN. 14. Munsif rejected this application, and proceeding to try the suit on the merits, dismissed the plaintiff's claim.
- The plaintiff appealed, and the lower appellate Court (Subordinate Judge of Bareilly) holding that the first Court should have allowed the plaintiff to withdraw, made an order under s. 373 of the Code in his favour.
- APPEL- LATE CIVIL. Against this order the defendants appealed to the High Court. The appeal coming on for hearing before a single Judge, the respondent (plaintiff) took a preliminary objection that no appeal lay from [98] the order under s. 373. This objection was allowed and the appeal dismissed.
- 17 A. 97 =
15 A.W.N. (1895) 17. The defendants thereupon appealed under s. 10 of the Letters Patent. Mr. J. Simeon, for the appellants.
Munshi Gobind Prasad, for the respondent.

JUDGMENT.

EDGE, C. J. and BANERJI, J.—This is an appeal brought by the defendants in the suit under s. 10 of the Letters Patent. In the Court of the Munsif, the plaintiff asked permission to withdraw from the suit with liberty to bring a fresh suit. The Munsif declined to give such permission, and finally made a decree dismissing the suit. The plaintiff appealed from that decree, and in the Court of first appeal, he urged that there were sufficient grounds for the granting of permission to him to withdraw the suit with liberty to bring a fresh suit. The Judge of the Court of first appeal, holding that view, gave permission under s. 373 of Act No. XIV of 1882, to the plaintiff to withdraw the suit with liberty to bring a fresh suit, and stated that the result would be that the decree of the Munsif would be set aside. That order was within the power of the Court of first appeal by reason of s. 582 of the Code. From that order granting permission the defendants appealed to this Court. The appeal lay to a single Judge, and our brother Blair, holding that no appeal lay from an order under s. 373 of Act No. XIV of 1882, dismissed the appeal. From that decree of our brother Blair, the defendants have brought this appeal. Mr. Simeon for the appellants has relied upon the decision of Mr. Justice Straight in *Ganga Ram v. Data Ram* (1), which case was very similar to the present, there having been there a decision by the first Court and permission granted under s. 373 by the first appellate Court. On the other hand, Mr. Viddya Charan Singh relies upon the decision of Mr. Justice Oldfield and Mr. Justice Brodhurst in *Kalian Singh v. Lekhraj Singh* (2), the decision of our brother Burkitt in *Jagdish Chaudhri v. Tulshi Choudhri* (3), the decision of our brother Aikman in *Zahuri v. Dina* [99] *Nath*, (Weekly Notes for 1893, p. 204) and the decision of Mr. Justice Trevelyan and Mr. Justice G. Banerji, in the case of *Jogodindro Nath v. Sarut Sunduri Debi* (4). In support of the appeal there is merely the decision of Mr. Justice Straight. In the case in which he expressed that opinion Mr. Justice Tyrrell, who was sitting with him, expressed no opinion on the point. There are thus in support of the contrary view the decisions of Mr. Justice Oldfield, Mr. Justice Brodhurst, Mr. Justice Trevelyan, Mr. Justice G. Banerji, Mr. Justice Burkitt, Mr. Justice Aikman and the decision at present under appeal of Mr. Justice Blair. The balance of authority is certainly in favour of the respondent. When permission is given under s. 373, there is no formal or other expression of an adjudication upon any right claimed or defence set up, and such a permission does not decide the suit, or, if the permission be given in the course of an appeal, the appeal or the suit. Consequently, the order

(1) 8 A. 82.

(2) 6 A. 211.

(3) 16 A. 19.

(4) 18 C. 322.

giving permission is not a decree as defined in s. 2 of Act No. XIV of 1882. It is, however, an order granting permission, but it is not one of the orders which is appealable under s. 588 of the same Act. When an order is made under s. 373 in the course of an appeal permitting the plaintiff to withdraw the suit with liberty to bring a fresh suit, it decides nothing as to the merits of the decree of the first Court, but it merely wipes out that decree by reason of the suit being withdrawn. We dismiss this appeal with costs.

Appeal dismissed.

1895
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17 A. 97 =
15 A.W.N.
(1895) 17.

17 A. 99 = 15 A.W.N. (1895) 19.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

JANKI KUAR (*Judgment-debtor*) v. SARUP RANI AND ANOTHER
(*Decree-holders*).^{*} [18th January, 1895.]

Execution of decree - Civil Procedure Code, ss. 253, 582, 583 - Security for performance of decree of appellate Court - Method of enforcing such security.

Where in an appeal security has been given to the appellate Court for the due performance of such decree as it may pass, the decree-holder may enforce such [100] security in the manner provided for by s. 253 of the Code of Civil Procedure. *Bans Bahadur Singh v. Mughla Begam* (1) followed. *Thirumalai v. Ramayyar* (2) and *Venkapa Naik v. Easlingapa* (3) approved. *Kali Charun Singh v. Balgobind Singh* (4) and *Tokhan Singh v. Udwant Singh* (5) dissented from.

[*Diss.*, 32 C. 494 = 1 C.L.J. 118 = 9 C.W.N. 372; F., 4 L.B.R. 197 = 14 Bur. L.R. 170; 109 P.R. 1906 = 1 P.L.R. 1907; R., 25 B. 409; 31 B. 128 = 8 Bom. L.R. 932; 13 C.P.L.R. 106; 7 O.C. 210.]

IN this case the decree-holders had obtained a decree from the Court of the Subordinate Judge of Cawnpore. That decree was affirmed on appeal by the High Court. The decree-holders applied more than once for execution, but specifying in their applications the decree of the lower appellate Court and not that of the High Court. Their applications were, however, granted and execution proceeded; but on a subsequent similar application being made the judgment-debtor raised an objection that the wrong decree had been named. The Subordinate Judge overruled that objection, applying the principle of s. 13 of Act No. XIV of 1882. The decree-holders sought to execute their decree by sale of certain property included in a security bond given for the performance of the decree which the High Court might pass in appeal.

The judgment-debtor on her objection being disallowed appealed to the High Court, and pleaded *inter alia* that, the decree having been incorrectly stated in the application for execution, that application could not be granted; that the principle of *res judicata* did not apply, and that the decree-holders could not enforce the decree in respect of the property covered by the security bond without first obtaining a decree for sale under section 99 of the Transfer of Property Act, 1882.

^{*} Letters Patent Appeal No. 9 of 1894.

(1) 2 A. 604.
(4) 15 C. 497.

(2) 13 M. 1.
(5) 22 C. 25.

(3) 12 B. 411.

1895
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15 A.W.N.
(1895) 19.

This appeal was dismissed by Burkitt, J., on the 6th of February 1894, and from that decision the judgment-debtor appealed under s. 10 of the Letters Patent.

Babu *Becha Ram Bhattacharji*, for the appellant.
Munshi *Ram Prasad*, for the respondents.

JUDGMENT.

EDGE, C. J., and BANERJI, J.—This is an appeal in execution proceedings. The decree-holder obtained a decree from the Court [101] of the Subordinate Judge of Cawnpore. His opponents appealed to the High Court. The decree of the Subordinate Judge was confirmed by the High Court with costs. The decree-holder subsequently applied for execution of the decree of the Court of first instance. An order for execution was made and execution proceeded. This is a subsequent application to further execute the same decree, by the assignees of the decree-holder. The judgment-debtor objects that the decree which could be executed was not the decree of the Subordinate Judge, but the decree of the High Court. It is perfectly true that the decree of the Subordinate Judge did merge in the decree of the High Court, but this point is not open to the judgment-debtor now. It was a point which the judgment-debtor could have taken in the previous application. It was not taken by her, and the principle of *res judicata* applies, and she is not now entitled to say that the decree of the Subordinate Judge is not the decree which can be executed. Mr. *Becha Ram* contended that the principle of *res judicata* did not apply because his client did not think it convenient to raise that objection on the previous application. The principle of *res judicata* does not depend upon the convenience, interest or motive of the litigant. It depends upon whether it was open to the litigant to raise the point on the previous occasion, and this point not having been raised by her then she cannot open it now.

In execution of the decree the judgment-creditors, the present decree-holders, asked the Court to put its process in execution by sale of property included in a security bond given for the performance of the decree which the High Court might pass in appeal. It is contended by Mr. *Becha Ram* that s. 99 of the Transfer of Property Act, 1882, limits the rights of these decree-holders, so far as the security bond is concerned, to a suit, and that s. 253 of the Code of Civil Procedure does not apply to the case. Section 99 of the Transfer of Property Act has, in our opinion, no application to the enforcement, by a process of the Court, of a security bond given to the Court for the performance of its decree. We are also of opinion that a security bond given to an appellate Court can be [102] enforced in the same way as a security bond can be enforced under s. 253 of the Code of Civil Procedure. We are supported in that opinion by the judgment of the High Court of Madras in *Thirumalai v. Ramayyar* (1), by a judgment of the High Court of Bombay in *Venkapa Naik v. Baslingapa* (2), and by the judgment of the majority of the Full Bench in this Court in *Bans Bahadur Singh v. Mughla Begam* (3). It appears to us that when an appellate Court is given by law power to require a security bond to be given for the performance of its decree, as for instance under s. 545 of the Code of Civil Procedure, 1882, it was not the intention of the Legislature that the bond should be given by one party to the other, or that the bond given to the Court should not be enforced by ordinary process,

(1) 13 M.

(2) 12 B. 411.

(3) 2 A. 604.

similar to that under s. 253 in the case of a security bond given in the suit; and it could not have been the intention that the Court should sue upon the bond, or that it should be necessary for the Court to assign the bond for some other person to sue upon it. In our opinion ss 582 and 583 of the Code of Civil Procedure made applicable in the case of a security bond given to an appellate Court s. 253 of the same Code. The provision in s. 363 of the Code that "in the case of a surety such security may be realised in manner provided by s. 253" was necessary, as s. 363 applies to circumstances arising subsequent to the decree of the first Court and is not in the chapters relating to the powers of appellate Courts. Our attention has been drawn to the case of *Kali Charun Singh v. Balgobind Singh* (1), subsequently followed in the case of *Tokhan Singh v. Udwant Singh* (2). In our opinion the view of law as stated in the cases in Madras and Bombay and by the majority of the Full Bench of this Court is right. The other objections were purely technical, and even from a technical point of view there was no substance in them. We dismiss this appeal with costs.

Appeal dismissed.

17 A. 103 = 15 A W N. (1895) 20.

[103] APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and
Mr. Justice Banerji.*

BADI-UN-NISSA (*Judgment-debtor*) v. SHAMS-UD-DIN AND
OTHERS (*Decree-holders*)* [21st January, 1895.]

Act No. XV of 1877 (Indian Limitation Act), sch ii. art. 179—Limitation—Date of final decree or order of the Appellate Court—Execution of decree.

Certain plaintiffs obtained a decree for pre-emption in respect of four villages. The defendant appealed, and the lower appellate Court dismissed the appeal. The defendant again appealed, but in his appeal only questioned the decision of the lower appellate Court in respect of two of the villages in suit. In this second appeal the plaintiffs' suit was dismissed as to one of the villages with regard to which the appeal was preferred and the defendant's appeal was dismissed as to the other.

Held that in respect of all the three villages as to which the final decree stood in favour of the plaintiffs, limitation began to run against the decree-holders from the date of the decree in second appeal, and not as to two of them from the date of the lower appellate Court's decree. *Hur Proshad Roy v. Enayet Hossein* (3), *Sangram Singh v. Bujhrat Singh* (4) and *Mashiat-un-nissa v. Rari* (5), distinguished.

THE facts of this case are as follows:—

The plaintiffs-respondents obtained a decree for pre-emption in respect of shares in four villages sold under a single instrument for a single price, viz., Ujhani, Qayam-ud-dinpur, Hasanpur and Bhonka. The defendant appealed in respect of all four villages, and the lower appellate Court upheld the decree of the Court of first instance on the 19th of December 1889. The defendant appealed to the High Court in respect of Ujhani and Hasanpur only, and on the 16th November 1892 the High Court decreed the appeal as regards Ujhani, but dismissed it as to Hasanpur. On the 9th of March 1893 the plaintiffs applied for execution of their decree by

* Letters Patent Appeal No. 34 of 1894.

(1) 15 C. 497. (2) 22 C. 25. (3) 2 C.L.R. 471. (4) 4 A. 36. (5) 13 A. 1.

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(1895) 19.

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(1895) 20.

delivery of possession of Qayam-ud-dinpur, Bhonka and Hasanpur. The defendant objected that execution of the decree so far as it related to Qayam-ud-dinpur and Bhonka was barred by limitation. The Munsif, in whose Court the application was made, disallowed the objection.

[104] The judgment-debtor appealed and her appeal was decreed by the Subordinate Judge.

The decree-holders then appealed to the High Court, which, on the 19th of April 1894, decreed the appeal and restored the order of the Munsif.

From this decree the judgment-debtor appealed under s. 10 of the Letters Patent.

Munshi *Ram Prasad*, for the appellant.

Babu *Datti Lal*, for the respondents.

JUDGMENT.

EDGE, C. J. and BANERJI, J.—The respondents here obtained a decree for pre-emption of certain shares in four villages, which we shall call respectively No. 1, No. 2, No. 3 and No. 4 villages. The appellant, who was the defendant in the suit, appealed that decree to the Court of the District Judge. The District Judge on the 19th of December 1889, dismissed the appeal and confirmed the decree of the Court of first instance. From that decree of the District Judge, the defendant appealed to this Court, in respect only of villages 1 and 3. By his appeal he did not question the decree so far as villages 2 and 4 were concerned. On the 10th of November 1892, this Court varied the decree of the Court below by dismissing the plaintiff's suit so far as village No. 1 was concerned, and dismissed the defendant's appeal as to No. 3. On the 29th March 1893, the plaintiffs applied for execution of their decree in respect of villages Nos. 2, 3, and 4. To that application the defendant objected in respect of villages 2 and 4 that the execution was barred by three years' limitation. The Court executing the decree disallowed the objection. The Subordinate Judge in appeal reversed the decree of the first Court and allowed the objection. The plaintiff appealed to this Court, and Mr. Justice Tyrrell in appeal reversed the decree of the Subordinate Judge and restored that of the Court of first instance. From that decree of Mr. Justice Tyrrell this appeal has been brought under s. 10 of the Letters Patent.

It has been contended by Munshi *Ram Prasad* for the appellant that the decree of the District Judge became final as to villages 2 [105] and 4, and that the three years' limitation prescribed by article 179 of schedule ii of Act No. XV of 1877, began to run, so far as villages 2 and 4 are concerned, from the 19th of December 1889, which was the date of the decree of the District Judge in the appeal in the suit. He has cited the following cases:—*Hur Proshad Roy v. Enayet Hossein* (1), *Sangram Singh v. Bujharat Singh* (2) and *Mashiat-un-nissa v. Rani* (3); but in these cases all the parties to the suit were not parties to the various appeals from the decree in the suit. The decree of this Court in the appeal in the suit as a matter of fact varied the decree in the suit by dismissing the suit of the plaintiffs as to one of the villages. There was consequently, in our opinion, no final decree between these parties until the decree of this Court was made. It is true that this Court, in the appeal to it, was bound to treat as final the rights of the parties *quá* villages 2 and 4, as those

(1) 2 C.L.R. 471.

(2) 4 A. 36.

(3) 13 A. 1.

villages were not the subject of appeal to it, but still it was the decree of the High Court which became the final decree between the parties to the suit. This case is distinguishable from those cited to us, for in those cases, as some of the parties to the earlier decrees were not parties to the subsequent decrees, the earlier decrees became final in the suit, so far as they were concerned, as between themselves, but here the final decree in the suit between the parties was the decree of this Court. We are, consequently, of opinion that paragraph 2 of article 179 of schedule ii of the Indian Limitation Act, 1877, applies in this case, and that the application for execution was in time.

The appeal is dismissed with costs.

Appeal dismissed.

17 A.106 (P.C.) = 5 M.L.J. 3 = 22 I.A. 44 = 6 Sar. P.C.J. 526.

[106] PRIVY COUNCIL.

PRESENT :

Lords Halsbury, Hobhouse, Shand, and Davey, and Sir R. Couch.

[On appeal from the High Court at Allahabad.]

THAKUR PRASAD *Petitioner (Appellant)* v. FAKIR-ULLAH
Objector (Respondent). [7th & 24th November, 1894.]

Effect as regards limitation of striking off petition for execution of decree—Second application, without express leave granted when the first was struck off, ss. 373, 647, of the Code of Civil Procedure inapplicable here—Act VI of 1891, ss. 4 and 5.

It is clear, both from the Code of Civil Procedure itself, and from the provisions of the Limitation Act of 1877, that a succession of applications for execution is contemplated. Section 647, Civil Procedure, cannot, on its true construction, be applied to execution of decree, and was inapplicable to petitions for execution before, and independently of, the passing of Act VI of 1892, sections 4 and 5.

A first application for execution of a decree having been, on the decree-holder's petition, struck off the list of cases pending for hearing, a second application was made within the period of limitation.

Held, that the first application, notwithstanding that the order striking it off had been made, was not annulled, but afforded a fresh starting point for limitation.

Held also, that although the petition for execution had been withdrawn without leave to apply again having been expressly granted by the Court, the petitioner's right to renew his petition, within due time, remained. The provisions of section 373, which could only have applied through the effect of section 647, had not been rendered applicable thereby to petitions for execution.

The judgment in *Sarju Prasad v. Sita Ram* (1) overruled. That in *Bunko Behary Gangopadhya v. Nil Madhub Chuttopadhya* (2) approved.

[*Rel. on*, 15 C.L.J. 89 = 13 Ind. Cas. 365 (369); *F.*, 24 C. 197 = 1 C.W.N. 236; 6 A.L.J. 760 (761) = 3 Ind. Cas. 904 (905); 170 P.L.R. (1903); 22 P.R. 1905 = 57 P.L.R. 1905; *Appr.*, 21 M. 261 (263); *R.*, 20 B. 198; 26 B. 109 = 3 Bom. L.R. 565; 36 B. 20 (27) = 13 Bom. L.R. 487 (492) = 11 Ind. Cas. 554 (556); 39 C. 265 (273) = 14 C.L.J. 431 (485) = 12 Ind. Cas. 151 (153); 26 M. 438; 3 C.L.J. 276; 12 C.L.J. 185 = 14 C.W.N. 924 (929) = 7 Ind. Cas. 126; 13 C.L.J. 532 (533) = 11 Ind. Cas. 385 (386); 15 C.L.J. 187 (189) = 14 Ind. Cas. 456 (457); 16 C.W.N. 736 (741); 18 Ind. Cas. 542 (543); 19 Ind. Cas. 683 (684); 4 L.B.R. 83 (84) = 14 Bur. L.R. 323 (325); 130 P.L.R. 1902; 29 P.R. 1908; *D.*, 26 B. 76 = 3 Bom. L.R. 431; 2 Ind. Cas. 156; 8 O.C. 263.]

APPEAL from decree (7th January 1890) of the High Court (3) reversing a decree (18th December 1888) of the Subordinate Judge of Allahabad.

(1) 10 A. 71.

(2) 18 C. 635.

(3) 12 A. 179.

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17 A. 106

(P.C.)=5

M.L.J. 3=22

I.A. 44=6

Sar. P.C.J.

526.

The effect of striking off the list of pending cases an application for execution came into question on two points in this appeal. First, as to whether a prior application had been annulled by being struck off, or still remained a fresh starting point for limitation, in respect of a renewal of the application within three years: secondly, whether or not the High Court had been right in applying the [107] provisions of s. 373 of the Code of Civil Procedure, on the construction that they had been rendered applicable to petitions for execution by s. 647; and in disallowing a second application where no liberty to present a fresh application had been given by the Court which struck off the first.

The appeal arose out of objections taken by the respondent, judgment-debtor, to the execution of a decree of the 11th of April 1883, for Rs. 10,320, held by the appellant, who petitioned for execution.

On the 29th of August 1885, the decree-holder's petition was on the file of the Subordinate Judge, who on that date recorded the order, striking it off, which appears at pp. 180, 181 and at p. 187 (as literally translated by Mahmood, J., in his judgment) of I.L.R., 12 All. On the 28th of August 1888, the decree-holder filed another application for execution, to which the judgment-debtors objected contending that ss. 373 and 374 of the Code of Civil Procedure, as construed in *Sarju Prasad v. Sita Ram* (1) operated as a bar. The Subordinate Judge disallowed the objection on the 18th of December 1888, giving his reasons thus:—

“As regards the first case of *Fakir-ullah*, objector, it is evident that the pleader for the decree-holder asked for striking off the case for a short time. The words ‘for the present’ were used by the decree-holder's pleader, and were understood by the Court in one and the same sense, and the Court, accepting the prayer of the decree-holder's pleader, struck the case off the file. This proceeding, having regard to the usage which has obtained from a long series of years, meant nothing more than this, that the Court allowed the case to be temporarily struck off, recognizing indirectly the right of the decree-holder's pleader to execute the decree further. Under these circumstances the case of *Fakir-ullah* is not fully governed by the precedents relied upon by the objectors.”

An appeal was heard by the High Court (STRAIGHT and MAHMOOD, JJ.). No distinction was drawn between the facts in the case [108] above mentioned and the present one. They decreed the appeal, and set aside the order of the Subordinate Judge. See *Fakir-ullah v. Thakur Prasad* (2). On the 21st of July 1892, the present appeal was admitted. On the 29th of July 1892, Act VI of 1892, to amend the Indian Limitation Act, 1877, and the Code of Civil Procedure was passed with a clause rendering its enactment, in regard to s. 647, applicable hereto.

On this appeal Mr. G. E. A. Ross, for the appellant, argued that the High Court had been in error in holding that by reason of the order passed on the first application for execution, the decree-holder was precluded from making the second application for execution. He was not barred by limitation, for the filing of the first application, though his petition was struck off, gave a fresh starting point for limitation, and the second application was within time. The reason assigned by the High Court was that the first application had been withdrawn, without leave given by the Court, which struck the petition off its file, to renew it, whereby a second application was precluded under s. 373 of the Code of Civil Procedure, that section having been rendered applicable, in their opinion, to executions by

(1) 10 A. 71.

(2) 12 A. 179.

the effect of s. 647. But s. 373 was not applicable, and *Sarju Prasad v. Sita Ram* (1) had been wrongly decided. Even if, however, this had been a right construction of s. 647, the proceeding and order of the 5th January 1886, were not a withdrawal of the application for execution of decree, but a petition for permission to stay proceedings for the present time. The explanation given by the Subordinate Judge of the practice before, and down to 1885, with regard to the temporary withdrawal of applications for execution, justified his finding that the facts of this case were not the same as those in the case cited.

Reference was made to Act VI of 1892, enacting that an explanation should be added to s. 647, Criminal Procedure, that it does not apply to applications for execution of decrees and there were cited:— *Tara Chand Megraj v. Kashinath Trimbak* (2); *Eshan [109] Chunder Bose v. Prannath Nag* (3); *Ramanadan Chetti v. Periatambi Shervai* (4); *Bunko Behary Gangopadhya v. Nil Madhub Chuttopadhya* (5); *Radha Charan v. Man Singh* (6).

The respondent did not appear.

Afterwards (24th November), their Lordships' judgment was delivered by LORD HOBHOUSE:—

JUDGMENT.

In this appeal the appellant complains that the High Court of Allahabad has erred in refusing to entertain his application to execute a decree obtained by him against the respondents on the 11th of April 1883.

The mode in which the question arises is as follows:—

The appellant first applied for execution on the 20th of August 1885. He did not actively prosecute that application, and on the 5th of January 1886, his pleader stated that the case might be struck off the list of pending cases "for the present." An order was accordingly made striking the case off the list "for default."

On the 24th of August 1888, the appellant made a second application. This was within three years from the date of his first application, and was in good time if the period of limitation was to be reckoned from that date; but out of time if the first application was to be treated as a nullity because it had been struck off the list. The respondents put in a written objection opposing the appellant's second application on two grounds; one was that his first application did become a nullity. The Subordinate Judge treated it as affording a fresh starting point of time within the terms of the Limitation Act XV of 1877, and made an order dated the 18th of December 1888 disallowing the respondents' objection. His opinion on this point appears to be in accordance with many decided cases, and the High Court have not expressed any adverse opinion. This appeal is argued *ex parte*, and their Lordships have to look carefully at the contentions of the appellant; but they have no hesitation in agreeing with the Subordinate Judge that the application was not barred by lapse of time. The point on which [110] the High Court dismissed it is quite a different one, which their Lordships go on to state.

By the Civil Procedure Code of 1882 it is enacted in s. 373 that if the plaintiff withdraws from the suit or abandons part of the claim without the permission of the Court to bring a fresh suit, he shall be precluded

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I.A. 44 = 6

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526.

(1) 10 A. 71.

(4) 6 M. 250.

(2) 10 B. 62.

(5) 18 C. 635.

(3) 22 W. R. 512 = 14 B. L. R. 143.

(6) 12 A. 392.

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COUNCIL.

17 A. 106

(P.C.) = 5

M.L.J. 3 = 22

I.A. 44 = 6

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from bringing a fresh suit for the same matter or in respect of the same part. By s. 647 of the same Code it is enacted that the procedure therein prescribed shall be followed as far as it can be made applicable in all proceedings in any Court of civil jurisdiction other than suits and appeals.

Some short time ago, in the case of *Sarju Prasad v. Sita Ram* (1) a decision was passed by the High Court of Allahabad, the effect of which is stated by Mr. Justice Straight in the present case thus:—"That where the circumstances and the facts in regard to an application for execution show that it was withdrawn at the instance of the pleader for the decree-holder, and that no sanction was given to its withdrawal with liberty to present a fresh application, any subsequent application made by that decree-holder was prohibited by the rule of s. 373 of the Civil Procedure Code read with s. 647 of the same Act." And again he says that the principle of s. 373 is properly applicable to execution proceedings, and that a decree-holder who is not desirous to proceed with an application for execution is in the same position as a plaintiff who desires to withdraw from a suit. That principle has been since adhered to in Allahabad.

The Subordinate Judge was of course bound by the ruling of the High Court, but he construed his order of the 5th January 1886 in combination with the statement then made by the appellant's pleader and showed therefrom that further proceedings were contemplated, and that the order ought to be read as giving permission for such proceedings. Incidentally, and by way of showing what hardship would be worked by construing the exact terms of his order as if they amounted to an absolute dismissal of the case, he mentions that the universal practice was to treat orders of [111] that kind as not constituting any bar to future application by decree-holders.

On the respondents' appeal the High Court refused to construe the order of the 5th of January 1886, according to the interpretation of the Subordinate Judge. They considered themselves bound by the order as recorded. They do not deny the practice as stated by the Subordinate Judge; on the contrary, Mr. Justice Straight refers to it as very loose and as requiring the greater strictness enforced by the ruling in *Sarju Prasad's* case. On this point their Lordships have only to say that they think the Subordinate Judge right in reciting the whole of the record of the 5th of January 1886, which embodied the pleader's statement, in order to get at the true meaning of the order; and that he has given a very reasonable account of its meaning. But they do not further examine that question, because their decision must be rested on the more general ground that the ruling in *Sarju Prasad's* case is erroneous.

It is not suggested that s. 373 of the Civil Procedure Code would of its own force apply to execution proceedings. The suggestion is that it is applied by force of s. 647. But the whole of Chapter XIX of the Code, consisting of 121 sections, is devoted to the procedure in executions, and it would be surprising if the framers of the Code had intended to apply another procedure, mostly unsuitable, by saying in general terms that the procedure for suit should be followed as far as applicable. Their Lordships think that the proceedings spoken of in s. 647 include original matters in the nature of suits such as proceedings in probates, guardianships and so forth, and do not include executions. That is the view taken by the High Court of Calcutta, after consideration of the Allahabad decisions, in the case of *Bunko Behary Gangopadhya v. Nil Madhub Chuttopadhya* (2).

(1) 10 A. 71.

(2) 18 O. 695.

On this construction of s. 647 the reasoning of the High Court in *Sarju Prasad's* case falls to the ground. And it is clear, both from the Code itself and from the provisions of the Limitation Act of 1877, that the Legislature contemplated that there might [112] be a succession of applications for execution. Under these enactments a course of practice has grown up all over India. Whether it is an injurious practice, as intimated by the High Court in this case, is not a question for their Lordships. It appears to be allowed by the law, and it has never been successfully impugned except in Allahabad. The High Court of Bombay after one contrary decision, and the High Courts of Calcutta and Madras, have repeatedly affirmed the legality of the procedure which is struck at by the ruling in *Sarju Prasad's* case.

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Nov. 24.
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PRIVY
COUNCIL.
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17 A. 106
(P.C.)=5
M.L.J. 3=22
I.A. 44=6
Sar. P.C.J.
526.

Their Lordships' attention has been called to the recent Act VI of 1892, which would appear to have been passed in order to avoid the disturbance of practice caused by the Allahabad rulings. That Act is framed so as to apply to the present appeal, and would have controlled their Lordships' opinion had it been the other way. But having regard to the controversies which have arisen, and the difference of opinion between the various High Courts, their Lordships have thought it right to state their opinion that the Act of 1892 does nothing more than express the true meaning of the Civil Procedure Code.

The result is that the High Court ought to have dismissed the respondents' appeal with costs. Their Lordships will humbly advise Her Majesty to make that order, thereby restoring the Subordinate Judge's decree of the 18th of December 1888. The respondents must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant : Messrs. *Barrow and Rogers*.

17 A. 112 (P.C.)=5 M.L.J. 20=22 I.A. 1=6 Sar. P.C.J. 580.

PRIVY COUNCIL.

PRESENT :

Lords Hobhouse and Macnaghten, and Sir R. Couch.

[*On petition for special leave to appeal from the High Court at Allahabad.*]

SAIYID MUZHAR HOSSEIN (*Petitioner*) v. MUSSAMAT BODHA BIBI
AND ANOTHER (*Objectors*). [24th November & 8th December, 1894.]

Finality of an order with reference to the admission of an appeal to Her Majesty in Council
—*Civil Procedure Code, Chapter XLV—Refusal of a certificate, ss. 600, 601—*
Remand order, ss. 562 and 565.

An order comprising the decision of the Appellate High Court upon a cardinal issue in a suit, that issue being one that goes to the foundation of the suit, and one [113] that can never, while this decision stands, be disputed again, is a final decree for the purposes of appeal to the Queen in Council, notwithstanding that there may be subordinate inquiries yet to be made in disposing of the suit.

Rahimbhoy Habiobhoy v. Turner (1) referred to and followed.

The certificate, of which the grant was part of the procedure in the admission of such an appeal, was refused by the High Court on the ground that the proposed appeal was from an order remanding a suit under s. 562 of the Code of Civil

(1) 15 B. 155=18 I.A. 6.

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17 A. 112
(P.C.) = 5
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22 I.A. 1 = 6
Sar. P.C.J.
580.

Procedure; and that orders of remand under that section were, by the practice of the Court, treated as not final within s. 595, cl. (a). That practice is probably correct; but here the order only purported to be under s. 562, which was not applicable. The first court had not disposed of the suit upon a preliminary point, so as to have excluded evidence of fact appearing to the appellate court essential; and s. 565 appeared to be applicable rather than s. 562. The appellate court had reversed, once for all, the decision of the first Court upon an issue as to the making and validity of a will, which issue governed the whole case.

[F., 22 A. 405; 35 C. 618 = 8 C.L.J. 168 = 12 C.W.N. 543; R., 25 A. 629; 31 A. 545 = 6 A.L.J. 786 = 3 Ind. Cas. 967 (963) = 6 M.L.T. 94; 33 A. 391 (392) = 8 A.L.J. 192 = 9 Ind. Cas. 932; 29 C. 758 = 5 C.W.N. 617; 35 M. 1 (14) = 8 Ind. Cas. 340 (345) = 21 M.L.J. 1 (14) = 8 M.L.T. 453 (458); 23 A.W.N. 159; 15 C.W.N. 60 (61) = 7 Ind. Cas. 622; 11 O.C. 169; D., 18 A. 19 = 15 A.W.N. 134 (F.B.); 1 O.C. 206; 52 P.R. 1907 = 34 P.L.R. 1908 = 119 P.W.R. 1908.]

PETITION for special leave to appeal from an order (26th June 1894) of the High Court, refusing a certificate; also for special leave to appeal from an order (11th January 1894), in respect of which the certificate had been applied for and refused.

This *ex parte* petition for special leave to appeal arose out of the proceedings below in a suit in which the principal issue, raising the question whether a valid bequest had been made of property, was decided in the negative by the first court; which left other subordinate issues untried. The decision was reversed on appeal, the High Court, at the same time that it maintained the will, remanding the suit to the first court for the other issues to be disposed of, and purporting to do so under s. 562, Civil Procedure. The plaintiff, in order to obtain admission of an appeal to the Queen in Council, applied for a certificate (sections 595, 598). This was refused, on the ground that the order in appeal was not to be treated as a final one.

The petitioner applied for special leave to appeal for himself, and as representative of his deceased wife, Haidri Begum. The order (11th January 1894), and the order (26th June 1894), refusing the certificate were made in two suits, *Bodha Bibi* and *Nasiban Bibi v. Haidri Begum*, and *Bodha Bibi v. Haidri Begum*. [114] In these property, including zamindari shares and houses were claimed, the title alleged being that the plaintiffs were assignees under sale-deeds, of the year 1890, of the rights of certain persons who were devisees of that property. The will was stated to be that of Saiyid Ibn Ali, the deceased son of Haidri Begum. The latter with her husband, the present petitioner, answered, denying the existence of any such will, alleging that the sale-deeds were collusive and asserting that Haidri had inherited the estate of Saiyid Ibn Ali.

The Subordinate Judge fixed several issues, of which the principal related of the alleged testator's death and raised the question whether he had made the alleged bequests. On the evidence adduced, which consisted partly of a letter written by the testator on the 1st August 1878, relied on as operating as a will, the Subordinate Judge found that no valid will had been made. He dismissed both the suits, holding it unnecessary to proceed with the other issues.

On the appeal of the plaintiffs, the High Court on the 11th January 1894, reversed these decrees, and made an order purporting to remand under section 562 of the Code of Civil Procedure both suits to be disposed of on the remaining issues. The High Court decided in favour of the plaintiffs as to the will, and refused a certificate on a subsequent application with reference to the admission of an appeal to the Queen in Council on the ground above stated.

Mr. W. A. Raikes, for the petitioner, submitted that the order of the 11th January, although it included a remand to the first court, was, in effect, a final decree. It had been decided by the High Court that the alleged testator, Ibn Ali, had made a valid will. This was the principally contested point, it being stated on the other side, that there were reasons why it could not be a valid will, according to Muhammanadan law. The decision of the High Court was one that went far to conclude the whole case, and it was incorrect. Now was the time for the petitioner to appeal from this decision. There was no remand on the question of the making of a valid will, and it could not again be contested unless by appeal to the Queen in Council. It might be that where section 562 was really applicable [115] and the decision on a preliminary point had excluded evidence, a remand under that section would not be a final decree. But here the case did not fall under that section. Section 565 would have been appropriate.

He referred to *Rahimbhoy Habibbhoy v. Turner* (1).

Their Lordships having on the 24th November reported to Her Majesty in Council their opinion that the petition should be granted, afterwards, on the 8th December 1894, their reasons were given by LORD HOBHOUSE :—

OPINION.

In this case the value of the property affected by the decree made in two cognate suits appears to be such as would have allowed the High Court to grant leave to appeal in the ordinary course, if they had thought it in other respects right to grant that leave. They have refused it on the ground that the order objected to is not a final order. To see whether it is so or not, it is necessary to ascertain the nature of the proceedings.

The present petitioner is the principal defendant in the suit. The plaintiff's case is that one Ibn Ali by his will gave the property in suit to certain persons, also defendants, who conveyed it to the plaintiff. Several defences were raised. One was of a preliminary nature, *viz.*, that there was a misjoinder, and this was overruled. The next went to the foundation of the plaintiff's claim, being a denial that Ibn Ali made any valid gift to the grantors of the plaintiff. The others were all of a subordinate character. The Subordinate Judge took the evidence and heard the case. He decided against the plaintiff on the question of Ibn Ali's will, which defeated the suit, and made it unnecessary to give judgment on the other issues. The plaintiff appealed from his decree, and the High Court decided that Ibn Ali had made a valid gift; and they remanded the case under section 562 of the Civil Procedure Code to be disposed of on the other issues according to law.

The petitioner applied for leave to appeal, which the High Court refused on the ground above stated. They do not give any reason [116] for their decision that the order is not final, except that there was a remand under section 562, and that it was the established practice of the Court to treat such orders of remand as not being final orders.

Probably the practice referred to is quite correct. But then the remand contemplated by section 562 is one made in a case where the first Court has disposed of the suit on a preliminary point so as to exclude evidence of essential facts. That is not the present case. The only preliminary point was the misjoinder. To establish the will of Ibn Ali was

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17 A. 112

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(1) 15 B. 155 = 18 I.A. 6.

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the first step in the plaintiff's case, and on her failing in that, her whole suit failed. But that does not make the point a preliminary point decided so as to exclude essential evidence. Nor does it appear that any such evidence was excluded. It seems to their Lordships, judging as well as they can on this *ex parte* application, that the High Court has miscarried in purporting to remand under section 562, and that the case would rather fall under section 565 which requires the appellate Court to decide issues on which the evidence has been taken. However this may be, the question is whether the decree of the High Court is final. It appears to their Lordships that it is final. The case is analogous to that of *Rahim-bhoy Habibbhoy v. Turner* (1), decided by this Board in 1890 and reported in I.L.R., 15 Bom. 155. There the defendant denied his liability to account to the plaintiff. The High Court affirmed his liability and directed an account. Of course the account might turn out in the defendant's favour. But their Lordships held that the order establishing liability was one which could never be questioned again in the suit, and that it was the cardinal point of the suit. Therefore they thought that leave to appeal should be granted. In this case the will of Ibn Ali is the cardinal point of the suit, and as after the decision of the High Court that can never be disputed again, their order is final, notwithstanding that there may be subordinate inquiries to make.

Their Lordships will therefore humbly advise Her Majesty to grant special leave to appeal.

Solicitor for the petitioner: Mr. T. C. Summerhays.

17 A. 117 = 15 A.W.N. (1895) 21.

[117] APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Aikman.

GANGA PRASAD (*Plaintiff*) v. LAL BAHADUR SINGH AND ANOTHER
(*Defendants*).^{*} [22nd December, 1894.]

Civil Procedure Code, ss. 566, 574—Issue not disposed of by the lower appellate Court—Procedure.

In a suit for money due under a bond the plaintiff tendered three witnesses in the Court of first instance to prove execution of the bond. That Court having examined one of such witnesses declined to examine the others, being satisfied on his evidence of the genuineness of the bond, and passed the decree in favour of the plaintiff. On appeal by the defendant the lower appellate Court disposed of the sole issue in the appeal, *viz*, execution or non-execution in the following words:—"I do not think the claim made out by the plaintiff on his own evidence."

Held, that under the circumstances above described it was competent to the High Court in second appeal to act under s. 566 of the Code of Civil Procedure and refer an issue as to the execution or non-execution of the bond in suit to the lower appellate Court, that issue having practically not been tried at all by the said Court.

Kanhai Lal v. Manorath Ram (2), *Madho Singh v. Kashi Singh* (3) and *Durga Dihal Das v. Anoraji* (4) referred to.

^{*} Second Appeal, No. 262 of 1894, from a decree of J. J. McLean, Esq., District Judge of Cawnpore, dated the 2nd January 1894, reversing a decree of N. L. Banerji, Munsif of Haveli, Cawnpore, dated the 5th December 1892.

(1) 15 B. 155 = 18 I.A. 6.

(3) 16 A. 342.

(2) 14 A.W. N. (1894) 19.

(4) 14 A.W.N. (1894) 190.

THE facts of this case were as follows :—

The plaintiff sued to recover money upon a bond alleged to have been executed in his favour by the defendants. The defendants denied execution. An issue was framed by the Court of first instance (Munsif of Cawnpore) as to whether the bond was or was not executed by the defendants in favour of the plaintiff. The plaintiff upon the day appointed for the hearing tendered three witnesses in support of his allegation that the bond had been so executed. The Court examined only one of the three, and, being satisfied upon the evidence of that witness that the bond was duly executed, decreed the plaintiff's claim; but the Court declined to examine the other witnesses for the plaintiff, apparently on the ground that it considered the evidence of the first witness sufficient to establish the plaintiff's claim.

[118] The defendants appealed. The lower Appellate Court (District Judge of Cawnpore) disposed of the sole issue before it, *viz.*, execution or non-execution of the bond in suit, in the following terms :— " The evidence on the record is very meagre, but I observe that plaintiff only called one witness to prove the bond, Moti Lal, patwari, the writer, and none of the four attesting witnesses to it (Debi, Baldeo, Bhawani and Gokul) were called. The patwari may or may not be an independent witness. The bond is not registered. It appears that appellant's zamindari property is mortgaged to plaintiff for Rs. 2,000. Under these circumstances, if plaintiff did make a further advance at all, he would have done it on better security than an unregistered bond. The appellant's plea as to witnesses seems also well founded. The case had been adjourned owing to plaintiff's absence and defendant had to summon his witnesses for the adjourned hearing. They did not attend. Apparently defendant asked a further opportunity which was refused, but the record is not very clear as to this. However, I do not think the claim made out by the plaintiff on his own evidence." The Court proceeded to allow the appeal and dismiss the plaintiff's suit.

The plaintiff thereupon appealed to the High Court.

Munshi Ram Prashad and Munshi Gobind Prasad, for the appellant.

The respondents were not represented.

JUDGMENT.

KNOX and AIKMAN, JJ.—The appellant in this second appeal, was plaintiff in the Court of first instance. He brought a suit based upon a bond alleged to have been executed by the respondents in his favour. The respondents denied execution. An issue was framed as to whether the bond was or was not executed in favour of the plaintiff by the defendants. Upon the day appointed for hearing the case, the plaintiff tendered three witnesses in support of his allegation that the bond had been so executed. The Court examined only one of the three, was satisfied upon the evidence of that witness that the bond had been duly executed, and decreed the plaintiff's [119] claim. The evidence of the remaining witnesses tendered by the plaintiff was not taken, because the Court, so far as we can judge from an order endorsed upon the written paper under which plaintiff tendered his witnesses for examination, considered that the evidence of the one witness examined by the Court was sufficient to prove the issue. We do not understand how the Court of first instance could have passed an order virtually prejudging the case before it proceeded to hear the defence set up by the defendants. Unless this action admits of some explanation, which is not before us, we have no hesitation in saying that such action

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DEC. 22. on the part of the Munsif was most improper and ought never to be repeated. The Munsif passed a decree in favour of the plaintiff.

— Upon appeal preferred by the defendants, the lower Appellate Court

APPEL- disposed of the issue raised before it, *i.e.*, execution or non-execution of
LATE the bond, in a manner, which we cannot but characterize as most unsatis-
CIVIL. factory. That Court was dealing as a Court of appeal with a question of
— fact, and its decision upon that is by law final, provided there has been no

17 A. 117 = substantial error or defect in the procedure which may possibly have
18 A.W.N. produced error or defect in the decision of the case upon the merits. In
(1895) 21. this, and in other cases which have come before us, we have found strong
reasons for doubting whether Courts of first appeal fully appreciate the
grave responsibility which the law thus imposes upon them. In the
present instance it is difficult to understand how the learned Judge could
have brought himself to finally dispose of the question of fact before him
by the observation—"I do not think the claim made out by the plaintiff,
on his own evidence." This is neither a trial of the issue before him
nor a proper judgment under s. 574 of the Code. We have therefore
before us in second appeal a case in which there has been in our opinion
no trial of the sole issue raised in the case by the lower Appellate Court
before which it was so raised. It is perfectly obvious that, as the
parties are entitled to a trial of the issue, and as the issue has not been tried,
in some way or another trial of that issue must still be made. Sitting as
a Court of second appeal, we are precluded from trying questions of fact,
and this [120] issue, which is the sole issue, and the trial of which is essen-
tial to a right decision of the suit upon the merits, must be tried by the Court
or Courts below. The learned vakil for the appellant moved us to set aside the
decree of the lower Appellate Court, and to have the case remanded for a
second decision. In support of this he cited the cases of *Kanhai Lal v.*
Manorath Ram (1), *Madho Singh v. Kashi Singh* (2) and *Durga Dihal*
Das v. Anoraji (3). We have very carefully considered all these three
decisions, and, as our judgment shows, have been met with the difficulties
by which the learned Judges who decided those cases felt themselves pressed.
While considering whether we could adopt the procedure laid down in
those cases, we find ourselves in this case face to face with the difficulty
created by the very positive and imperative provisions of s. 564 of the
Code. By that section an Appellate Court is expressly debarred from
remanding a case for a second decision, except as provided in s. 562. Now
in the case before us it is impossible to hold that the lower Appellate Court
disposed of the appeal before it upon a preliminary point. The case
appears to us to fall within the provisions of s. 566. We have above
declared that the lower Appellate Court has not tried the issue essen-
tial to the right decision of the suit upon the merits. We therefore refer
that issue for trial to that Court, and as that Court, not having tried,
could not legally decide the issue, we direct the lower Appellate Court to
take all the evidence tendered by the parties, to try the issue before it and
to return to this Court its finding thereon together with the evidence.
Ten days will be allowed after return within which either party may
present a memorandum of objections to the findings.

Issue referred.

(1) 14 A.W. N. (1894) 19.

(2) 16 A. 342.

(3) 14 A.W.N. (1894) 190.

17 A. 120=15 A.W.N. (1895), 22.

APPELLATE CRIMINAL.

Before Mr. Justice Banerji.

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JAN. 10.
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APPEL-
LATE
CRIMINAL.

QUEEN-EMPRESS v. AJUDHIA.* [10th January, 1895.]

Act No. XLV of 1860 (Indian Penal Code), ss. 75 457, 511—Attempt to commit house-breaking by night after previous convictions—Sentence.

17 A. 120=
15 A.W.N.
(1895) 22.

Section 75 of Act No. XLV of 1860, does not apply to the case of an attempt to commit the offence punishable under s. 457 of the Code, after previous convictions [121] of offences falling within Chapter XII or Chapter XVII, such offence being punishable under s. 511. *Sheo Saran Tato v. The Empress* (1), *Empress of India v. Ram Dayal* (2), *Empress v. Nana Rahim* (3) and *Queen-Empress v. Sricharan Bauri* (4) referred to.

[F., 14 P.R. 1906 (Cr.)=12 P.L.R. 1907=15 P.W.R. 1907=5 Cr. L.J. 85; Appr., 17 A. 123 (124); R., 10 Bom. L.R. 26=7 Cr.L.J. 32 (33)=3 M. L. T. 122 (123).]

THE facts of this case sufficiently appear from the judgment of Banerji, J.

The Government Pleader (Munshi Ram Prasad) for the Crown.

JUDGMENT.

BANERJI, J.—The appellant Ajudhia was committed to the Court of the Sessions Judge of Ghazipur charged with the offence of house-breaking by night in order to the committing of theft punishable under s. 457 of the Indian Penal Code. He had four previous convictions.

It has been proved by clear and unimpeachable evidence that Ajudhia was caught in the act of digging a hole through the wall of the house of Ram Lakhan, Sonar. There can be no doubt that his intention was to commit theft. As he did not enter the house he was guilty of an attempt to commit the offence punishable under the last clause of s. 457 of the Indian Penal Code, and was properly convicted by the then Officiating Sessions Judge.

On the question of sentence the learned Sessions Judge was of opinion that, as Ajudhia had previous convictions for offences punishable with rigorous imprisonment for three years and upwards under Chapter XVII of the Indian Penal Code, s. 75 of that Code applied to his case. He was further of opinion that the terms of s. 75 precluded him from passing a sentence of transportation which should be of less duration than for life. He also thought that—"whereas s. 457 prescribed a maximum term of fourteen years' imprisonment even for the first offence, s. 75 of the Indian Penal Code, which refers to second convictions, limits the maximum to ten years' rigorous imprisonment." And he held that, although under s. 511 he could have sentenced the accused to seven years' rigorous imprisonment, if he had no previous convictions, he was limited by the provisions of s. 75 to the power of sentencing the accused to five years' rigorous imprisonment only by reason of the [122] accused having been repeatedly convicted on previous occasions. The learned Sessions Judge has accordingly sentenced Ajudhia to five years' rigorous imprisonment, that being, according to the learned Judge, "the utmost penalty permitted by the law."

* Criminal Appeal No. 1005 of 1894.

(1) 9 C. 877.

(2) 3 A. 773.

(3) 5 B. 140.

(4) 14 C. 357.

1895 On all the above points the views of the learned Sessions Judge are
JAN. 10. clearly erroneous. Section 75 empowers a Court to award in the case of
 — certain offences mentioned in the section a more severe sentence on a
APPEL- second conviction than that which the offender would otherwise have
LATE been liable to. As was held in *Sheo Saran Tal v. The Empress* (1), the
CRIMINAL. object of the section is "to provide for an additional sentence, not for a
 — less severe sentence, on a second conviction," and "recourse should not
17 A. 120= be had to that section if the punishment for the offence committed is it-
15 A.W.N. self sufficient." It could never be the intention of the Legislature that
(1895) 22. the punishment for an offence on a second conviction should be less than
 what it would have been on a first conviction. If, therefore, s. 75 applied
 to the case, the learned Judge was not precluded by its provisions from
 passing a more severe sentence than that which was admissible under
 it, if the higher punishment could be awarded for the offence on a first
 conviction.

The learned Judge evidently overlooked the provisions of s. 59 of the Indian Penal Code in coming to the conclusion that he was precluded by the provisions of s. 75 from passing a sentence of transportation which should be of less duration than for life. Under s. 75, when it applies, an offender is liable to an alternative sentence of ten years' rigorous imprisonment. By s. 59, where the offender is punishable with imprisonment for seven years or upwards, the Court is competent to award the sentence of transportation instead of imprisonment, such transportation not being for a shorter period than seven years, and not exceeding the term of imprisonment which could be awarded for the offence.

In this case the learned Sessions Judge has erred in applying s. 75 of the Indian Penal Code. That section applies, in the case of a second conviction, to offences punishable under Chapter XII or [123] Chapter XVII of the Code. An attempt to commit an offence is itself an offence within the definition of an offence as given in s. 40, and where no express provision is made in any other part of the Code for the punishment of such offence, it is punishable under s. 511. An attempt to commit house-breaking by night is punishable under s. 511 only. That section appears in Chapter XXIII of the Code. Although, therefore, the offence of house-breaking by night is punishable under s. 457, which appears in Chapter XVII, the offence of attempting to commit house-breaking by night is not punishable under that Chapter, but is punishable under Chapter XXIII only. As s. 75 does not apply to offences other than those punishable under Chapter XII or Chapter XVII, the learned Sessions Judge was wrong in applying it to the present case. I am fortified in this opinion by the rulings of this Court in *Empress of India v. Ram Dayal* (2), of the Bombay High Court in *Empress v. Nana Rahim* (3) and of the Calcutta High Court in *Queen Empress v. Sricharan Bauri* (4).

The appellant, Ajudhia, has been properly convicted of an attempt at house-breaking by night with intent to commit theft. For this offence he was liable, under s. 511, to be sentenced to seven years' rigorous imprisonment, that being one-half of the largest term of imprisonment provided by the last portion of s. 457 for the offence of house-breaking by night with intent to commit theft. The sentence of five years' rigorous imprisonment passed on Ajudhia was therefore a legal sentence, and it was in my opinion a proper one. The appeal is dismissed.

(1) 9 C. 877.

(2) 3 A. 773.

(3) 5 B. 140.

(4) 14 C. 357.

17 A. 123 = 15 A.W.N. (1895) 23.

APPELLATE CRIMINAL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Banerji.

QUEEN-EMPRESS v. BHAROSA.* [9th January, 1895.]

Act No. XLV of 1860 (Indian Penal Code), ss 75, 511.—Attempt to commit an offence after previous conviction—Sentence.

Section 75 of the Indian Penal Code does not apply to cases which are confined to s. 511 of that Code. The offences which come under s. 511 must be punished entirely irrespective of s. 75. *Queen-Empress v. Ajudhia* (1) approved.

[F., 14 P.R. 1906 (Cr.) = 12 P.L.R. 1907 = 15 P.W.R. 1907 (Cr.) = 5 Cr. L.J. 85 ; R., 10 Bom. L.R. 26 = 7 Cr. L.J. 32 (33) = 3 M.L.T. 122 (123).]

[124] THE facts of this case sufficiently appear from the judgment of Edge, C. J.

Neither the appellant nor the Crown was represented.

JUDGMENT.

EDGE, C. J.—Bharosa Bhar has appealed against a conviction for an attempt to commit the offence punishable under s. 379 of the Indian Penal Code and the sentence of three years' rigorous imprisonment passed thereon. He has had notice to show cause why he should not be convicted of an offence under s. 451 of the Indian Penal Code and why his sentence should not accordingly be enhanced. The case against him is a very clear one. A prostitute, her brother and her servant, were sleeping in the verandah of her house, which was made practically a part of her house by *chiks* or screens which cut it off from the outside. In this inclosed verandah where the persons were sleeping, there was a box containing six hundred rupees' worth of jewelry and articles of clothing. The prisoner was caught in the act of trying to remove the box. He was charged with the commission of the offence punishable under s. 457 of the Indian Penal Code. The Officiating Sessions Judge considered that he could not be convicted under that section and convicted him under s. 511 read with s. 379 of the Indian Penal Code. The Sessions Judge went at some length into the question of previous convictions charged against the prisoner. Taking the view which he did of the offence committed by the prisoner, s. 75 of the Indian Penal Code could not possibly apply. Section 75 does not apply to cases which are confined to s. 511 of the Indian Penal Code. The offences which come under s. 511 of the Indian Penal Code must be punished entirely irrespective of s. 75 of that Code. I have had the opportunity of reading the judgment of my brother Banerji in *Queen-Empress v. Ajudhia* (1) where he deals with the question of the applicability of s. 75, and I may say that I entirely agree with the view of the law as in that judgment expressed. As it was, the sentence which was passed by the Sessions Judge was illegal. The utmost sentence of imprisonment that can be passed for the full offence under s. 379 is three years' rigorous imprisonment with [125] or without fine. When the offence committed is only an attempt to commit the offence of theft, s. 511 applies, and the utmost sentence of imprisonment which can be imposed for the offence is half of that which can be given for the full offence. The sentence of imprisonment which

* Criminal Appeal No. 928 of 1894.

(1) 17 A. 120 = 15 A.W.N. (1895) 22.

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17 A. 123 =

15 A.W.N.

(1895) 23.

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17 A. 123=
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may be given for the full offence of theft can only exceed three years' rigorous imprisonment if the accused has been previously convicted of an offence to which s. 75 of the Code applies ; but, as s. 75 does not apply to offences under Chapter XXIII, in which s. 511 is, the sentence for the attempt to commit the offence cannot be enhanced by any application of s. 75. In our opinion the accused certainly committed the offence of house-trespass with the intention of committing theft. We set aside the conviction and sentence passed upon the accused and convict him of the offence punishable under the last clause of s. 451 of the Indian Penal Code. The accused admitted a previous conviction under s. 380 of the Indian Penal Code, in respect of which he was sentenced to two years' rigorous imprisonment and 20 stripes. We sentence him under s. 451 of the Indian Penal Code to be rigorously imprisoned for five years. The period of imprisonment already undergone will form part of his sentence. We dismiss this appeal.

BANERJI, J.—I concur.

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APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Banerji.

ACHHAN KUAR AND ANOTHER (*Defendants*) v. THAKUR DAS AND OTHERS (*Plaintiffs*).^{*} [11th January, 1895.]

Hindu Law—Hindu widow—Power of widow of sonless Hindu to mortgage ancestral property—Pardah-nashin woman, conditions necessary to the execution of a valid deed by—Expectancy—Mortgage purporting to be of property in which one of the professed executants had an interest in expectancy only.

One Raja Khairati Lal died in 1866 possessed of considerable property both moveable and immoveable. He left surviving him a widow, Rani Hulas Kuar, who [126] died in 1878, a daughter, Rani Achhan Kuar, married to one Raja Lalji, and two grandsons, sons of Achhan Kuar, Kuar Inayat Singh and Kuar Shamsheer Bahadur, the latter of whom died sometime subsequent to 1881, as did also his father Raja Lalji.

In December, 1877, a mortgage-deed was executed over certain of the ancestral property of the family of Khairati Lal, the ostensible executants being Raja Lalji for himself, and Hulas Kuar, Achhan Kuar and Inayat Singh through Lalji as their general attorney. This deed was to secure a debt of Rs. 10,000 stated to be to some small extent for an advance in cash, and as to the balance in respect of certain previous debts and interest thereon. At the date of this bond both Inayat Singh and Shamsheer Bahadur were minors.

In April 1881, Hulas Kuar having in the meanwhile died, and Inayat Singh having attained majority, but Shamsheer Bahadur being still a minor, a second bond of a similar nature to the former was executed by Lalji, Achhan Kuar and Inayat Singh for Rs. 20,000, this sum being recited as composed of various debts of earlier date with interest thereon, of an advance to pay Government revenue, an advance for expenses of the marriage of Lalji's daughter and a very small balance in cash.

It was not shown that the debts secured by either of these two bonds were debts incurred for legal necessity by the widow or daughter of Khairati Lal, or that the mortgagees after due inquiry had reasonable grounds for believing that such necessity existed, nor was it shown that the mortgages were entered into with the consent of all the husband's kindred under circumstances which might raise a valid presumption that the debts secured by them were properly incurred.

^{*} First Appeal No. 22 of 1892, from a decree of Maulvi Jafar Husain, Additional Subordinate Judge of Bareilly, dated the 18th January, 1892.

It was further not shown that the power-of-attorney under which Lalji purported to act in executing the bond of 1877 on behalf of Hulas Kuar, Achhan Kuar and Inayat Singh was ever properly explained to the professed executants or that they understood its import; nor was it shown that either of the bonds was duly explained to and comprehended by the professed executants, other than Lalji himself, in manner required by law in the case of documents executed by *pardah-nashin* women; nor, though at the date of the execution of the second bond, Inayat Singh had attained the age of majority, did it appear that he signed the bond with any clear knowledge of its contents, or of the liability which he was professing to incur thereby, or otherwise than through the influence brought to bear on him by his father, Lalji.

Held, on suit by the mortgagees to bring to sale the ancestral property which had been of Khairati Lal in his life-time in enforcement of the two mortgages abovementioned, that the mortgages were not binding on the alleged executants or on the ancestral property at the date of suit in the hands of Achhan Kuar.

Kuar Inayat Singh's interest in the family property in suit could only be affected by the mortgage of the 2nd of April, 1881, on proof that the debt was in fact one, or was, on reasonable inquiry by and statements made to the lenders of [127] the money believed by them to be one, in respect of which his mother Rani Achhan Kuar, as a Hindu daughter in possession, could mortgage or charge the family property beyond her own then vested interest in it, or on proof that he, as one of the reversioners, by joining with his mother in executing the document of mortgage, led the lenders of the money to believe that such a necessity existed for the loan as enabled the Hindu daughter to create a valid mortgage on the family property beyond the extent of her own life interest.

The Hindu law which prevails in these Provinces recognizes no power in a reversioner to sell or mortgage his interest in expectancy, even although he may be the heir apparent.

It is absolutely necessary, before holding that a *pardah-nashin* lady or her property is liable on a contract alleged to have been made by her, or in consequence of an alleged execution by her of a general power-of-attorney, to be reasonably satisfied that the liability she was incurring and the nature of the transaction were explained to her; and more particularly is this the case if it is sought, by reason of her having executed a document, to fix her and her property with a liability to pay a debt, which, if the document had not been executed by her or by an agent appointed by her with adequate power, could not have been enforced against her or her property. It is also necessary when money-lenders in this country seek to enforce against the property of a Hindu family a contract of mortgage made by a reversioner, who, although of age at the time, was then still of tender years and without experience of business, for the Court, when the question is raised, to be satisfied that the reversioner understood the nature of the transaction and the effect of the contract which he was entering into, or that the reversioner of the family property, in which the reversioner had an estate in expectancy only, was liable for the debt in respect of which the mortgage is sought to be enforced and that no unfair advantage was taken of the reversioner's youth and inexperience.

[Affirmed, 21 A. 71 (P.C.)=2 C.W.N. 729=25 I.A. 183=7 Sar. 417; R., 3 Bom. L.R. 658; 143 P.L.R. 1905.]

THE facts of this case are fully stated in the judgment of the Court. Mr. T. Conlan and Mr. D. N. Banerji, for the appellants.

The Hon'ble Mr. Colvin and Babu Jogindro Nath Chaudhri, for the respondents.

JUDGMENT.

EDGE, C.J., and BANERJI, J.—The plaintiffs in the suit, in which this appeal has been brought by the defendants, brought their suit in the Court of the Subordinate Judge of Bareilly to recover Rs. 86,338-13-0, with costs of suit, interest during the pendency of the suit and future interest, by sale of certain ancestral property of the defendants, and they further prayed for a decree against the defendants personally. The suit was brought upon two mortgage [128] bonds, dated respectively the 2nd of December 1877, and the 1st of April, 1881. The bond of the 2nd of December, 1877, was alleged to have been made by Raja Lalji on his own

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behalf, and by Rani Hulas Kuar, Rani Achhan Kuar and Kuar Inayat Singh through Raja Lalji as their general attorney. The consideration was stated in the bond to be Rs. 10,000, the details of which, as given in the bond, were—

	Rs.	a.	p.
On account of <i>hundis</i> ...	7,000	0	0
On account of interest upon the <i>hundis</i> , ...	188	3	0
On account of the interest of the bond, dated 25th May 1877, in respect of the 2nd quarterly payment ...	500	0	0
	7,688	3	0
Cash ...	2,311	13	0
Total ...	10,000	0	0

The bond of the 1st of April 1881, was alleged to have been made by Raja Lalji, Rani Achhan Kuar and Kuar Inayat Singh. The consideration was stated in the bond to be Rs. 20,000, the summary details of which as given in the bond, were :—

	Rs.	a.	p.	Rs.	a.	p.
Interest on two bonds ...	8,402	10	9			
Deduct previous payment ...	302	10	9	8,100	0	0
In respect of a Rukka, dated 1st December 1880.						
Principal amount ...				10,475	0	0
In respect of the interest on the amount of the Rukka ...				1,300	14	0
In cash ...				124	2	0
				20,000	0	0

[129] The details of the above sum of Rs. 8,100 as given in the bond were :—

	Rs.	a.	p.
Compound interest in respect of the bond for Rs. 20,000, dated 25th May 1877, up to end of March 1881 ...	5,251	10	9
Compound interest in respect of the bond for Rs. 10,000, dated 2nd December 1877, up to end of March 1881 ...	3,151	0	0
Deduct previous payment ...	302	10	9
	2,848	5	3

The details of the above sum of Rs. 10,475 as given in the bond, were :—

	Rs.	a.	p.
On 22nd June 1879, for revenue ...	2,000	0	0
On 5th November 1879, to pay interest to Intizam Begam ...	1,575	0	0
On 17th May 1880, to defray expenses of daughter's marriage ...	2,000	0	0
On 2nd August 1880, to pay interest, to Motti Ram Sah ...	4,000	0	0
On 9th October 1880, to pay interest to Intizam Begam ...	900	0	0

We have set out the above details of the sum of Rs. 20,000, as it will be necessary to consider them carefully later on.

The sum of Rs. 86,338-13-0 claimed is composed of the above-mentioned sums of Rs. 10,000 and Rs. 20,000 and compound interest on those sums amounting to Rs. 56,338-13-0.

The defendants pleaded, *inter alia*, that the bond of the 2nd of December 1877, was executed by Raja Lalji alone during the minority of the defendant Kuar Inayat Singh and without the knowledge of the defendants; that the property alleged to have been hypothecated by the bond was property which had belonged to Raja Khairati Lal and was at the date of the bond in the [130] possession of his widow, Rani Hulas Kuar; that the defendants had at that time acquired no right to the estate other than a right of expectancy, and that, if the bond was the bond of Rani Hulas Kuar, there was no such necessity for the loan as enabled Rani Hulas Kuar to charge the estate beyond her own life interest in it.

The defendants admitted that they had executed the bond of the 1st of April 1881, but they pleaded, *inter alia*, that they had executed that bond under the influence and at the earnest request of Raja Lalji; that the transaction was not explained to them, and that they did not understand the document or that the debt admitted or incurred under the bond was such as would create liability upon the estate left by Raja Khairati Lal, which was at the date of the bond in the possession by right of inheritance of his daughter, Rani Achhan Kuar, who then had living two sons, the defendants, Kuar Inayat Singh and Kuar Shamsheer Bahadur. The written statement of the defendants is somewhat obscurely and confusedly worded, but we have above given what we have understood to be the meaning of those paragraphs of the written statement which, in the view we entertain of this case, are material to our judgment.

The Subordinate Judge, after what appears to us to have been a perfunctory consideration of this by no means easy case, gave the plaintiffs a decree for sale, but dismissed their claim for a decree personally against the defendants. From that decree for sale the defendants have brought this appeal.

The property included in the bonds in suit is ancestral property which belonged to the joint Hindu family, the head of which in his life-time was Raja Khairati Lal of Bareilly. Raja Khairati Lal married Rani Hulas Kuar, and had by her one child, a daughter, the defendant Rani Achhan Kuar. The Rani Achhan Kuar married Raja Lalji and had issue three sons, the eldest of whom died many years ago, and the others of whom were the defendants Kuar Inayat Singh and Kuar Shamsheer Bahadur. Raja Khairati Lal died in 1866. Rani Hulas Kuar died on the 22nd of June, 1878. Raja Lalji died six or seven years ago, and Kuar Shamsheer Bahadur died subsequently to the 1st of April 1881, and before the commencement [131] of this suit. On the 2nd of December 1877, Kuar Inayat Singh and Kuar Shamsheer Bahadur were minors. On the 1st of April 1881, Kuar Inayat Singh, being then between nineteen and twenty years old, was of age, but Kuar Shamsheer Bahadur was then still a minor. Rani Achhan Kuar and Kuar Inayat Singh are the defendants to this suit. It must be kept in mind in considering this case that Raja Lalji never had any title to or interest in the property included in the bonds. In 1877, Rani Hulas Kuar's title was solely that of the widow of a sonless Hindu.

Assuming for the moment that the bond of the 2nd of December 1877, was the bond of Rani Hulas Kuar and was not the bond of the

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defendants, and that they have not by their own acts precluded themselves from denying that the family property is liable to be sold in enforcement of that bond, the plaintiffs, in order to prove its validity as a mortgage affecting the interests of Rani Achhan Kuar and Kuar Inayat Singh in the estate which was of Khairati Lal, must prove that there was legal necessity for raising the money, the consideration for that bond, by a charge on Khairati Lal's estate, or that the mortgagees of that bond in advancing their money gave credit on reasonable grounds to representations that the money was wanted for such necessity. [*Lala Amarnath Sah v. Rani Achhan Kuar* (1).]

If the bond of the 2nd of December 1877, was solely the bond of Raja Lalji, and not the bond of the defendants or of Rani Hulas Kuar, it did not operate as a valid mortgage of any of the property included in it, as Raja Lalji, in his capacity of son-in-law of Rani Hulas Kuar, husband of Rani Achhan Kuar and father of Kuar Inayat Singh, had no power under the Hindu law to charge the property which was of Khairati Lal with the payment of any debt, whether the debt was incurred by Raja Lalji for his own private purposes or was a debt necessarily incurred for the purposes of the family descended from Khairati Lal. The legal obligation of a Hindu son to pay his father's debts not tainted with immorality, extends only to the family property in which he and his father were [132] jointly interested as members of a Hindu family, and to such self-acquired property of the father as has come to the son. It does not appear whether or not Raja Lalji had any property of his own. If he had, it is not shown that any property of Raja Lalji came to the hands of the defendants, or of either of them, and no property which was of Raja Lalji is the subject of this suit.

During the life-time of Rani Hulas Kuar her daughter Rani Achhan Kuar had no interest in the estate of Khairati Lal other than one in expectancy. After the death of Rani Hulas Kuar in 1878, and in 1881, Rani Achhan Kuar's title and interest was merely that of the sole daughter of a deceased sonless Hindu. Under the law of the Mitakshara, which applies in this case, the estate of a daughter in property inherited from her father "exactly corresponds to that of a Hindu widow both in respect to the restricted power of alienation and to its succession after her death to her father's heirs and not her own." (Mayne on Hindu Law and Usage, paragraph 526, 3rd ed.) In 1877, and thence hitherto Kuar Inayat Singh's sole title and interest was and is that of a reversioner. So far as the interest of Kuar Inayat Singh in the family property is concerned, as he was, in 1877 and 1881, not in possession, but merely one of the two reversioners who would, on the death of Rani Achhan Kuar, be entitled, if they survived her, to possession, he had in neither of those years any power under the Hindu law to create a mortgage or charge on the family property. Kuar Inayat Singh's interest in the family property in suit can only be affected by the mortgage of the 2nd of April, 1881, on proof that the debt was in fact one, or was, on reasonable inquiry by and statements made to the lenders of the money believed by them to be one, in respect of which his mother Rani Achhan Kuar, as a Hindu daughter in possession, could mortgage or charge the family property beyond her own, then vested interest in it, or on proof that he, as one of the reversioners, by joining with his mother in executing the document of mortgage, led the lenders of the money to believe that such a necessity existed for the

loan as enabled the Hindu daughter to create a valid mortgage on the [133] family property beyond the extent of her own life interest. In the *Collector of Masulipatam v. Cavalry Vencata Narrainapah* (1) their Lordships of the Privy Council, referring to an alienation made by a Hindu widow of property of her deceased husband, said (at p. 551):—"On the other hand it may be taken as established that an alienation by her which would not otherwise be legitimate may become so if made with the consent of her husband's kindred The exception in favour of alienation with consent may be due to a presumption of law that where that consent is given the purpose for which the alienation is made must be proper." In *Raj Lukhee Dabea v. Gokool Chunder Chowdhry* (2), their Lordships, referring to an alienation by a Hindu widow, said:—"Their Lordships do not mean to impugn those authorities which lay down that a transaction of this kind may become valid by the consent of the husband's kindred, but the kindred in such case must generally be understood to be all those who are interested in disputing the transaction. At all events there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one and one justified by Hindu law. That it can be, as Mr. Field seemed to put it, a presumption of law in the sense of '*præsumptio juris et de jure*,' their Lordships do not think. It is no doubt an element to be taken into consideration and deserving of considerable weight in the estimation of all the evidence of the transaction." In the present instance Kuar Inayat Singh's brother, Kuar Shamsheer Bahadur, was alive on the 2nd of April 1881, and had then as much interest in the property as had Kuar Inayat Singh. Kuar Shamsheer Bahadur was not in any sense a party to the bond of the 1st of April 1881. It is not suggested that Kuar Shamsheer Bahadur consented to the giving of the mortgage, and indeed he could not have consented, for he was then a minor.

If the mortgage of the 1st of April 1881, was not valid as against Rani Achhan Kuar, the fact of Kuar Inayat Singh's having joined in the mortgage could not make it valid as against his interest in expectancy, for, according to the law of the Mitakshara as under-[134]stood and acted upon in these provinces, he could not alone, even if he had enjoyed full coparcenary right in possession in the property, have validly sold or mortgaged even his own share without the consent of all the other coparceners, except for the necessary purposes of the joint family; and the Hindu law which prevails in these provinces recognizes no power in a reversioner to sell or mortgage his interest in expectancy, even although he may be the heir apparent. Section 6, clause (a), of the Transfer of Property Act, 1882 (Act No. IV of 1882), although it does not, except in matters of procedure, apply to transfers which took place before the passing of that Act, embodies a principle which had long been recognised as the law, at least in this part of India, applicable to Hindus.

Rani Achhan Kuar is a *pardah-nashin* lady who keeps strictly to the custom of the *pardah*. It is absolutely necessary, before holding that a *pardah-nashin* lady or her property is liable on a contract alleged to have been made by her or in consequence of an alleged execution by her of a general power-of-attorney, to be reasonably satisfied that the liability she was incurring and the nature of the transaction were explained to her; and more particularly is this the case if it is sought, by reason of her

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having executed a document, to fix her and her property with a liability to pay a debt, which, if the document had not been executed by her or by an agent appointed by her with adequate power, could not have been enforced against her or her property. It is also necessary when money-lenders in this country seek to enforce against the property of a Hindu family a contract of mortgage made by a reversioner, who, although of age at the time, was then still of tender years and without experience of business, for the Court, when the question is raised, to be satisfied that the reversioner understood the nature of the transaction and the effect of the contract which he was entering into, or that the reversioner, or the family property, in which the reversioner had an estate in expectancy only, was liable for the debt in respect of which the mortgage is sought to be enforced and that no unfair advantage was taken of the reversioner's youth and inexperience.

[135] We shall now consider what were the transactions relating to each of the two bonds in suit here.

That the bond of the 2nd of December 1877, was executed by Raja Lalji is admitted. On behalf of the plaintiffs it has been contended that Raja Lalji executed that bond as the general attorney of Rani Hulas Kuar, Rani Achhan Kuar and Kuar Inayat Singh. It was not executed by Rani Hulas Kuar, Rani Achhan Kuar or Kuar Inayat Singh personally. The power-of-attorney relied upon by the plaintiffs is a *mukhtarnamah* of the 6th of March, 1877, (document No. 83). That *mukhtarnamah* was the subject of criticism by their Lordships of the Privy Council in *Lala Amarnath Sah v. Rani Achhan Kuar* (1). The endorsement of the Sub-Registrar shows that before registering the *mukhtarnamah* he read it over to the two ladies and Kuar Inayat Singh and that they verified it. The Sub-Registrar does not appear to have taken the trouble to enquire whether Kuar Inayat Singh was then a minor or of full age. Kuar Inayat Singh was at that time between 16 and 17 years of age. It may be doubted whether any *pardah-nashin* lady who was not a woman of affairs and possessed of a knowledge of business would understand the nature and scope of the power she was conferring by a *mukhtarnamah* such as that in this case. It not only purported to make valid all prior acts of Raja Lalji, but it purported to authorise Raja Lalji to borrow money, to execute documents, to hypothecate, mortgage, sell or otherwise transfer moveable and immoveable property, and to give a lease of any village, in whole or in part, at any rent he might think proper, and to do all such acts apparently without consulting the ladies or Kuar Inayat Singh. It was a document which, if the ladies thoroughly understood its effect, would have enabled Raja Lalji to divest them of every scrap of property which they possessed. There is no evidence before us to show that the nature and effect of that *mukhtarnamah* were explained to either of the ladies. Rani Achhan Kuar was examined in this case, and we believe her evidence, every word of which appears to us to be of [136] importance. She said :—"The villages, buildings and other landed property at Bareilly, Shahjahanpur and Lucknow are mine. I got them from Rani Hulas Kuar, my mother, who inherited the same from her husband Raja Khairati Lal. On his (Khairati Lal's) death he left a considerable property both moveable and immoveable as well as outstandings. Raja Lalji was my husband. I remember having executed a *mukhtarnamah* in his name with a view to manage the villages. I did not know that my estate was incumbered. I came to know of the existence of

(1) 19 I.A. 196.

debt when the Paharwalas filed a suit." And later on :—" Raja Lalji never consulted me in matters relating to the management of the estate. He was my elder, *malik*, and out of respect for him I could not interfere. Raja Khairati Lal was not indebted at the time of his death ; he had ample money ; why should he borrow ?" The suit by the Paharwalas to which she referred was the suit brought by Lala Amarnath Sah and others upon a bond in favour of Moti Ram Sah of the 23rd of March 1873, (L R. 19 I. A., 196). Kuar Inayat Singh (document No. 254) was examined in this case. It appears to us that his evidence, as well as that of Rani Achhan Kuar, was given with moderation and bears the impress of truth. As to Raja Lalji, he said :—" I have not received a single farthing on account of any of these two bonds (the bonds of the 2nd December 1877, and 1st of April 1881). Their amounts may have been taken by Raja Lalji." And later on :—" There was no enmity between Raja Lalji and me. He should be considered my and my mother's well-wisher. A son considers his father his well-wisher, though the other may not be so at heart. It would appear from the fact of institution of the suit and perusal of the bonds that he acted maliciously. Nothing else has been disclosed. It appeared from the bond sued on and the other bonds sued on previously that his proceedings were *mala fide*." And still later on :—" On the death of Raja Khairati Lal the property was managed by Raja Lalji as one having sole authority. He did not use to consult Rani Achhan Kuar or me in regard to the management of the property. On his death, *i.e.*, at the time of the death of Raja Khairati Lal, there were no [137] debts due against the *riyasat* (estate), but on the contrary there were debts due to us from several persons." As to the *mukhtarnamah* Kuar Inayat Singh said :—" Raja Lalji was a general attorney on my behalf. I do not fully understand the conditions applicable to general and special attorneys, but he used to do all works, and if this is the meaning of a general attorney the Court may consider him to be so," and " I admit the execution of the power-of-attorney executed in favour of Raja Lalji in 1877, but at that time I had not sufficient maturity of understanding to judge of what I was writing."

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The result of the evidence to which we have referred, and which we believe, is that Raja Khairati Lal, who died in 1866, left on his death very considerable unincumbered landed and other property, and left no debts, and that Rani Achhan Kuar understood when she executed the *mukhtarnamah* of the 5th of March, 1877, that she was executing a document which empowered her husband Raja Lalji to act as the attorney and agent of the family in the management of the villages, as, for instance, in granting leases, fixing and collecting rents and giving receipts, and the payment of the Government revenue and other such matters. At the time when the *mukhtarnamah* of the 5th of March 1877 was given it appears from the evidence above referred to that Rani Achhan Kuar or Kuar Inayat Singh had not the slightest reason to suspect that it was or would be necessary to borrow money or to mortgage or sell any part of the family property, and it may be safely assumed that the possibility of, or the necessity to provide for, any such contingency was not present to their minds, and that they did not know that the *mukhtarnamah* was making provision for the happening of contingencies which there was then, so far as they knew, no chance of occurring. There is no more reason to assume that the two *pardah-nashin* ladies and Kuar Inayat Singh understood that the *mukhtarnamah* purported to empower Raja Lalji to mortgage and sell their family property in the future than there is for assuming that they

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understood that the *mukhtarnamah* purported to ratify and make valid mortgages and sales by Raja Lalji of their family [138] property in the then past. On the other hand, as Rani Hulas Kuar and Rani Achhan Kuar were strictly *pardah-nashin* ladies, and as the two male members of the family of Khairati Lal, viz., Kuar Inayat Singh and Kuar Shamsheer Bahadur were then minors, and as Khairati Lal's estate comprised much village property, it was convenient, if not absolutely necessary, that some one should be empowered to act as the agent and general attorney of the family in the management of the village property, and the person who would naturally be selected to manage the village property was under the circumstances Raja Lalji, who stood to the persons then interested in Raja Khairati Lal's estate in the position of son-in-law, husband and father. It is not proved, nor is there any suggestion in the evidence, that the scope and effect of that *mukhtarnamah* were explained to any one of the three persons who executed it. Neither Rani Hulas Kuar, nor Rani Achhan Kuar, nor Kuar Inayat Singh, who was then 16 or 17 years old, is shown to have any knowledge of business. It was Raja Lalji, and not they, who managed the estate of Khairati Lal after Khairati Lal's death. They were in the hands of Raja Lalji, who, apparently for his own purposes, and not in their interest, got them to execute the *mukhtarnamah* in the form in which it appears. Unless the fact that Rani Achhan Kuar and Kuar Inayat Singh executed the bond of the 1st of April 1881, in which reference in most general and vague terms is made to the bond of the 2nd of December 1877, be taken as proof that they knew on the 1st of April 1881, that Raja Lalji had made the bond of the 2nd of December 1877, and unless the evidence of Nand Kishore, on which we can place no reliance, is to be believed, there is absolutely nothing to suggest that Rani Achhan Kuar or Kuar Inayat Singh were aware, before the commencement of this suit, or that on Moti Ram Sah's bond, that Raja Lalji was, as their general attorney, acting upon any power to mortgage or sell their family property. The bond of the 25th of May 1877, has not been put before us in evidence, and we are left in the dark as to that transaction and as to the person or persons by whom it was made. We have not been [139] informed as to whether or not Intizam Begam obtained a mortgage bond, or if she did, by whom it was made. It was open to the plaintiffs, if it would have been to their interest, to have produced evidence as to those transactions with the object of showing that Rani Hulas Kuar, Rani Achhan Kuar or Kuar Inayat Singh knew that Raja Lalji was pledging their credit or mortgaging their property, if such evidence would have shown anything of the kind. Raja Lalji knew, even if the Sub-Registrar had no reason to suspect the fact, that his son whose signature he obtained to that *mukhtarnamah* was a minor, and that neither his wife nor his son had then any other interest than that of expectancy in the family property, in which he himself had no interest whatever; and yet, exercising the influence which he possessed as a son-in-law, a husband and a father, and apparently without explaining the effect of the *mukhtarnamah*, he procured the signatures to it of these two *pardah-nashin* ladies and his minor son. It is impossible for us under such circumstances to hold that either Rani Achhan Kuar or Kuar Inayat Singh was bound by her or his execution of the *mukhtarnamah* of the 5th of March 1877.

As Rani Hulas Kuar died on the 22nd of June 1878, it is unnecessary to consider whether she was bound by her execution of that *mukhtarnamah*, unless and until it is proved that there was necessity for the making of

the mortgage bond of the 2nd of December, 1877, or that the lenders of the money were on proper inquiry reasonably satisfied that such a necessity existed.

It is well established law in India that as against reversioners a recital in a mortgage of the family property made by a female having a limited estate that the mortgage money was advanced for necessary purposes, as, for instance, for the payment of Government revenue, is not evidence that there was in fact any necessity for the loan. Such a recital does not even suggest to our minds that the mortgagees of the 2nd of December 1877, made any reasonable inquiry as to the existence of any necessity for the loan. That bond recites that the Rs. 10,000 were borrowed for the purposes of paying the "Government revenue, seed and *takavi* expenses, &c." [140] The detail at the end of the bond represents that a cash payment of Rs. 2,311-13-0, was made and that the balance was in respect of money due on *hundis* and for interest. None of the accounts which have been produced in evidence suggest that any portion of that Rs. 10,000 was advanced for any necessary purpose of the family. The only oral evidence which, if true, suggests that any portion of that Rs. 10,000 was borrowed for necessary purposes is that of Nand Kishore, (document No. 251). He is a pleader practising at Bareilly and is the father of Govind Prasad, one of the persons in whose favour the bond of the 2nd of December 1877, and that of the 1st of April 1881, were made. Nand Kishore was not ostensibly a party to either of those bonds or interested in them. Govind Prasad was at the date of the bond of 1877, 18 or 19 years old, and it does not appear how he at that early age had acquired money to lend on mortgage, but, according to the detail at the foot of the bond, one half of the Rs. 10,000 was advanced by Govind Prasad. Govind Prasad (document No. 250) said:—"I am not fully acquainted with the circumstances of the two bonds on the basis of which I have instituted this suit. They should be ascertained from my manager, Munshi Nand Kishore, pleader, who is my father. The debt was advanced through him." And in cross-examination:—"Munshi Nand Kishore defrays the expenses of this case on my behalf." Govind Prasad apparently knew little or nothing about the bonds or his suit. Nand Kishore in his evidence made a statement in reference to the bond of the 1st of April 1881, to which he was not ostensibly a party, which indicates that he and not Govind Prasad was the lender of the money. He said:—"After that I refused to give money. Then they executed a bond for Rs. 20,000 in my favour." A careful consideration of the evidence of Nand Kishore has satisfied us that it is such as an unscrupulous lawyer, who had become aware of the difficulty of fixing Rani Achhan Kuar and Kuar Inayat Singh and their family property with liability, would give. In our opinion his evidence must be regarded with the greatest suspicion. He said, in reference to the bond of the 2nd of December 1877:—"Rs. 10,000 was [141] borrowed owing to drought to pay revenue. The five persons executed a bond for Rs. 10,000, through Raja Lalji, the general attorney. Some money was given in cash and some money was set off against the interest due under the old bond. Rani Hulas Kuar was alive at that time. The bond was executed on her behalf through Raja Lalji." Later on he said:—"I was not present when the bond of 1877 was written." In cross-examination Nand Kishore said:—"The bond for Rs. 10,000, the basis of the claim, was not signed by Kuar Inayat Singh. I do not verbally re-collect how much money in cash was given in respect of this bond. A detail of it is given in the bond. The money of the bond for Rs. 10,000,

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was not given before me. It was given by Mohan Lal, but not in my presence. I know that a conversation about the transaction of the bond of 1877 was held with me and Mohan Lal, but there was more conversation with Mohan Lal than with myself. I had a talk with Raja Lalji and Kuar Inayat Singh. Nawab Abdul Aziz Khan, pleader, sat at that time. The conversation with Mohan Lal did not take place before me. There was a drought in 1877. Revenue was demanded from them and all other *raises*. Raja Lalji told me that there was a demand of revenue and that I should give him money, and that I should make arrangement for money." Mohan Lal is dead, so is Raja Lalji. Kuar Inayat Singh swore positively that Raja Lalji did not consult him in regard to the management of the property, and that he had not received a single farthing on account of either of the bonds in suit. He was not cross-examined as to any conversation with Nand Kishore. With the single exception of the recital in the bond of the 2nd of December 1877, not one piece of evidence has been put before us in corroboration of Nand Kishore's statement suggesting that the Rs. 10,000, or any part of it, was advanced for the payment of Government revenue. We are not satisfied with the evidence of Nand Kishore, and we find that it is not proved that there was any necessity for the bond of the 2nd December 1877, or that those who advanced the Rs. 10,000, made any inquiry as to the necessity for the loan.

[142] The learned counsel for the defendants-appellants raised further points as to the bond of the 2nd of December 1877, as to which, holding the views which we have already expressed, we do not think it necessary to give any opinion. One of such points was this:—In the commencement of the bond it purports to be by Raja Lalji, son-in-law, Rani Hulas Kuar, wife, Achhan Kuar, daughter and Kuar Inayat Singh, daughter's son, "and heirs of Raja Khairati Lal deceased." The bond was executed by Raja Lalji alone, and nowhere in the bond or in its execution does it purport to have been executed by Raja Lalji as the attorney or on behalf of any one except himself, and he in the bond is falsely described as one of the heirs of Raja Khairati Lal. It was contended that the bond was not executed by Raja Lalji under the *mukhtarnamah* of the 5th of March 1877. We were referred to Story on Agency, paragraphs 145 to 150, and paragraph 160 A; Paley on Agency, 3rd ed., p. 180; Act No. VII of 1882, s. 2; 44 and 45 Vic., c. 41, s. 46; to the observation of Cotton, L. J. in *In re Whitley Partners, Limited* (1) and to Leake on Contracts, 3rd ed., p. 400. It was contended that the endorsement by the Sub-Registrar of the 6th of December 1877, could not affect the construction of the bond and was not evidence against the defendants that the bond had been executed by Raja Lalji as the attorney of anyone.

It was also contended on behalf of the defendants that as the bond of the 2nd of December 1877, was not in fact executed by the grantors of the *mukhtarnamah* of the 5th of March 1877, Raja Lalji had no authority under the special powers as to registering documents contained in that *mukhtarnamah* to register the bond on behalf of anyone but himself in his individual capacity, and that the registration as against the defendants was invalid and consequently that s. 49 of the Indian Registration Act, 1877 (Act No. III of 1877), applied.

We shall now consider the transaction relating to the bond of the 1st of April 1881.

(1) L.R. 32 Ch. D. 397 at p. 338.

[143] The bond of the 1st of April 1881, was executed by Raja Lalji and Kuar Inayat Singh by their putting their signatures to it, and by Rani Achhan Kuar by her seal being put to it. That bond purports to be for interest amounting to Rs. 8,100 on the bond of the 2nd of December 1877, and another bond for Rs. 20,000 of the 25th of May 1877 and for the following items :—

	Rs.	a.	p.
" In respect of the <i>Rukka</i> of 1st December 1880.			
Principal amount	10,475	0	0
In respect of the interest on the amount of			
the <i>Rukka</i>	1,300	14	0
In cash"	124	2	0
Making a total of Rs. 20,000.			

The particulars of the sum of Rs. 10,475-0-0 as stated in the bond are as follows :—

	Rs.	a.	p.
On 22nd June 1879, for revenue ...	2,000	0	0
On 5th November 1879, to pay interest to Intizam Begam	1,575	0	0
On 17th May 1880, to defray expenses of daughter's marriage	2,000	0	0
On 2nd August 1880, to pay interest to Moti Ram Sah	4,000	0	0
On 9th October 1880, to pay interest to Intizam Begam	900	0	0

The bond of the 25th of May 1877, has not been sued upon, and we have no information concerning it or of the transaction with Intizam Begam referred to in the above detail beyond that contained in the evidence of Nand Kishore.

If the views which we have already expressed be correct, neither Rani Achhan Kuar, nor Kuar Inayat Singh, nor the family property which was of Raja Khairati Lal was liable under the bond of the 2nd of December 1877. For the Rs. 4,000 interest to Moti Ram Sah [144] neither Rani Achhan Kuar, nor Kuar Inayat Singh, nor their family property was liable. That Rs. 4,000 was due under the bond which was sued upon in the case of *Lala Amarnath Sah v. Rani Achhan Kuar* (1). As to the items of Rs. 1,575-0-0 and Rs. 900, all the information appearing on the record put before us is the following statement of Nand Kishore :—" Raja Lalji and Inayat Singh asked me to get some more money advanced to them. Accordingly I got Rs. 30,000-0-0 advanced to them by the wife of Usman Khan. His wife's name is Intizam Begam ; and she obtained a decree." Kuar Inayat Singh was not asked a single question in cross-examination suggesting that he had made any such request of Nand Kishore or that he had been in any way liable to Intizam Begam for a debt or under a bond or under a decree. We place no reliance upon the evidence of Nand Kishore ; and beyond that evidence and the fact that Kuar Inayat Singh executed the bond of the 1st of April 1881, nothing has been put before us to suggest, much less to prove, that Kuar Inayat Singh was in any way liable for any debt to Intizam Begam. For all that appears, that debt and the liability for it may have been Raja Lalji's alone. Nand Kishore's evidence, beyond the fact that the seal of Rani Achhan Kuar had been put to the bond of the 1st of

(1) 19 I.A. 196.

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April 1881 after that bond had been at one side of the *pardah* read to some one whom he did not see and who was at the other side of the *pardah*, does not suggest that Rani Achhan Kuar was under any liability for any debt to Intizam Begam or even knew that any money was owing by any one to Intizam Begam.

If the item of Rs. 2,000 was advanced on the 17th of May 1880 to defray the expenses of the marriage of Raja Lalji's daughter, these expenses would in ordinary course be borne by her father Raja Lalji, and not by Raja Khairati Lal's estate, and it does not appear why Rani Achhan Kuar or Kuar Inayat Singh or their property should have been liable in respect of those marriage expenses, if they were in fact incurred. As to the interest on the bond of the 25th of May 1877, beyond the entry of the following particulars in the bond of the 1st of April 1881:—"Compound interest [145] in respect of the bond for Rs. 20,000, dated 25th May 1877, up to end of March 1881. Rs. 5,251-10-9,"—the recital in the bond of the 1st of April 1881, that Rs. 20,000 had been found due by Raja Lalji, Rani Achhan Kuar and Kuar Inayat Singh on two bonds, one of which was stated in the bond of the 1st of April 1881, to be a bond of the 25th of May 1877, and the following statement of Nand Kishore:—"In 1877, I, on behalf of Govind Prasad jointly with Baij Nath, (again said) Magni Ram and Mohan Lal advanced a loan of Rs. 20,000 to four persons, viz., Hulas Kuar, Achhan Kuar, Inayat Singh and Raja Lalji,"—there is nothing before us to suggest any liability of Rani Achhan Kuar or Kuar Inayat Singh or their family property in respect of that loan of Rs. 20,000 or the interest on it. On the 25th of May 1877, Rani Hulas Kuar was alive and in possession of the family property for the estate of the widow of a sonless Hindu. The interests of Rani Achhan Kuar and Kuar Inayat Singh were merely expectancies, and Kuar Inayat Singh was a minor, and further, there is nothing to show that Rani Hulas Kuar or Rani Achhan Kuar knew of that loan of the 25th of May 1877, or that the transaction was explained to them, or that they or Kuar Inayat Singh or the family derived any benefit whatsoever from the loan of that Rs. 20,000 of the 25th of May 1877. It may be inferred from the evidence of Rani Achhan Kuar and Kuar Inayat Singh that they knew nothing of the loan of the 25th of May 1877.

Another item of those which made up the Rs. 20,000 of the bond of the 1st of April 1881, was that of Rs. 2,000, which, according to the bond, had been advanced on the 22nd of June 1879, for the payment of Government revenue. Outside the bond of the 1st of April 1881, no evidence has been put before us to show that the Rs. 2,000 or any part of it was required in 1879 for the payment of revenue, or indeed that any such sum was advanced for any such purpose, or that the Government revenue could not have been paid at that time out of the rents of the family property. This is what Nand Kishore said as to the consideration for the bond of the 1st of April 1881:—"Out of the amount of the bond for Rs. 20,000 the [146] executants took some Lucknow *hundis* to pay the debt due to Sah Badri Das, because they were in debt, and they further stated that some money was required to meet the expenses of the marriage of the daughter, and a portion of the money was set off against the interest due under the old bonds, and Rs. 124 and odd annas were paid in cash." Nand Kishore said nothing in connection with that bond as to any necessity for the payment of the Government revenue. If any reliance is to be placed on the details given in the bond of the 1st of April 1881, no part of the consideration except the sum of Rs. 124-2-0

was advanced after the 9th of October 1880. The sum of Rs. 1,300-14-0 was, according to the detail in the bond, interest on a *rukka* of the 1st December 1880, given in respect of the items which made up the sum of Rs. 10,475. The item of Rs. 124-2-0 most probably represented the cost of the stamped paper upon which the bond of the 1st of April 1881 was written and the expenses of preparing the bond and getting it registered. We have gone thus at length into the items composing the sum of Rs. 20,000 of the bond of the 1st of April 1881, in order to ascertain, if possible, what was the consideration, if any, for Rani Achhan Kuar and Kuar Inayat Singh making themselves and their family property liable for the payment of the Rs. 20,000 with interest at the rate of 14 annas per centum per mensem, not to speak of a liability for compound interest at 12 per cent. per annum on six-monthly rests.

It is not shown to our satisfaction that Rani Achhan Kuar and Kuar Inayat Singh received any consideration for the bond of the 1st of April 1881.

Let us now see if they or either of them understood the transaction which Raja Lalji induced them to enter into in 1881. Rani Achhan Kuar swore and we believe her, that she had never borrowed any money from Thakur Das and Baij Nath of Pilibhit or Govind Prasad of Bareilly and that she had not known until the present suit was filed and the demand was made against her and Kuar Inayat Singh that Raja Lalji had borrowed any money from the plaintiffs or their firms. Nand Kishore said that Shankar Sahai read the bond of the 1st of April 1881, to Rani Achhan Kuar and [147] brought it back to him where he was sitting after her seal had been affixed to it. Later on he admitted in cross-examination that he never saw Rani Achhan Kuar, and he said:—"I did not see anyone with my own eyes affixing the seal. I did not see the person with my own eyes to whom the bond was read out. There was a *pardah* between. I saw the seal from a distance and not from near. It was in the hand of Shankar Sahai. He affixed the seal. I do not recollect wherefrom Shankar Sahai got the seal." There is not one word of evidence placed before us to show that the bond of the 1st of April 1881, or any of the items in it was ever explained to Rani Achhan Kuar. It was a bond which required considerable explanation, and to be carefully explained, if it was desired by Raja Lalji and Nand Kishore that Rani Achhan Kuar and her son Kuar Inayat Singh should understand the transaction to which it referred and the liability which they were asked to undertake in executing it. One use which was made of that bond in the Subordinate Judge's Court, and also before us in this appeal, was to found an argument that Rani Achhan Kuar and Kuar Inayat Singh by executing that bond admitted a liability of themselves and their family property under the bond of the 2nd of December 1877, and indeed a comparison of the bonds of the 1st of April 1881 and the 2nd of December 1877 leads us to the conclusion that the object of the reference in the bond of the 1st of April 1881 to the bond of the 2nd of December 1877, and of making the interest in arrear under the bond of the 2nd of December 1877 part of the consideration for the bond of the 1st of April, 1881 was to obtain evidence, by the execution of the bond of the 1st of April 1881 by Rani Achhan Kuar and Kuar Inayat Singh, that they had admitted a liability of themselves and their property under the bond of the 2nd of December 1877. Under the bond of the 2nd of December 1877, the ordinary interest payable was at the rate of one rupee per centum per mensem and the condition as to compound interest was as follows:—"In case of default in payment of interest every three

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months, the interest will be added to the principal and the creditors will be entitled to take (charge) compound interest at the rate of one rupee four annas per cent. per mensem without regard to the due date or after the expiration of the term at their pleasure." Under that condition the interest, Rs. 2,848-5-3, in arrear on the 31st of March 1881, under the bond of the 2nd of December 1877, would have borne interest at the rate of one rupee four annas per centum per mensem; whereas by making that interest, Rs. 2,848-5-3, as was done, part of the principal consideration for the bond of the 1st of April 1881, it would bear only ordinary interest at the rate of 14 annas per centum per mensem, and the compound interest on the six-monthly rests under the bond of the 1st of April 1881, was at the rate of only one rupee per centum per mensem. Nand Kishore, who negotiated on behalf of the money-lenders the transaction of the 1st of April 1881, volunteered no explanation of the reasons which induced the money-lenders of 1877, to forego the more advantageous terms of interest as to the sum of Rs. 2,848-5-3, and we cannot conceive what other object they could have had than that of attempting to make evidence to fix Rani Achhan Kuar and Kuar Inayat Singh and their family property with liability for the bond of the 2nd of December 1877. If that was their object it would most probably have been frustrated if the bond of the 1st of April 1881, had been explained to Rani Achhan Kuar and Kuar Inayat Singh. What chance of explanation or of independent advice had Rani Achhan Kuar or Kuar Inayat Singh? It was not to the interest of Raja Lalji to explain to his wife that she was incumbering her ancestral property. Although Shankar Sahai was an agent of the family, he was, as appears by the Sub-Registrar's endorsement on the bond of the 2nd of December 1877, as far back as 1877, the agent of Raja Lalji and he was not likely to give information or explanations to Rani Achhan Kuar or to Kuar Inayat Singh which Raja Lalji was unlikely to give. Shankar Sahai, although an agent of the family, was obviously not a confidential servant of Rani Achhan Kuar. She was *pardah-nashin* as to him, and Kuar Inayat Singh tells us that Achhan Kuar did not appear before Shankar Sahai. Even Nand Kishore makes Shankar Sahai stand on the outside of the *pardah* whilst reading the bond of the 1st of April 1881, to some one who was on the other side of the *pardah*. Is it likely that Rani Achhan Kuar had the deed of the 1st of April 1881, explained to her by Kuar Inayat [149] Singh? Kuar Inayat Singh had just come of age, he was then 19 or 20 years of age. In our opinion he entered as blindly into this transaction as did Rani Achhan Kuar. He had no experience of business. Raja Lalji managed everything. Kuar Inayat Singh said:—"I signed the document of 1881, because filial duty prevented me from disobeying his (Raja Lalji's) order. Also his influence as father prevented me from disobeying his order." We do not believe the statement of Nand Kishore that—"Inayat Singh signed himself after seeing and understanding all the accounts." That Kuar Inayat Singh may have seen that details of the Rs. 20,000 were stated in the bond is possible, but that he understood the accounts, or what those details represented, or what the object of the bond was, or what might be the inference to be drawn from his execution of it, we do not believe. In our opinion Kuar Inayat Singh blindly executed the bond at the bidding of his father Raja Lalji. Nand Kishore, who, on behalf of the mortgagees, negotiated that transaction and saw to the execution of the bond, must have known perfectly well that he was dealing with a helpless woman and her equally helpless son who had no one to advise them. Except the sum of Rs. 124-2-0, to

which we have referred, not one farthing was advanced on the execution of the bond after the 1st of April 1881. The balance of the Rs. 20,000, if the detail given in the bond can be treated as reliable evidence for any purpose, consisted of advances made between the 22nd of June 1879, and the 9th of October 1880, not proved in our opinion to have been made to these defendants or for the benefit of their property, and of interest upon loans, for some of which loans neither these defendants nor their property were liable, and for the remainder of which loans it is not in our opinion proved that these defendants or their property was liable. That the plaintiffs or those whom they represent knew that the property which they sought to have mortgaged to them was not the property of Raja Lalji and was the family property left by Raja Khairati Lal, or that they were aware that there was no necessity for incurring the debts appears to be a reasonable inference from the fact that they sought to make the Hindu woman in possession and one of the immediate reversioners parties to the bonds [150] so as to bind them, if possible, for advances previously made. They went further, for Nand Kishore attempted to prove at the trial that Kuar Inayat Singh was of full age in 1877. It was proved that he was then a minor, and subsequently, as appears from the finding on the 2nd issue framed by the Subordinate Judge, it was admitted that Kuar Inayat Singh was a minor at the date of the execution of the bond of the 2nd of December, 1877. Even if it be assumed that Kuar Inayat Singh understood the scope and effect of the bond of the 1st of April 1881, that fact would not in our opinion entitle the plaintiffs to the relief claimed by them.

The only relief to which they may be entitled, if at all, is a decree for the sale of the property mortgaged in the two bonds on which their suit is founded. Having regard to the law of limitation they are not entitled to a decree personally against either of the two defendants. As we have shown above, the bond of the 2nd of December 1877, is not binding on Rani Achhan Kuar. It has not been proved that she executed the bond of the 1st of April 1881, with a knowledge of its contents and of the effect of it on her property. So far therefore as her interests in the property are concerned, the mortgages on which the plaintiffs rely cannot be enforced against those interests.

Kuar Inayat Singh has no present vested interest in the property. His interests are those of a reversioner expectant on the death of his mother, Rani Achhan Kuar. A mortgage of such interests during the life-time of Rani Achhan Kuar cannot affect the property in the hands of Rani Achhan Kuar. We have pointed out in an earlier part of the judgment, that, under the Hindu law which prevails in these Provinces, there is no power in a reversioner to sell or mortgage his interests in expectancy. Under the ordinary law in this country also he has no such power. The Code of Civil Procedure, 1882, exempts in s. 266, clause (k), contingent interests of this description from liability to sale in execution of a decree. The same was the rule under the Code of 1877. Under Act No. VIII of 1859 also it was held, in *Ram Chunder Tantra Doss v. Dhurmo Narain Chuckerbutty* (1), that the interest of an heir [151] according to Hindu law, expectant on the death of a widow in possession was not property, and was not rendered liable to attachment and sale in execution of a decree by s. 205 of that Act. Kuar Inayat Singh, therefore, could not pass any title to the plaintiffs under the

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1895 mortgage of the 1st of April 1881, and in any view their suit is liable to
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 APPEL- To sum up, we find that in 1877, Kuar Inayat Singh was a minor,
 LATE and consequently was not bound by his execution of the *mukhtarnamah* of
 CIVIL. the 5th of March 1877, or by the bond of the 2nd December, 1877.

17 A. 125= We find that the *mukhtarnamah* of the 5th of March 1877, was not
 15 A.W.N. explained to Rani Achhan Kuar, and that she understood the *mukhtar-*
 (1895) 24. *namah* merely conferred power on Raja Lalji to act as the agent of the
 family in the management of the village property, and did not understand
 that it conferred power on him to mortgage or sell the family property,
 and that she was not bound by it.

We find that Raja Lalji had no authority to execute the bond of the 2nd of December 1877, on behalf of Rani Achhan Kuar, or of Kuar Inayat Singh, or to borrow money on their account.

We find that it is not proved that there was any family necessity for borrowing the money, the alleged consideration for the bond of the 2nd of December 1877, or for the mortgaging of the family property.

We find that it is not proved that the mortgagees of the bond of the 2nd of December 1877, satisfied themselves upon any reasonable inquiry that there was any family necessity for the making of that bond. We find that neither Rani Achhan Kuar nor Kuar Inayat Singh nor their family property is liable by the bond of the 2nd December 1877.

We find that the bond of the 1st of April 1881, was not explained to Rani Achhan Kuar, and that it is not proved that she understood that bond or the liabilities it purported to create or admit.

We find that it is not proved that there was any family necessity for the making of the bond of the 1st of April 1881, or that the [152] mortgagees of that bond satisfied themselves upon any reasonable inquiry that there was any family necessity for the making of the bond.

We find that it is not proved that Rani Achhan Kuar or Kuar Inayat Singh, or their family property was under any liability in respect of any part of the money, the alleged consideration for that bond, or that they or either of them received any consideration for the making of the bond.

We find that the bond of the 1st of April 1881, is not proved to be a bond binding upon Rani Achhan Kuar or her interest as a Hindu daughter in the family property, and that under such circumstances, and Kuar Shamsher Bahadur being then alive and having an equal interest with Kuar Inayat Singh in the family property, and Kuar Inayat Singh having merely an interest in expectancy in the family property and being incapable under the Hindu law of mortgaging or selling his interest in expectancy, no valid mortgage of the family property was effected by the bond of the 1st of April 1881, and no valid mortgage existed to the making of which he, as a reversioner, could consent.

We further find that Raja Lalji either with the active assistance or with the knowledge and connivance of Nand Kishore, who was acting for the mortgagees of the bond of the 1st of April 1881, took an undue advantage of his position as father and of the youth and inexperience and want of business knowledge of Kuar Inayat Singh, in procuring the execution of the bond of the 1st of April 1881, and that when Kuar Inayat Singh executed that bond he did not understand its object or its effect.

The Subordinate Judge on the ground of limitation dismissed the claim of the plaintiffs for a decree personally against Rani Achhan Kuar and Inayat Singh. From that dismissal there has been no appeal.

We allow this appeal, and dismiss with costs in both Courts so much of the plaintiffs' suit as was not dismissed by the Subordinate Judge.

Appeal decreed.

17 A. 153 = 15 A.W.N. (1895) 37.

[153] REVISIONAL CRIMINAL.

Before Mr. Justice Aikman.

QUEEN-EMPRESS *v.* KELLIE.* [14th January, 1895.]

Act No. XLV of 1860 (Indian Penal Code), s. 409—Criminal breach of trust—Conviction for criminal breach of trust on general deficiency in account.

An accused person may be charged with criminal breach of trust in respect of a general deficiency, and it is not necessary in all cases to charge the accused with the embezzlement of a particular sum received on a certain date from some particular person. *Reg. v. Lloyd Jones* (1); *Reg. v. Chapman* (2); *Reg. v. Wolstenholme* (3); and *The Queen v. Lambert* (4) referred to.

[*Diss.*, 2 C.W.N. 341 (345); *Appr.*, 18 A. 116 = 16 A.W.N. 11; *R.*, 33 A. 36 (40) = 7 A.L.J. 897 = 7 Ind. Cas. 186 = 11 Cr. L.J. 442.]

† [THIS was an application for revision of an appellate order of the Sessions Judge of Cawnpore sustaining the conviction of the applicant for the offence of criminal breach of trust as an agent, punishable under s. 409 of the Indian Penal Code. The applicant, Archibald Kellie, was the agent at Cawnpore of the firm of Messrs. Ullmann Hirschhorn & Co., the head office of which is in London. The firm has a branch in Calcutta, which imports piece-goods, thread, &c., and sells them through its agents. It was Kellie's duty to sell in Cawnpore the goods sent him by the Calcutta branch and to remit the proceeds to Calcutta. He was also bound to send to Calcutta cash abstracts showing his transactions. He had been dilatory in sending in his accounts, and in consequence of this Mr. Tilemann, the manager of the Delhi branch, and Mr. Sonderegger, an assistant in the Calcutta branch, met at Cawnpore, and on the 28th of August 1894 checked Kellie's accounts. According to those accounts, which were in Kellie's own handwriting, he ought to have had in hand a cash balance of Rs. 3,041-0-8; but all that he had was Rs. 113-7-0, there being thus a deficiency of Rs. 2,927-9-8. In respect of this deficiency Kellie was charged with the offence punishable under s. 409 of the Indian Penal Code and convicted, and his appeal was dismissed by the Sessions Judge.]

The judgment of Aikman, J., after stating the facts as above, thus continued:—

Mr. C. Ross Alston, for the applicant.

[154] The Government Pleader (Munshi Ram Prasad), for the Crown.

* Criminal Revision No. 688 of 1894.

† [This para though given in the statement of facts forms really a part and parcel of the Judgment of the Court.—ED.]

(1) 8 O. and P. 288.

(3) 11 Cox. Cr. Ca. 313.

(2) 1 C. and K. 119.

(4) 2 Cox. Cr. Ca. 309.

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15 A.W.N.
(1895) 24.

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(1895) 37.

The case for the petitioner has been well argued by *Mr. Ross Alston*. The main ground relied on by the learned counsel for the petitioner is that a conviction for criminal breach of trust on a general balance of account is bad in law.

In support of this he referred to *Reg. v. Lloyd Jones* (1). In that case Alderson, B., observed:—"It is not sufficient to prove at the trial a general deficiency in account. Some specific sum must be proved to be embezzled, in like manner as in larceny some particular article must be proved to have been stolen." The cases of *Reg. v. Chapman* (2) and *Reg. v. Wolstenholme* (3) were also relied upon.

The propriety of these rulings has been doubted even in England. With reference to the ruling in *Reg. v. Lloyd Jones*, the following remarks are made in Roscoe's Criminal Evidence, 10th edition, page 477:—"When a person is employed in the receipt and payment of money, it is almost impossible to prove anything more than a deficiency in account, and if the words of Alderson, B., in *Reg. v. Jones* (1) were to be taken in their strict sense, it would be impossible ever to procure a conviction for embezzlement when there were running accounts between the parties." And the author goes on to suggest that there was in the case referred to some misapprehension of the principles of law applicable to the question. I would also refer to the case of *The Queen v. Lambert* (4) decided in 1847. In that case, when the cash in the hands of the accused, an employee in the Customs Department, was checked, it was found to be short by £.270 of the amount which, according to his books, ought to have been in his possession. The accused had by virtue of his employment both to receive and pay away money on account of Government. It was contended on his behalf that the charge could not be supported in the absence of evidence to prove the appropriation of any particular sum from any one person. Erle, J., said:—"I think that the offence is sufficiently made out, within the [155] meaning of the statute, if the jury are satisfied that the prisoner received in the aggregate the amount with which he appears to have charged himself and that he absconded or refused, when called upon, to account, leaving a portion of the gross sum deficient. There would be constant failure of justice if I were to decide otherwise, since it is impossible in cases like the present, where a number of different amounts of money have been received, to specify which sum or sums or the part of which sum or sums have been embezzled."

But, be the law in England what it may, I have no hesitation in holding that, according to Indian law, an accused person may be charged with criminal breach of trust in respect of a general deficiency, and that it is not necessary in all cases to charge the accused with the embezzlement of a particular sum received on a certain date from some particular person. It is enough if the accused person has sufficient notice of the accusation he has to meet, and that he had in the present instance.

To hold otherwise would, to use the words of Erle, J., result in a "constant failure of justice." It was further argued by the learned counsel for the petitioner, on the strength of the ruling in the case *Rex v. Edward Hodgson* (5), that, as the prisoner's accounts were not shown to

(1) 8 C. and P. 288.
(4) 2 Cox. Cr. Ca. 309.

(2) 1 C. and K. 119.
(5) 3 C. and P. 422.

(3) 11 Cox. Cr. Ca. 313.

be incorrect, there was therefore no embezzlement, but merely a default of payment. But it is not in respect of accounts that a charge is made in such cases; it is in respect of the disappearance of a certain sum of money. The accounts may be kept in a faultless manner whilst speculation is going on; on the other hand, it is possible to imagine that accounts may be kept in a slovenly manner and that there may be many omissions in them, even whilst any suspicion of dishonesty is negatived. In the case referred to by the learned counsel it was said:—"If the prisoner regularly admits the receipt of the money, the mere fact of not paying it over is not felony. It is but matter of account." In this case, however, there was something more than the mere fact of not paying over the balance.

[156] It appears from the evidence of Mr. Tilemann and Mr. Sonderegger that when questioned as to this deficiency Kellie admitted that he had taken the money, and their evidence is borne out by the terms of a letter (Exhibit G.) written by Kellie to Mr. Sonderegger on the 30th of August 1894.

The learned counsel for the applicant also addressed the Court in mitigation of sentence. The punishment which has been sustained was a sentence of two years' rigorous imprisonment. Having regard to the circumstances of the case, I am of opinion that this punishment was not a bit too severe. This was not the case of an employee yielding on a solitary occasion to temptation. A large amount was embezzled, and it appears from the evidence of Mr. Sonderegger that Kellie admitted that speculation had been going on for some eighteen months. The nature of the defence set up by the applicant does not tell in his favour, as it amounted to an insinuation that the missing amount had been taken by Messrs. Tilemann and Sonderegger, an insinuation which I concur with the lower Courts in thinking to be baseless.

For the above reasons I reject the application and direct that the records be returned.

17 A. 156 = 15 A.W.N. (1895) 43.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Aikman.

HAIDAR SHAH (*Applicant*) v. JAMNA DAS AND OTHERS
(*Opposite Parties*).^{*} [22nd January, 1895].

Civil Procedure Code, ss. 350, 359—Insolvency—Powers exercisable by Court under s. 359—Withdrawal of application by applicant without permission to renew—Court not competent to make payment of costs a condition precedent to the granting of permission to withdraw.

A Court acting under s. 359 of the Code of Civil Procedure may, on the motion of a creditor under certain circumstances, order the imprisonment of an applicant for a declaration of insolvency, or it may, under certain circumstances of its own motion, send the applicant to be dealt with by a Magistrate; but it cannot, unless moved by [157] a creditor, pass an order of imprisonment under that section; and if on the motion of a creditor it has ordered the imprisonment of the applicant, it cannot subsequently act under the last clause of s. 359. *Kadir Bakhsh v. Bhawani Prasad* (1) referred to.

Where, an application for a declaration of insolvency having been filed, the applicant asked and obtained permission to withdraw the application absolutely,

^{*} First Appeal No. 91 of 1893, from an order of A. M. Markham, Esq., District Judge of Meerut, dated the 12th June 1893.

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(1895) 43.

i.e., without permission to renew the application, it was *held* that the Court could not make the payment by the applicant of the opposing creditors' costs a condition precedent to the granting of such permission so as to enable the Court subsequently to revive the proceedings commenced by the application, but that such proceedings were finally determined by the applicant's withdrawal.

[R., 3 Ind. Cas. 61 (63); 5 N.L.R. 88 (91).]

THE facts of this case were as follows:—

* [One Hafiz Syed Haidar Shah applied on the 4th of February 1891 to the District Judge of Meerut under s. 344 of the Code of Civil Procedure to be declared an insolvent. With his application he put in a schedule setting out the amount and particulars of his property and other matters which the law requires should be set out in such an application. A day was fixed for hearing the application, and on the 20th June 1891, the application was heard and the applicant was examined. On the 22nd of June 1891 the applicant stated to the Court that he withdrew his application for being declared an insolvent and prayed that the insolvency case might be struck off. Upon this the District Judge passed the following order:—"On application of the applicant in person, the petition of insolvency may be permitted to be withdrawn on the costs of the opposing creditors being paid." Nothing further took place until the 16th of November 1892, when one of the creditors, *i.e.*, The Bank of Upper India, Ltd., a creditor in whose presence the order of the 22nd of June 1891 had been passed, represented to the Court that the costs, payment of which had been ordered, had not been paid, and asked that the proceedings might be revived. No section of the Code was quoted as supporting such a request, but an order was passed calling upon the appellant to appear and show cause why his application to be declared an insolvent should not be revived. No cause was shown within the time granted, and on the 29th of November 1892 the Court directed that the application to be declared [158] an insolvent be revived and taken up at the point it had reached on the 20th of June 1891. The parties and their witnesses were directed to be present on the date fixed for their presence. The appellant did not appear, but on behalf of the Bank of Upper India an affidavit was filed declaring that Hafiz Syed Haidar Shah had, on the 12th of June 1892, transferred his entire property to his wife in lieu of dower with the object of defrauding creditors. No other evidence of any kind appears to have been taken, but the Court recorded an order setting out that—"as it would appear that this transfer amounts to a fraudulent transfer to defeat creditors and that the applicant has been guilty of concealment of debts, the Court orders that the applicant be called upon to appear on Saturday the 22nd instant at 11 A.M. and show cause why he should not be committed to prison under cl. 5 of s. 359, C.P.C., at the request of the opposing creditors." On this adjourned date an appearance was made on behalf of Haidar Shah, and it was argued that s. 359 would not apply, as there had been no decision under s. 350 of the Code of Civil Procedure. It was further contended that no fraud of any kind on the part of Haidar Shah had been proved, and the jurisdiction of the Court to revive, as it was called, the proceedings which had come to a close on the 22nd of June 1891, was disputed. The objections were overruled, the learned Judge holding that no decision under s. 350 was required, and that all that was necessary was that at any time during the hearing under s. 350 it should have been proved that there had been a

* [This portion though given in the statement of facts forms really a part and parcel of the Judgment of the Court.—ED.]

fraudulent transfer or an act of bad faith. Upon the affidavit already mentioned, and upon an admission by the vakil for Haidar Shah that on the 12th of June 1892 his client had transferred a portion of his property in favour of a person whom the Judge terms a creditor not named by the applicant in his list of creditors, it was held that there had been a fraudulent transfer and an act of bad faith regarding the matter of his application. The objection taken to the jurisdiction of the Court was also overruled. The Judge held that his order permitting withdrawal was only conditional; that as the condition had not been fulfilled, sanction [159] was finally refused, and the hearing under s. 350 was still subsisting on the 12th of June 1892. The Judge then proceeded to order that Haidar Shah be, at the instance of the represented creditors, and at their costs, "imprisoned in the civil jail for one year, unless he shall sooner satisfy the said opposing and represented creditors." On the same date, and on the representation of the vakil for those of the creditors who were present, the above order was amended, and a new order issued directing that the applicant was under s. 359 to be arrested and conveyed to the jail to suffer simple imprisonment for six months. It is this last order from which the present appeal has been filed. That order was, however, followed by a further order directing that, as Haidar Shah had absconded, the case under the last clause of s. 359 of the Code be referred to the Magistrate of the District to the end that Haidar Shah might be dealt with under s. 87 and the following sections of the Code of Criminal Procedure.]

The judgment of the Court (Knox and Aikman, JJ.) after stating the facts as above, thus continued:—

Mr. *Abdul Majid* and Pandit *Sundar Lal*, for the appellant.

Babu *Jogindro Nath Chaudhri* and Munshi *Jwala Prasad*, for the opposite parties.

JUDGMENT.

This order (*i.e.*, that under the last clause of s. 359 of the Code of Civil Procedure), it is hardly necessary to point out, was certainly not one in accordance with law. All that the last clause of s. 359 authorises under certain circumstances, which did not arise in the present case, as there had been an order passed under the first clause of the section, is that the Court may send an applicant for insolvency before it to the Magistrate to be dealt with according to law. In the present case the Judge had already adopted the first of the two courses prescribed in s. 359 and had no power to have recourse to the second alternative. The meaning of this section appears to have been somewhat misunderstood. What the section requires is that if a Court be moved thereto by a creditor it shall, under the circumstances set out in the section, sentence the applicant to imprisonment. This is the only course open to a Court when set in motion at the instance of [160] the creditors. If there be no application by any creditor, the Court is still empowered, if it consider the case calls for such an order, to proceed *suo motu* and to send the applicant to the Magistrate. It cannot, unless moved by a creditor, pass an order of imprisonment. The case of *Kadir Bakhsh v. Bhawani Prasad* (1) (Edge, C. J., and Straight, J.) was cited to us in the course of the argument. There are certain expressions in the judgment in that case which appear to be opposed to the view we have taken. Straight, J., there held that

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when a creditor applied to a Court to exercise its jurisdiction under s. 359 it was open to the Court either itself to punish the applicant for insolvency or to send him before a Magistrate to be dealt with according to law. In our opinion, the wording of the section is against this interpretation. Omitting the words immaterial to the decision of the point raised, the section runs as follows:—

"Whenever at the hearing under s. 350 it is proved that the applicant has (a) been guilty, &c.,—the Court shall, at the instance of any of his creditors, sentence him by order in writing to imprisonment for a term which may extend to one year from the date of committal; or, the Court may, if it think fit, send him to the Magistrate to be dealt with according to law."

The repetition in the last clause of the words "the Court," and the fact that the word "shall" is used in the one clause and the word "may" in the other lead us to think that the one course is not intended to be an alternative to the other when the Court is set in motion by a creditor. Had an alternative been intended we should have expected to find the word "shall" in both clauses or the word "may" in both clauses.

The insertion of the words "at the instance of any of his creditors" between the words "shall" and "sentence" support the same view.

The intention of the Legislature apparently was to restrict the Court to the one course of sending the applicant to be dealt with by a Magistrate when the Court of itself, and without being moved [161] thereto by a creditor, comes to the conclusion that the applicant should be punished for any act of bad faith he is proved to have committed; and the reason probably is that, in this event, the Court is, as it were, itself the prosecutor.

We have the authority of the learned Chief Justice for saying that he concurs in the interpretation which we now put upon this section.

To return to the order from which this appeal is filed. It is contended that that order and all the proceedings taken after the 22nd of June 1891 are without jurisdiction; that the Judge could not revive the proceedings, and that no fraud on the part of the appellant had been proved at any hearing under s. 350. It appears to us that this contention is good and must prevail. The only authority in the Code of Civil Procedure for withdrawal of proceedings once commenced before a Civil Court is that contained in s. 373, which by s. 647 applies to proceedings under chapter XX of the Code. That section gives a plaintiff, and similarly in the case before us gave the applicant, a choice of withdrawing from a suit or application with or without the permission of the Court before which his suit or application stands. No restriction of any kind is placed upon his withdrawing without permission of the Court: he is liable, if he so withdraws, for such costs as the Court may award, and is precluded from bringing a fresh suit or application in the same matter. This is totally different from a power given to a Court, as is given in other sections of the Code, to make the payment of costs precedent to an order which the Court intends to pass. The only case in which a Court may, under this section, impose any condition upon a plaintiff who seeks to withdraw is where that plaintiff asks the Court for permission, not only to withdraw, but also for liberty to bring a fresh suit for the same subject matter. In this case the applicant stated that he withdrew without any further thought or suggestion that he intended to, or wished to, bring a fresh application. The case fell within the second paragraph of section 373, and the order passed by the Court should have been to

[162] the effect that as the applicant has asked to withdraw from the application he be adjudged to pay the costs of the opposing creditors. It follows therefore that any condition imposed by the Judge as to costs being paid precedent to permission to withdraw was without jurisdiction and must be regarded as mere surplusage. The proceedings determined on the 22nd of June 1891, and no longer subsisted after that date for any purpose whatsoever. At the hearing it was contended that an applicant for insolvency finding the case going against him, and after trouble taken by the creditors to prove fraud, might, if he could withdraw unconditionally, by so doing escape the penalties provided by law under section 359 for the punishment of fraudulent debtors. Such an argument overlooks the existence in the Code of s. 643, which in our opinion does provide for and meet such a contingency. In view of the above finding it becomes unnecessary for us to take up the question of fraud, and we would only remark here that up to the 22nd of June 1891 no fraud had been proved, and no evidence of fraud given even after that date. The affidavit filed by the Bank and the very qualified admission made by the pleader for Hafiz Syed Haidar Shah, do not amount to proof of fraud. For these reasons we allow this appeal and set aside the order of the Court below with costs. There was an application filed in connection with this appeal by one Shankar Lal. It was not supported, and therefore it stands dismissed.

Appeal decreed.

17 A. 162 = 15 A.W.N. (1895) 35.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

ABDUR RAHMAN (*Decree-holder*) v. SHANKAR DAT DUBE (*Objector*).^{*}
[28th January, 1895.]

Civil Procedure Code, s. 234—Execution of decree—Attachment during lifetime of judgment-debtor—Application after death of judgment-debtor to bring his representatives on to the record of the execution proceedings—Procedure

In execution proceedings if the decree-holder desires to proceed after the death of the judgment-debtor against property which has not been attached during the lifetime of the judgment-debtor, his proper course is that marked out by s. 234 of Act No. XIV of 1882 : but if the property has been attached during the lifetime of [163] the judgment-debtor, it then comes into the lands of the law and the attachment does not abate on the death of the judgment-debtor, and for the purpose of proceeding against, and if necessary selling, that property it is not necessary to implead any one as a legal representative.

THE facts of this case were as follows : † [One Abdur Rahman had obtained a money decree against Raja Hari Har Dat Dube, on the 30th of April 1890, for a sum of Rs. 820-8-0. On the 15th of November 1890, two boxes containing shawls were ordered to be attached, and the attachment was effected in the month of December. The sale was stayed under an order of the District Court pending the disposal of the suit in which the judgment-debtor was one party and his brother Shankar Dat, the present respondent, was the other. On the 23th of June 1891, an

^{*} First Appeal No. 248 of 1892, from an order of Kuar Bharat Singh, Officiating Judge of Jaunpur, dated the 3rd September 1892.

† [This portion though given in the statement of facts forms really a part and parcel of the Judgment of the Court.—ED.]

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(1895) 35.

application was made to strike off the execution proceeding, but to maintain the attachment, with leave to apply again for further steps in aid of execution. The case was ordered to be struck off, the attachment maintained, and the permission prayed for given. A further application was made in relation to the same attachment. The attachment still remained subsisting at the time of the death of the judgment-debtor, on the 13th of January 1892. A further application was made in execution for the attachment of a sum of 1,000 rupees payable under an agreement between the deceased judgment-debtor and the present respondent, then due for the month of November of that year. The Court made an order prohibiting Raja Shankar Dat from paying that money to the deceased judgment-debtor. The order was still subsisting at the time of the death of the judgment-debtor. On the 11th of December 1891, an application was made that Raja Shankar Dat be ordered to pay into Court the sum of Rs. 500, then due from him to the judgment-debtor. An order was made granting that application. Notice was duly served on Raja Shankar Dat's agent. On the 6th of January 1892, an application was made for the attachment of a sum of money (about 200 rupees) then deposited in the Rent Court and standing to his credit, and an order of attachment was issued accordingly. At a date subsequent to these attachments and while they were all three subsisting, Raja Hari Har Dat, died. The [164] present appeal arises out of an application made to the Court in which the proceedings then were to put upon the record, as legal representative of the deceased, his brother, the Raja Shankar Dat, and his widow Rani Sahodra Kaur. Objection was taken upon the part of Raja Shankar Dat, but not upon the part of the widow. The Court, referring to a judgment already delivered, and which had relation to the execution of a decree obtained by another plaintiff against the judgment-debtor in the case, refused to put the names upon the record as representatives, alleging that he did so for the reason given in the previous case. It appears that the Judge probably did not notice that the one case was in no sense upon all fours with the other. In that case execution was sought against the zamindari property, and such property was not at the time of the decease of the judgment-debtor under attachment. The Court refused to put either of the names upon the record. It is against that order that Mr. *Ghulam Mujtaba* appeals.]

After stating the facts as above, the judgment of Blair, J., thus continued:—

Maulvi *Ghulam Mujtaba*, for the appellant.

Mr. *T. Conlan*, Mr. *Abdul Majid* and Pandit *Sundar Lal*, for the respondent.

JUDGMENT.

It appears to us that the ruling of the Full Bench of this Court in the case of *Sheo Prasad v. Hira Lal* (1) is a binding authority upon the question at issue in this matter. It is needless to follow in detail the erroneous reasons given by the Judge below in dealing with this matter. It is clear to us that this is a case which is really decided by the ruling above referred to. It was there held by the Full Bench that s. 234 of the Code of Civil Procedure applied only to cases in which after the death of the judgment-debtor the decree-holder sought to bring to sale property which was of the judgment-debtor in his lifetime, and which was not at the time of his death under attachment in the suit of the

(1) 12 A. 440.

judgment-creditor. In the view of the Court which decided that case section 234 contemplates that the property which was of the judgment-debtor in his lifetime may [165] not only have come to the hands of his legal representative, but may, before the making of the application under the section have not been duly disposed of by the representative. In this case, it appears to us that no item of the property attached has come into the possession of the legal representative, whose liability under s. 234 of the Code of Civil Procedure is expressly limited to the extent of the property of the deceased which has come to his hands and has not been duly disposed of. That being so, we think the Court below, though for wrong reasons, is perfectly right in refusing to put up upon the record the names of the respondents as representatives of the deceased judgment-debtor. It seems to be settled law that no such representative need be put on the record. Mr. *Ghulam Mujtaba* is in our opinion entitled to take such further steps in the execution proceedings as he may be advised, and that no impediment can arise from the fact of there not being on the record any legal representative of the deceased judgment-debtor. The appeal is dismissed with costs.

BURKITT, J.—I concur in the judgment which has been pronounced and desire to add a few words only. The application made by the decree-holder on the 18th of February, 1892, and the 5th of March, 1893, to bring Raja Shankar Dat and Rani Sahodra Kuar on the record in the execution proceedings was properly rejected by the District Judge, not for the reasons given by him, which, in my opinion, have no bearing on the matter, but because the applications so made were applications for which the law makes no provision whatsoever. Those applications were apparently modelled on the lines of s. 368 which provides for the substitution of names in the place of the deceased defendant in a suit; but under Act No. VI of 1892 and the recent rulings of their Lordships of the Privy Council such procedure cannot be adopted in execution proceedings. In such proceedings if the decree-holder desires to proceed after the death of the judgment-debtor against property which has not been attached during the lifetime of the judgment-debtor his proper course is that marked out by s. 234 of Act No. XIV of 1882, but if the property has been attached during the lifetime of the judgment-debtor it [166] then comes into the hands of the law and attachment does not abate on the death of the judgment-debtor, and for the purpose of proceeding against, and if necessary selling, that property, it is not necessary to implead any one as a legal representative. It was therefore in this case quite unnecessary to ask for an order to bring the brother and the widow of the deceased judgment-debtor on the record. It was an order which the Court had no jurisdiction to pass, and in refusing to pass it the Court was right, though, as I said before, the reasons it gave for that refusal are wrong and irrelevant.

Appeal dismissed.

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CRIMINAL. QUEEN-EMPRESS v. SRI LAL AND OTHERS.* [4th February, 1895.]

17 A. 166 = Act No. XLV of 1860 (Indian Penal Code), ss. 159, 160—Affray—"Public place."

15 A.W.N.
(1895) 42.

Held, that a *chabutra* which was neither a place to which the public had a right of access, nor a place to which the public were ever permitted to have access, was not, though it adjoined a public road, a "public place" within the meaning of s. 159 of the Indian Penal Code.

[R., 29 B. 386 (390 = 7 Bom. L.R. 333 = 2 Cr. L.J. 252 ; 31 C. 542 = 8 C.W.N. 458 (462) ; A.W.N. 1904, 92 ; 10 Cr. L.J. 16 (17).]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Roshan Lal* and *Babu Satya Chandar Mukerji*, for the applicants.

The Government Pleader (*Munshi Ram Prasad*), for the Crown.

JUDGMENT.

EDGE, C.J., and BANERJI, J.—This is an application for revision of an order of the Sessions Judge of Farakhabad dismissing the appeal of the applicants from a conviction under s. 160 of the Indian Penal Code.

The fighting appears to have taken place on a *chabutra*, which from the evidence in the Court below appears to have been private property adjoining a public thoroughfare. We infer from the evidence that that *chabutra* was neither a place to which the public had a right of access, nor a place to which the public were used to [167] have access, nor was it a place to which the public were ever permitted to have access, though it adjoined a public road. We must look to s. 159 of the Indian Penal Code to see what are the ingredients of the offence of an "affray." S. 159 runs as follows:—

"When two or more persons by fighting in a public place, disturb the public peace, they are said to commit an affray." It will be observed that this section does not make fighting "in public," which is likely to disturb the public peace, an affray. The fighting disturbing the public peace which is an affray, is fighting which takes place in a "public place." No doubt the fighting in this case on the *chabutra* was fighting in public, because the public could see what was taking place.

Some of the statutes in England make acts penal which are done in public, others make acts penal which are done in a public place, so that in the criminal statute law in England, the distinction is, it will be observed, between doing an act in public and doing an act in a public place. As the *chabutra* was not a place to which the public had by right or by permission, or by usage or otherwise, access, we must hold that it was not a public place, although any member of the public walking along the street could walk on to it, but in doing so he would be committing a trespass.

Under these circumstances, we must set aside the convictions. We acquit the applicants, and order that the fines, if paid, be refunded.

* Criminal Revision No. 701 of 1894.

17 A. 167 = 15 A.W.N. (1895) 36.

APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.*NATTHU SINGH (*Defendant*) v. GULAB SINGH (*Plaintiff*).
[5th February, 1895.]*Limitation—Suit for possession of property incidentally necessitating the setting aside of or declaration of invalidity of an adoption—Act No. XV of 1877 (Indian Limitation Act), sch. ii, art. 118.*

Article 118 of sch. ii of the Indian Limitation Act applies only to suits for a declaration that an adoption is invalid or in fact never took place; it does not apply [168] to a suit for possession of property merely because it may be necessary in order to give effect to the relief claimed in such suit to find that a given adoption is invalid. *Basdeo v. Gopal* (1), *Ghandharap Singh v. Lachman Singh* (2), *Padajirav v. Ramrav* (3) and *Lala Parbhu Lal v. Mylne* (4) referred to.

[*Dias.*, 24 B. 260 = 1 Bom. L.R. 799 (F.B.); F., 24. A. 195 = 22 A.W.N. 10; 26 A. 40 = 23 A.W.N. 163; 25 C. 354 (364); 20 M. 40 (46) = 6 M.L.J. 272 (276); R., 21 B. 159 (162); 21 B. 376 (379); 9 C.W.N. 222 (224); 11 C.P.L.R. 49; D., 34 A. 8 (11) = 8 A.L.J. 1101 (1105) = 11 Ind. Cas. 476 (477).]

THE plaintiff in this case sued for possession of a share in certain immoveable property which had been in her lifetime in the possession of one Musammat Lacheho, the widow of one Tarsi Ram. The property in suit, with the exception of two plots, once belonged to Zorawar Singh, the common ancestor of the parties save the defendants Zauki Ram and Murli Singh, who were mortgagees from Musammat Lacheho. Zorawar Singh had five sons, three of whom, *i. e.*, Tarsi Ram, Ganga Ram and Khushal Singh, died in his lifetime. Zorawar Singh died in 1864, leaving him surviving two sons, Gulab Singh (the present plaintiff) and Shib Singh, and sons of two other sons.

Musammat Lacheho Kuar, widow of Tarsi Ram, got a one-fifth share of the property left by her father-in-law, Zorawar Singh; and it is now undisputed that she was in separate possession of the share up to her death in November 1891.

On the 19th of June 1876, Musammat Lacheho executed a hypothecation bond in favour of Zauki Ram and Murli Singh. The mortgagees brought a suit in 1888 upon the bond. The plaintiff, Gulab Singh, and Natthu Singh were added as defendants to this suit under s. 32 of the Code of Civil Procedure. Gulab Singh contested the validity of the mortgage on the ground that Musammat Lacheho was in possession as a Hindu widow in lieu of her right of maintenance and that the transfer by her was void. The Court held that Musammat Lacheho was in adverse and proprietary possession of the property and gave the plaintiffs a decree for a portion of the amount claimed. On appeal, the defendants got a decree for a larger amount, and in other respects the finding of the Lower Court was upheld. Upon the death of Musammat Lacheho Natthu Singh set up his right as the adopted son of Tarsi Ram, and his right was recognized by the Revenue authorities.

[169] The plaintiff claimed to recover possession of a share in the property on the ground that it had been given to Musammat Lacheho in lieu of maintenance and that on her death it reverted, in part at least, to

* First Appeal No. 93 of 1893, from a decree of Babu Ganga Saran, B.A., Subordinate Judge of Aligarh, dated the 23rd January 1893.

(1) 8 A. 644.

(2) 10 A. 485.

(3) 13 B. 160.

(4) 14 C. 401.

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the plaintiff. He denied that Natthu Singh had been ever adopted by Tarsi Ram as his son, and sued to have it declared that the decree obtained by the mortgagee defendants could not be executed against the property because the interest of Musammat Lachcho came to an end at her death. The defendant Natthu Singh maintained the validity of his adoption, and also pleaded limitation, and further that the plaintiff on his own showing was not entitled to more than a one-fourth share.

The Lower Court (Subordinate Judge of Aligarh) found that the plaintiff's claim as against the mortgagee defendants was barred by the principle of *res judicata*; but that as against Natthu Singh and the other defendants the plaintiff was entitled to a one-fourth share of the property in suit, and made a decree accordingly. Natthu Singh thereupon appealed to the High Court.

Mr. *Abdul Raoof*, for the appellant.

Mr. *C. Ross Alston* and *Munshi Ram Prasad*, for the respondent.

JUDGMENT.

EDGE, C.J., and BANERJI, J.—This appeal has been heard with First Appeal No. 117 of 1893. In First Appeal No. 93 of 1893, the defendant Natthu Singh is the appellant, and in First Appeal No. 117 of 1893, Gulab Singh, plaintiff, is appellant. The suit was for possession of shares in a village which were in the possession of the defendant Natthu Singh at the commencement of the suit. The plaintiff was entitled to the decree which he got in the Court below, if Natthu Singh was not adopted, as alleged by him, by one Tarsi Ram. Tarsi Ram was one of the five sons of Zorawar Singh. Gulab Singh, the plaintiff, was one of those sons. Natthu Singh's case was that Tarsi Ram and Tarsi Ram's then wife, Musammat Lachcho, adopted Natthu Singh about two years before Tarsi Ram died. The plaintiff's case is the utter negation of any [170] such adoption. The adoption is said to have taken place about 1863. In 1876 (Zorawar Singh having died in 1864), Musammat Lachcho, the widow of Tarsi Ram, who had predeceased his father Zorawar Singh, presented an application to the Revenue Court asking for mutation of names in respect of a certain share in the village to be made in favour of Natthu Singh. She alleged in the proceedings on that application that her deceased husband had adopted Natthu Singh when the latter had been about one year old. As a matter of fact that application was opposed by, amongst others, the plaintiff in this suit, and Musammat Lachcho's name was entered in the revenue papers and Natthu Singh's was not entered.

On the fact of that application having been made in 1876, and opposed by the present plaintiff, Mr. *Abdul Raoof*, for the defendant Natthu Singh, has contended that this suit is barred by limitation. He relies on art. 118 of sch. ii of the Indian Limitation Act, 1877, and in support of his contention further relies on the judgments of their Lordships of the Privy Council in *Jagadamba Chaodhrani v. Dakhina Mohun Roy Chaodhri* (1), *Mohesh Narain Munshi v. Taruck Nath Moitra* (2), and on a judgment of this Court in *Inda v. Jehangira* (3). The last mentioned case was undoubtedly decided on art. 118 of sch. ii of Act No. XV of 1877; the two cases before their Lordships of the Privy Council were decided upon the former Limitation Act, No. IX of 1871. The article especially referring to adoptions was, in Act No. IX of 1871, art. 129 of

(1) 13 C. 308.

(2) 20 C. 487.

(3) 10 A.W.N. (1890) 241.

sch. ii. The two articles of Act No. XV of 1877 which especially refer to suits relating to adoption are arts. 118 and 119 of sch. ii. Article 129 of Act No. IX of 1871 in words related to suits "to establish or set aside an adoption." It is true that their Lordships of the Privy Council, in the cases to which we have referred, treated the words "to set aside an adoption," in that article, as referring to suits for a declaration that an adoption was invalid. We find also that when the Legislature passed Act No. XV of 1877, they did not use the language of art. 129 of Act No. IX of 1871, but used language in [171] arts. 118 and 119 which, according to the ordinary construction, would limit those articles to suits, in the one case to obtain a declaration that an alleged adoption was invalid or never in fact took place, and in the other case to obtain a declaration that an adoption was valid. The Legislature in other parts of the schedule, for example, in art. 91 of sch. ii of Act No. XV of 1877, followed the wording of art. 92 of Act No. IX of 1871, which had reference to suits "to cancel or set aside an instrument not otherwise provided for." We assume that by departing from the language of art. 129 of Act IX of 1871, and by using language in arts. 118 and 119 of the schedule of the present Act, which can only refer to suits for declarations, it was intended that those articles should apply only to suits in which such declarations were sought. In this view we are supported by the decision of this Court in *Basdeo v. Gopal* (1) and *Ghandharap Singh v. Lachman Singh* (2); by a decision of the Bombay High Court in *Padajirav v. Ramrav* (3), and by a decision of the Calcutta High Court in *Lala Parbhu Lal v. Mylne* (4). This being the case, and the present suit not having been one for a declaration, we hold that art. 118 does not apply and that the suit is not barred by limitation.

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We now come to the merits of the suit. Zorawar Singh, the head of this family, died in 1864. His son, Tarsi Ram, whose widow Musammat Lachcho was, predeceased Zorawar. At the time that Musammat Lachcho's name was entered in the revenue papers as representing a one-fifth share in the property left by Zorawar, Zorawar's son, Shib Singh, was alive. Shib Singh was the father of three sons, one of whom was Natthu Singh, who was alleged to have been adopted by Tarsi Ram. It is impossible to believe that, if this adoption had in fact taken place, Shib Singh would not, on the death of Zorawar Singh, have insisted on the right of his own natural son Natthu Singh to have his name entered as the grandson of Zorawar and as the adopted son of Tarsi Ram. He did not insist on anything of the kind. Musammat Lachcho's name was entered. There is another thing which in our opinion is fatal [172] to this alleged adoption. If the adoption had in fact taken place, Natthu Singh ceased to have any share in the interest of his natural father, Shib Singh; but, on the death of Shib Singh, Natthu Singh took an equal share in Shib Singh's property with his brothers and continued to cultivate the *sir* of Shib Singh. Another fact which goes against the adoption is that Musammat Lachcho up to the time of her death in 1891 continued to be not only recorded in respect of the one-fifth share, but actually cultivated it.

There is evidence on the record which we believe, which shows that Tarsi Ram died some years before Natthu Singh was born. Natthu Singh's case depends on his proving that the adoption alleged by him took place in Tarsi Ram's lifetime. Musammat Lachcho, as the widow of Tarsi Ram, was allowed by the family to be entered in the revenue papers in respect of the one-fifth share for her maintenance, though she was not

(1) 8 A. 644.

(2) 10 A. 485.

(3) 13 B. 160.

(4) 14 C. 401.

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entitled to be so entered. It is very possible that in 1876, owing to some ill-feeling amongst the members of the family she was disposed to put forward Natthu Singh as the adopted son of Tarsi Ram. Whatever was the cause of her line of conduct at that time, her subsequent conduct was inconsistent with any adoption having taken place. On these grounds we dismiss first appeal No. 93 of 1893, with costs.

Appeal dismissed.

17 A. 167 =
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(1895) 36.

17 A. 172 = 15 A.W.N. (1895) 42.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Aikman.

HAMIDA BIBI (*Plaintiff*) v. ALI HUSEN KHAN (*Defendant*).^{*}
[11th February, 1895.]

Civil Procedure Code, ss. 366, 588—Abatement of suit—Appeal.

No appeal will lie from an order under the first paragraph of s. 366 of the Code of Civil Procedure declaring that a suit shall abate, such order neither amounting to a decree nor being specifically appealable under s. 588. *Bhikaji Ram Chandra v. Purshotam* (1), dissented from.

[F., 2 N.L.R. 7; R., 10 O.C. 121; 121 P.R. 1907 = 51 P.W.R. 1907.]

THE facts of this case are as follows:—

The plaintiff sued in the Court of the Subordinate Judge of Shahjahanpur to recover a sum of Rs. 41,686-10-8 as her dower [173] debt, but died shortly after the filing of the suit, and before issues were framed, on the 14th of November 1893. After various adjournments for the purpose of allowing the heirs of the deceased plaintiff to come in, the case was fixed for the 15th of May 1894. On the 10th of January 1894, one Musammam Hamida Bibi, the mother of the plaintiff, applied to be brought on the record as legal representative of the plaintiff in respect of some of the property in suit, but that application was rejected, as it did not contain a schedule of the property, nor was it signed and verified. On the 29th of May 1894, Hamida Bibi again applied to be brought on to the record as a representative of the deceased plaintiff, but this application also was rejected as not being signed and verified, and also as being beyond time. Hamida Bibi accordingly appealed to the High Court.

Pandit Moti Lal and Babu Durga Charan Banerji, for the appellant.
Mr. Abdul Majid and Maulvi Ghulam, Mujtaba for the respondent.

JUDGMENT.

KNOX and AIKMAN, JJ.—A preliminary objection is raised by Mr. Ghulam Mujtaba to the hearing of this appeal, on the ground that the order appealed from is an order passed under the first paragraph of s. 366 of Code of Civil Procedure and that no appeal is provided for such order by s. 588 of the Code. Our attention was drawn in the course of the argument to the case of *Bhikaji Ram Chandra v. Purshotam* (1) in which it was held that such an order is appealable. It was held by the learned

* First Appeal No. 123 of 1894, from an order of Rai Banwari Lal, Subordinate Judge of Shahjahanpur, dated the 26th June 1894.

(1) 10 B. 220.

Judge who decided that appeal that such an order was virtually "a decree within the meaning of s. 2 of Act No. XIV of 1882, as it disposes of the plaintiff's claim as completely as if a suit had been dismissed." The learned Judges who decided that appeal appear to have overlooked the very important provisions of s. 371, which allow a person claiming to be the legal representative of a deceased to apply for an order to set aside the order of abatement. It cannot therefore be said that an order under the first paragraph of s. 366 is an [174] adjudication which, as far as the Court expressing it, decides the suit or appeal. Moreover, it is provided by clause (20) of s. 588 of the Code that an applicant whose application for an order to set aside an abatement is refused can appeal from such order of refusal. We sustain the objection and dismiss the appeal with costs.

Appeal dismissed.

17 A. 174 = 15 A.W.N. (1895) 47.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

SHIB CHARAN LAL (*Defendant*) v. RAGHU NATH (*Plaintiff*).^{*}
[11th February, 1895.]

Civil Procedure Code, s. 13—Res judicata—Finding in judgment not embodied in the decree and not essential to the making of the decree as framed—Act No. I of 1887 (Specific Relief Act), s. 42.

A finding in a judgment to operate as *res judicata*, the Court being a Court of jurisdiction competent to try the subsequent suit, must be material and necessary to support the precise and particular ground or grounds on which the decree or some operative part of it was made, otherwise the finding must be considered either as superseded by the decree, or as entirely immaterial, or as no more than incidental and subsidiary to the main question in the suit, although in the latter case the finding may have been necessary to the decision of the suit.

The finding of fact to operate as *res judicata* need not have been the sole finding of fact upon which the decree was made, but it must have been a material and necessary finding of fact, material and necessary in the sense that the fact must have been found as it was found in the judgment, and could not have been found otherwise, for the decree as it was made to have been a good result in law from the fact or facts so found. Further, if there were two findings of fact, either of which would justify in law the making of the decree which was made, that one of such two findings of fact which should in the logical sequence of necessary issues have been first found, and the finding of which would have rendered the other of such two findings unnecessary for the making of the decree which was made, is the finding which can operate as *res judicata*.

A matter cannot be said to be "directly and substantially in issue" within the meaning of the first paragraph of s. 13 of Act No. XIV of 1882 unless and until it is, or becomes, material for the decision of the suit to find as to it. The framing of issues under s. 146 of Act No. XIV of 1882, on which at that stage of the suit the right decision of the case appears to depend, does not of itself make the matter to which such issues relate "directly and substantially in issue" within the meaning of s. 13, although, when the finding upon any one or more of the issues is sufficient for the decision of the suit, it may be desirable that the Court should state in its judgment its finding or decision upon each separate issue which it had framed.

[175] The following cases were referred to :—*Krishna Behari Roy v. Brojeswari Chowdranee* (1), *Soorjomonee Dayee v. Suddanund Mohapatler* (2), *Rajah Run Bahadoor Singh v. Mussumut Lachoo Koer* (3), *Radnamadhub Holdar v.*

^{*} Appeal No. 44 of 1894 under s. 10 of the Letters Patent.

(1) 2 I.A. 283.

(2) I.A. Supp. Vol. 212.

(3) 12 I.A. 23.

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[F., 32 B. 315=10 Bom.L.R. 380; 20 A.W.N. 89; R., 8 A.L.J. 409 (410)=9 Ind.Cas. 983 (984); 6 Ind. Cas. 696; 11 Ind. Cas. 89 (90); 121 P.R. 1907=51 P.W. R. 1907; 101 P.W.R. 1911=120 P.L.R. 1911=9 Ind. Cas. 1030 (1031); 19 A.W.N. 182; 4 M.L.T. 90; D., 24 C. 900 (907); 5 A.L.J. 48=A.W.N. (1908) 41=3 M. L.T. 205; 5 Ind. Cas. 278 (279); 4 O.C. 145 (150); 57 P.R. 1907 (F.B.)=66 P.W. R. 1907.]

THE facts of this case and the arguments on either side are fully stated in the judgments of the Court.

Mr. *Abdul Majid*, for the appellant.

Babu *Viddya Charan Singh*, for the respondent.

JUDGMENT.

EDGE, C.J., and BANERJI, J.—Raghu Nath, who is the respondent to this appeal, brought in the Court of the Munsif of East Budaun the suit in which this appeal has arisen and made Cheda Lal, Ramji Lal, Sundar Lal, and Seeb Charan Lal, defendants to the suit. Shib Charan Lal is the appellant here.

In his plaint Raghu Nath alleged that a certain pacca house had been the property of one Mansukh deceased, that Mansukh died without male issue and left two daughters, viz., Musammât Kishna and Musammât Biba, him surviving, who, having obtained possession of the house for their interest as the daughters of a deceased sonless Hindu, died. Raghu Nath further alleged that he was the son of Musammât Biba, who died in 1890, and that Cheda Lal, Ramji Lal and Sundar Lal were the sons of Musammât Kishna, and that on the death of Musammât Biba, who was alleged by Raghu Nath to have survived her sister Musammât Kishna, he, Raghu Nath, and the defendants Cheda Lal, Ramji Lal and Sundar Lal as the heirs of Mansukh became entitled to the house, each to the extent of one-fourth.

[176] It was further alleged in the plaint that Musammât Kishna, jointly with the defendants Cheda Lal and Ramji Lal and in collusion with them and without necessity, on the 19th of September 1879, by deed mortgaged the house to the defendant Shib Charan Lal, that Shib Charan Lal subsequently on appeal in suit brought by him in 1891 against Cheda Lal, Ramji Lal and Sundar Lal upon the mortgage of the 19th of September 1879, obtained a decree for sale as against the defendants, Cheda Lal, and Ramji Lal, of their interests in the house, which by that decree was declared to be the two-thirds interests, and that Shib Charan Lal's suit for sale as against Sundar Lal was dismissed.

It was alleged in the plaint, as was the fact, that the plaintiff Raghu Nath instituted in 1893 in the Court of the Munsif of East Budaun a suit against these defendants Shib Charan Lal, Cheda Lal, Ramji Lal and Sundar Lal for a declaration that he was one of the four heirs of Mansukh and as such was entitled to a one-fourth share in the house, and that the Munsif, finding that the plaintiff Raghu Nath was not in possession of the house, dismissed the suit.

(1) 15 I.A. 97.
(4) 7 A. 606.
(7) 1 A. 266.
(10) 18 B. 597.

(2) 25 W.R. C.R. 225.
(5) 1 A. 480.
(8) 7 B. 464.
(11) 5 W.R. P.C. 63.

(3) 6 C. 319.
(6) 2 A. 497.
(9) 4 M. 134.
(12) 11 Ch. D. 798.

It was also alleged in the plaint that the defendant Shib Charan Lal in 1893 put his decree for sale in execution.

The plaint concluded with following prayer:—"The plaintiff prays judgment that by declaring that the plaintiff is the owner of, and entitled, to, one-fourth of the house bounded as below and situate in Budaun mohalla Syedpura, he may be put in possession of the aforesaid one-fourth share jointly with the defendants Nos. 1, 2 and 3 (Cheda Lal, Ramji Lal and Sundar Lal) by protecting the same from the demand of the decree of the appellate Court, No. 812 of 1891 (the decree for sale) and the decree of the original Court, No. 516 of 1891."

The defendants Cheda Lal, Ramji Lal and Sundar Lal did not defend this suit. The defendant Shib Charan Lal in his written statement pleaded, *inter alia*, that this suit was barred by s. 43 of Act XIV of 1882 and that the mother of the plaintiff Raghu Nath was one Musammat Gaura, and was not Musammat Biba, and that [177] neither Musammat Gaura nor Musammat Biba was a daughter of Mansukh.

In the present plaintiff's suit of 1893, he alleged, and the defendant, Shib Charan Lal denied, that the plaintiff Raghu Nath was the son of a Musammat Biba and that Musammat Biba was one of two daughters of Mansukh and that the plaintiff Raghu Nath was, as such son of Musammat Biba, entitled to a one-fourth share in the house in question. In that suit the Munsif in his judgment found that issue as to title in favour of Raghu Nath, but, as Raghu Nath had not claimed any decree for possession, the Munsif dismissed the suit under the proviso to s. 42 of the Specific Relief Act, 1877 (Act No. I of 1877), on a finding that the plaintiff was not in possession, jointly or otherwise, of the house in question.

In the present suit the same Munsif held that by reason of his finding as to title in the previous suit the question of the title of the plaintiff Raghu Nath as one of the four heirs of Mansukh was *res judicata* under s. 13 of Act No. XIV of 1882, and also found as a fact that, apart from the question of *res judicata*, the plaintiff Raghu Nath had in this suit proved his title as one of the four heirs of Mansukh; and finding the other issues in favour of the plaintiff decreed his claim. As to the plea that this suit was barred by s. 43 of Act No. XIV of 1882, the Munsif relied upon and followed the decision of this Court in *Mohan Lal v. Bilaso* (1). From that decree the defendant Shib Charan Lal appealed to the Court of the District Judge. In his grounds of appeal he questioned the correctness of the findings of fact of the Munsif. His fifth ground of appeal was:—"That s. 13, Civil Procedure Code, was not at all applicable, because in the former case the plaintiff's claim was dismissed. An appeal is preferred against a decree and not on the ground of reasons. When that decision has not the effect of *res judicata* (s. 13) against the parties, it does not stand in bar." In that appeal the District Judge of Shahjahanpur held that the question of the title of the plaintiff Raghu Nath was not *res judicata*, and that s. 13 of Act No. XIV of 1882 did not [178] apply; and, finding as a fact that the plaintiff had not proved his title as an heir of Mansukh, he set aside the decree of the Munsif and dismissed the suit. From that decree the plaintiff appealed to this Court. His appeal was heard by a Single Judge, who, holding that the question of title was, by reason of the finding as to title of the Munsif in the previous suit, *res judicata* under s. 13 of Act No. XIV of 1882, reversed the decree of the District Judge, and made, under s. 562 of Act No. XIV of

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1882, an order of remand. From that order of remand this appeal has been brought under s. 10 of the Letters Patent of this Court by the defendant Shib Charan Lal.

The only question argued before us was the question of *res judicata*. Mr. *Abdul Majid*, for the defendant Shib Charan Lal, relied upon the proviso to s. 42 of the Specific Relief Act, 1877 (Act No. I of 1877), and contended that the finding as to title in the previous suit was immaterial to the decision of that suit; that the decree in that suit having been entirely in favour of Shib Charan Lal, and an appeal lying from a decree and not from a finding in a judgment not embodied in the decree, he could not have questioned that finding by an appeal, and that a finding which could not be questioned by an appeal could not in a subsequent suit operate as *res judicata*. Mr. *Abdul Majid* cited the following cases. *Umrao Lal v. Behari Singh* (1), *Ram Sewak Singh v. Nakched Singh* (2), *Putali Mehetz v. Tulja* (3), *Anusuyabai v. Sakharam Pandurang* (4), *Ghela Ichharam v. Sankalchand Jetha* (5), *Devarakonda Narasamma v. Devarakonda Kanaya* (6), *Nundo Lall Bhattacharjee v. Bidhoo Mookhy Debee* (7), *Thakur Magundeo v. Thakur Mahadeo Singh* (8), *Rajah Run Bahadur Singh v. Mussumut Lachoo Koer* (9), and *Narain Das v. Faiz Shah* (10).

Mr. *Viddya Charan Singh*, for the plaintiff-respondent Raghu Nath, contended that the finding as to title was a material finding, [179] and even if not material to the decision of the previous suit, the issue as to title was tried between the parties, and, the Court having expressed an opinion on it, the matter became *res judicata*, whether an appeal from the decree in the previous suit could or could not have been brought by Shib Charan Lal; that Shib Charan Lal had an appeal against the decree in the previous suit, as that decree was defective by reason of that finding as to title not having been embodied in the decree, and, even if no appeal lay on the part of Shib Charan Lal from that decree as it stood, he could, under s. 206 of Act No. XIV of 1882, have got the Court to amend the decree so as to bring it into conformity with the judgment by embodying that finding in it, and could then have appealed from the decree as amended. He cited the following cases:—*Krishna Behari Roy v. Brojeswari Chowdranee* (11), *Shaikh Enaetoollah v. Shaikh Ameer Buksh* (12), *Niamut Khan v. Phadu Buldia* (13), *Ram Gholam v. Sheotahal* (14), *Man Singh v. Narayan Das* (15), *Lachman Singh v. Mohan* (16), *Mohan Lal v. Ram Dial* (17), *Jamaitunnissa v. Lutfunnissa* (18), and the *Duchess of Kingston's case* (19). He also referred to *Hukm Chand's Treatise on the law of res judicata*, paragraph 60, page 131.

It was vigorously contended by Mr. *Viddya Charan Singh* before us that *Krishna Behari Roy v. Brojeswari Chowdranee* (11), *Shaikh Enaetoollah v. Shaikh Ameer Buksh* (12), *Niamut Khan v. Phadu Buldia* (13) and the judgment of Mahmood, J., in *Jamaitunnissa v. Lutfunnissa* (18) were authorities for the proposition that a finding in a judgment which is not embodied in the decree made upon that judgment operates as between the parties as *res judicata* if the Court which expressed such finding in its judgment was competent to try the subsequent suit.

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| (1) 3 A. 297. | (2) 4 A. 261. | (3) 3 B. 223. | (4) 7 B. 464. |
| (5) 18 B. 597. | (6) 4 M. 134. | (7) 13 C. 17. | (8) 18 C. 647. |
| (9) 12 I.A. 23=11 C. 301. | | (10) 24 P. R. 551=157 P.R. 1889 (F.B.) | |
| (11) 2 I.A. 283=25 W. R. C.R. 1. | | (12) 25 W.R. C.R. 225. | |
| (13) 6 C. 319. | (14) 1 A. 266. | (15) 1 A. 480. | (16) 2 A. 497. |
| (17) 2 A. 843. | (18) 7 A. 606. | (19) 2 Smith L.C. 9th Ed., 812. | |

That proposition is not in our opinion supported by the decision of their Lordships of the Privy Council in *Krishna Behari Roy v. Brojeswari Chowdrania*. In that case Bunwari Lall had brought [180] a suit to set aside certain patni leases granted to one of the defendants by the widow of one Goursoonder Roy, to whom Bunwari Lall alleged that he had been adopted by the widow as a son. Krishna Behari Roy intervened in the suit; alleging that he and not Bunwari Lall was the heir of Goursoonder Roy. One of the defences set up was that Bunwari Lall had not been validly adopted. The Principal Sudder Ameen found that Bunwari Lall had been validly adopted, but dismissed the suit on the finding that the patni leases could not be set aside. Krishna Behari Roy appealed to the Civil Judge, who, affirming the decision of the Principal Sudder Ameen, dismissed the appeal. From that decree of the Civil Judge Krishna Behari Roy appealed to the High Court at Calcutta. According to the judgment of their Lordships of the Privy Council, the High Court, "after fully hearing the case upon the issue of adoption, affirmed the decisions of the Courts below. There exists therefore a final and complete judgment upon the issue raised either at the instance of Krishna Behari Roy, or which he adopted, on the very question which he seeks again to raise in this suit;" and their Lordships held that Krishna Behari Roy was precluded by the principle of *res judicata* from questioning the validity of the adoption of Bunwari Lall in the subsequent suit which was before them in appeal. Krishna Behari Roy had intervened, not to support the suit of Bunwari Lall to have the patni leases set aside, but to defeat that suit on the plea that Bunwari Lall had no title to the property, and consequently could not maintain the suit. The patnidar had not appealed from the decree of the Principal Sudder Ameen, and the decree of the High Court dismissing Krishna Behari Roy's appeal was made on the ground that Bunwari Lall had been validly adopted, and that was the finding of the High Court to which effect was given by its decree dismissing Krishna Behari Roy's appeal. It accordingly seems to us that it was only by reason of the finding as to the validity of Bunwari Lall's adoption having been given effect to in the decree of the High Court that their Lordships held that finding to be *res judicata* on the question of adoption.

[181] The contention of Mr. Viddya Charan Singh to which we are referring, received support from the fact that Markby and Romesh Chunder Mitter, JJ., in *Shaikh Enaetoollah v. Shaikh Ameer Buksh* (1) and Norris, J., in *Niamut Khan v. Phadu Buldia* (2), obviously, and apparently the other members of the Full Bench in the latter case, assumed, incorrectly in our opinion, that the decision of their Lordships of the Privy Council in *Krishna Behari Roy v. Brojeswari Chowdranee* (3), was solely based upon the finding of the Principal Sudder Ameen. Markby, J., at page 226 of 25 W.R.C.R. said:—"So in the case reported in 25 Weekly Reporter, p. 1, the decree in the previous suit, the finding in which was relied on was not before the Privy Council, nor have we been able to examine it, as it was not a decree of this Court, but we may with safety say that the finding relied on was not in the decree, for the suit was dismissed." Norris, J., at page 324 of I.L.R., 6 Cal., referring to an omission from the decree of a Munsif of his finding that a tenure was liable to enhancement, which finding was relied upon as operating as *res judicata*, said:—"The omission of this finding in the decree is not material, because as pointed out by Mr. Justice Markby in the case of *Shaikh Enaetoollah*

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(1) 25 W.R.C.R. 225.

(2) 6 Cal. 319.

(3) 2 I. A. 283 = 25 W.R.C.R. 1.

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v. *Shaikh Ameer Buksh*, their Lordships when they delivered their judgment in the case of *Soorjomone Dayee*, had not the decree before them, and neither in that case, nor in another very similar case, *Krishna Behari Roy v. Bunwari Lall Roy*, did they think it necessary to have the decree before them. As a matter of fact in neither case was the finding relied on embodied in the decree.

In *Shaikh Enaetoollah v. Shaikh Ameer Buksh* (1), the question common to the earlier suit and to that suit was whether the tenure of the tenant was one which allowed of, or precluded, an enhancement of the rent by the landlord. In the earlier suit the Munsif had found that the tenure was not protected from enhancement, but, finding that the grounds upon which enhancement was [182] claimed were not established, gave a decree for rent at the old rate. In that case Markby and Romesh Chunder Mitter, JJ., held that the finding in the earlier suit on the question of title, whether or not it was contained in the decree, might in the subsequent suit, which was then before them in appeal, be relied on as binding between the parties on the question as to whether the tenure was one which allowed of the rent being enhanced. Markby and Romesh Chunder Mitter, JJ., apparently came to that conclusion partly on the view which they entertained as to the basis upon which their Lordships of the Privy Council had decided the question of *res judicata* in *Krishna Behari Roy v. Brojeswari Chowdranee*, and which they expressed in the passage which we have already quoted from their judgment in *Shaikh Enaetoollah's* case, and partly from the view which they entertained as to the basis of the judgment of their Lordships in *Soorjomonee Dayee v. Suddanund Mohapatter* (2). As to that case they said:—"In a case reported in 20 Weekly Reporter 377, certain declarations of right contained in a judgment of this Court delivered in a previous suit were held by the Privy Council to be conclusive, this Court being competent to make them. The decree in that case was not before the Privy Council; it does not appear that the Privy Council thought it necessary; and in fact the decree, which is in the record of this Court and which we have examined contains none of the declarations relied on by the Privy Council; it is simply a decree for costs." The case to which their Lordships of the Privy Council referred was *Suddanund Mohapatter v. Bonomollee* (3). According to the report of the judgment of the High Court in that case, the High Court made in its judgment the declarations relied upon by their Lordships of the Privy Council in the case before them. It does not appear that any one suggested to their Lordships or informed them that those declarations in the judgment of the High Court had been omitted from its decree, and it may be presumed that their Lordships in deciding that case assumed that the declarations made by the High [183] Court in its judgment had been embodied in its decree. Consequently we cannot regard the judgment of their Lordships in *Soorjomonee Dayee v. Suddanund Mohapatter* as deciding or suggesting that a finding in a judgment not given effect to in the decree operates between the parties as *res judicata*. The fact that their Lordships in *Soorjomonee Dayee v. Suddanund Mohapatter* and in *Krishna Behari Roy v. Brojeswari Chowdranee* referred to the judgments of the High Courts, and not to the decrees which had been made, does not suggest to us an inference that their Lordships considered that a finding in a judgment not given

(1) 25 W.R. O.R. 225.

(2) L.R.I.A. Supp., Vol. 212=12 B.L.R. 304=20 W.R. 377.

(3) Marsh. 317=2 Hay 205.

effect to by a decree can operate as *res judicata*, for in many cases it is absolutely necessary to examine, not only a judgment, but the pleadings, in order to ascertain on what matters a decree is conclusive between the parties or their representatives. That such an examination is not only permissible but necessary in some cases is to be inferred from the judgment of their Lordships of the Privy Council in *Kali Krishna Tagore v. The Secretary of State for India in Council* (1). As the two authorities relied upon by the Court in *Shāikh Enaetoollah's* case did not in our opinion support the view as to *res judicata* expressed by that Court, we cannot regard the decision in *Shaikh Enaetoollah's* case as one of authority.

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Having regard to the referring order and to the judgment in *Niamut Khan v. Phadu Buldia* (2), it appears that the Calcutta Full Bench took the same view as Markby and Romesh Chunder Mitter, JJ., had taken in *Shaikh Enaetoollah's* case of the decisions of their Lordships of the Privy Council in *Soorjomonee Dayee v. Suddanund Mohapatter* and in *Krishna Behari Roy v. Brojeswari Chowdrance* and assumed that the Privy Council had decided in those cases that a material finding in a judgment which was not given effect to in the decree would operate as *res judicata*. In *Jamaitunnissa v. Lutfunnissa* (3) Mahmood, J., considered that the decisions of their Lordships of the Privy Council in *Krishna Behari* [184] *Roy v. Brojeswari Chowdrance* (4) and *Soorjomonee Dayee v. Suddanund Mohapatter* (5) supported the decision of the Calcutta Full Bench in *Niamut Khan v. Phadu Buldia*.

In *Nundo Lall Bhattacharjee v. Bidhoo Mookhy Debee* (6) and in *Thakur Magundeo v. Thakur Mahādeo Singh* (7) a Division Bench of the High Court at Calcutta refused to follow the decision of the Full Bench of that Court in *Niamut Khan v. Phadu Buldia*.

It does not appear from the report in *Man Singh v. Narayan Das* (8) whether the finding as to the bond which was relied upon as *res judicata* was given effect to by declaration or otherwise in any of the decrees in the suit in which the Munsif had found against the bond. Having regard to the finding in that case that the decree upon the bond under which it was sought to sell the property in question had been passed without jurisdiction so far as that property was concerned, the finding that the bond was not a valid bond, would appear to have been a finding immaterial and unnecessary to the decision of the first suit. We are therefore unable to accept the ruling in that case as an authority in support of Mr. Viddya Charan Singh's contention.

It would appear from the report of *Mohan Lal v. Ram Dial* (9), that the finding relied upon as *res judicata* had been given effect to in the decree by the dismissal of the suit. We shall again refer to that case later on.

It would appear from the judgment of Sir Robert Stuart, C. J., in *Lachman Singh v. Mohan* (10), and from the judgments of Oldfield and Mahmood, JJ., in *Jamait-unnissa v. Lutfunnissa* (11) that those learned Judges considered that a party in whose favor a decree is has a right to appeal against the decree as not being in conformity with the judgment by reason of its not having embodied in it a finding expressed in the judgment, if that finding was adverse [185] to the party in whose favour the decree was. The reason of those learned Judges for that view apparently

(1) 15 I. A. 186 = 16 C. 173 (183).

(4) 2 I. A. 283.

(8) 1 A. 480.

(5) I. A. Sup. Vol. 212.

(9) 2 A. 843.

(2) 6 C. 319.

(6) 13 C. 17.

(10) 2 A. 497.

(3) 7 A. 606.

(7) 18 C. 647.

(11) 7 A. 606.

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was that such finding would operate as *res judicata*, and consequently that the party considering himself aggrieved by it should have a right of appeal.

Holding apparently a contrary view of the law as to *res judicata*, Turner and Spankie, JJ., in *Ram Gholam v. Sheotahal* (1) held that a party in whose favor, a decree was, had a right of appeal against it in order to have a finding against him in the first Court upon which the decree in his favour was not made, considered and finally decided in appeal so as to preclude his opponent from raising that question again.

The opinions on this subject of Sir Robert Stuart, C. J., Turner, Spankie, Oldfield and Mahmood, JJ., to which we have just alluded appear to be opposed to the views expressed by their Lordships of the Privy Council in *Rajah Run Bahadoor Singh v. Mussumut Lachoo Koer* (2) to which we shall refer later on.

In support of the contention that no finding could operate as *res judicata* against a party if that party had no opportunity afforded to him of questioning that finding by an appeal against the decree, Mr. *Abdul Majid* mainly relied upon certain dicta in the judgment in *Anusuyabai v. Sakharam Pandurang* (3). In that case West and Nanabhai Haridas, JJ., said:—"In the case of *Jania Gaba v. Hulia Waru* it was said that an incidental finding of a District Court on a question of title in a case not admitting of further appeal could not be *res judicata* as to that point in a future suit. The decision could not be appealed against, and therefore, on the incidental question was not final. The same principle applies where an appeal is excluded by the decree; a point is not finally decided against any party who is not allowed the opportunity of questioning the decision, with the exception of the particular points, as in small causes, to the judgment on which a special finality is given by the Statute."

[186] It appears, however, to us that the operation of s. 13, Act No. XIV of 1882, cannot depend on the question whether the parties or either of them is or has been allowed an opportunity of questioning the decision in the particular matter by an appeal against the decree in the suit. If it were a true proposition of law that "a point is not finally decided against any party who is not allowed the opportunity of questioning the decision," a finding of fact by a District Judge in an appeal which reversed the finding of fact on the same matter by a Munsif could never operate as *res judicata*, although the District Judge rightly applied the law in arriving at that finding and rightly applied the law on the fact so found by him. Sections 584 and 585 of Act No. XIV of 1882 would preclude an appeal from the decree of the District Judge in such a case. It would be an anomaly in the law that a material and necessary finding of the Munsif should, if his decree were appealable, but was not appealed against, operate as *res judicata* by reason of s. 13, explanation IV, and that the contrary finding of fact on the same matter by the District Judge, however material and necessary it might be for the decree of the District Judge, should not operate as *res judicata* owing to a second appeal not being, by reason of ss. 584 and 585, permissible in the particular case. Explanation IV of s. 13 of Act No. XIV of 1882 would in our opinion make applicable the first paragraph of s. 13 to the decision of the District Judge on the matter, and such application satisfies us that the operation of the principle of *res judicata* under the law in British India cannot depend on the fact that an appeal does or does not lie against the decision of the matter in dispute.

(1) 1 A. 266.

(2) 12 I. A. 23.

(3) 7 B. 464.

Subject to the observation that it may be necessary to examine the judgment and the pleadings in order to ascertain what matters have and what matters have not been decided by the decree, we think that the law on the question of *res judicata*, was more correctly expressed in the judgment of the Madras High Court in *Devarakonda Narasamma v. Devarakonda Kanaya* (1) then it was *Anusayabai v. Sakharam Pandurang*. In *Devarakonda Narasamma v. Devarakonda Kanaya*, Innes and Mu-
[187] thusami Ayyar, JJ., said:—"The first defendant, Mr. Shaw represents, is apprehensive that the expression of the Judge's opinion in the judgment as to the adoption said to have been made by her may be held to be *res judicata* upon that point in any suit hereafter instituted. As to this we are of opinion that to see whether a matter is *res judicata* you must look to the former decree. If the decree does not decide the question, it is not *res judicata*. Certain recent decisions appear to have held that the first clause of section 13, Civil Procedure Code, precludes a second trial between the same parties, of matters which have been in issue and upon which the Judge has expressed his opinion in a former suit. We do not agree in this view. The words 'has been heard and finally decided by such Court' apply, not to the expression of opinion in the judgment, but to what has been decided by the decree." In *Ghela Ichharam v. Sankal Chand Jetha* (2), Sir Charles Sargent, C. J., and Fulton, J., said:—"Where, however, the defendant sets up two grounds of defence to the relief sought by the plaintiff and succeeds on one, which causes the dismissal of the plaint, the decision on the other issue in the plaintiff's favor cannot be said to be material to the determination of the suit: it is, therefore, not *res judicata* and no appeal would lie against it, because, as was remarked by the Privy Council in *Rajah Run Bahadoor Singh v. Mussumut Lachoo Koer*, the decree was not based on it, but was made in spite of it."

The question whether a party to a suit in whose favor the decree wholly is can appeal against that decree or against a finding in the judgment not embodied in, or given effect to by, the decree, and the question as to whether a finding in a judgment upon which finding the decree was not based, and in spite of which the decree was made, can operate as *res judicata*, appear to be concluded by the following passage in the judgment of their Lordships of the Privy Council in *Rajah Run Bahadoor Singh v. Mussumut Lachoo Koer* (3). At page 34 their Lordships are reported to have said:—"The widow has not appealed against the decree, nor could she, because it is in her favor, but she has appealed against the finding that the
[188] brothers were joint in estate. It may be supposed that her advisers were apprehensive lest that finding should hereafter be held conclusive against her, but this could not be so, inasmuch as the decree was not based upon it but was made in spite of it. If she had not appealed, she could have supported the decree on the ground that the Court ought to have decided the question of separation in her favor." Their Lordships threw out a suggestion that objection might have been taken that an appeal against a finding in a judgment did not lie, but, no objection having been taken at the Bar, their Lordships heard the widow's appeal.

The case of *Radhamadhub Holdar v. Monohur Mookerji* (4) affords a good example of the application of the principle of *res judicata*. In that case Matangini, a zamindar, granted a patni lease to Mookerji and subsequently mortgaged the zamindari interest to Mookerji, who obtained

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(1) 4 M. 134.

(3) 12 I.A. 23.

(2) 18 B. 597.

(4) 15 I.A. 97=15 C. 756.

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a decree for sale upon the mortgage. At the sale which was held in execution of his decree, Mookerji purchased the zamindari interest, i.e., Matangini's interest in the property the subject of the patni lease. Whilst Mookerji's suit for sale was pending another creditor of Matangini got a decree for money against Matangini, and in execution of it brought the zamindari interest of Matangini to sale and that interest was at that sale purchased by Radhamadhub. Radhamadhub after the purchase by him sued Mookerji for rent in respect of the patni holding, and his suit was dismissed on the ground that in Mookerji and not Radhamadhub had become vested Matangini's zamindari interest. The suit in appeal before the Privy Council was one subsequently brought by Radhamadhub against Mookerji for redemption of the mortgage granted to Mookerji by Matangini and their Lordships having referred to the ground upon which the suit for rent had been decided, said :—"On that ground the rent suit was decided against Radhamadhub. Radhamadhub now comes to redeem, but the right to redeem rests on precisely the same ground as the right to rent was rested. In each case the question is equally; who is the true representative of Matangini? Therefore their Lordships conceive [189] that the matter was expressly decided by the High Court in the rent suit."

As affording a good illustration of a material finding in a judgment which by reason of the decree in the suit could not operate as *res judicata* and of the effect of a decree as superseding a finding in a judgment, we may refer to the case of *Jamaitunnissa v. Lutfunnissa* (1). In that case the two questions which were referred to the Full Bench of this Court were :— (1) Whether the appeal to this Court on the part of the defendant Jamaitunnissa is maintainable? (2) Whether her objections under s. 561, Act No. XIV of 1882, in the Judge's Court were maintainable? It appears from the report that the plaintiff had brought in the Court of a Subordinate Judge a suit to obtain possession of certain property by right of inheritance to one Sikandar Ali Shah, then deceased, and to set aside a deed of endowment (*waqf-namah*) which the plaintiff alleged that the defendant had fraudulently induced Sikandar Ali Shah to execute. The Subordinate Judge found and held that the *waqf-namah* was not valid as against the plaintiff and could not interfere with the plaintiff's right of succession by inheritance, but, finding that the defendant was entitled to remain in possession of the property until a dower debt due to her was satisfied, dismissed the plaintiff's suit without granting by his decree the relief which the plaintiff had claimed in his plaint as to the *waqf-namah*. The plaintiff appealed to the Court of the District Judge against the decree of the Subordinate Judge, and the defendant in that appeal filed objections under s. 561 of Act No. XIV of 1882 to the finding as to the *waqf-namah*. The District Judge dismissed the plaintiff's appeal, and, considering that the question as to the *waqf-namah* was not necessary to the disposal of the plaintiff's claim, refused to consider the question as to the *wakf-namah* and disallowed the objections which had been filed by the defendant. From that disallowance the defendant appealed to this Court. The majority of the Full Bench, for reasons stated by them in their judgment, answered the two questions in the negative. The [190] contrary view was entertained by Mahmood, J., and apparently by Oldfield, J. It appears to us that, whether the plaintiff in that suit was or was not entitled to the then present possession of the land, and although the defend-

(1) 7 A. 606.

ant was entitled to the then present possession of the land in lieu of her dower-debt, the plaintiff, on the finding of the Subordinate Judge that the *waqf-namah* was not a valid deed which could interfere with the plaintiff's right of succession by inheritance to the grantor of that deed, was entitled to a decree setting that deed aside so far as it affected the plaintiff's interests, although his claim to the present possession of the land was dismissed. It may have been that on the finding that the defendant was entitled to the present possession in lieu of her dower-debt the finding of the Subordinate Judge as to the *waqf-namah* was in fact immaterial to her title to the then present possession, but that finding actually was material to one of the two reliefs claimed by the plaintiff. It also appears to us that the decree of the Subordinate Judge dismissing the plaintiff's suit was, as to the claim to have the *waqf-namah* set aside, at variance with the judgment, and that, if the finding as to the *waqf-namah* was correct, the plaintiff, and not the defendant, had a good appeal to the District Judge, as the relief claimed in the plaint as to the *waqf-namah* had not been granted by the decree. The relief as to the *waqf-namah* having been claimed in the plaint and not having been expressly granted by the decree, must, according to explanation III of s. 13 of Act No. XIV of 1882, be deemed to have been refused, and such refusal, notwithstanding the finding in the judgment that the *waqf-namah* was invalid as against and not binding on the plaintiff, would, by reason of s. 13, preclude the plaintiff from again alleging in any suit which the first Court was competent to try that the *waqf-namah* was not a valid deed binding upon him. In fact, having regard to the ground upon which that suit was dismissed, to the fact that the relief claimed in the plaint as to the *waqf-namah* was not granted by the decree, and to explanation III of s. 13 of Act No. XIV of 1882, all the issues, so far as the principle of *res judicata* as expressed in s. 13 was concerned, were finally decided by [191] the Court below in the defendant's favor, and she had nothing about which to appeal, and had no appeal by way of objection under s. 561 of Act No. XIV of 1882, or otherwise to the Court of the District Judge, and had no appeal from the decree of the District Judge to this Court. Explanation III of s. 13 of Act XIV of 1882 does not depend upon any finding of the Court in its judgment or upon the reasons of the Court for not granting the relief; it depends solely upon the fact that a relief claimed in the plaint was not expressly granted by the decree. By s. 2 of Act No. XIV of 1882, a "judgment means the statement given by the Judge of the grounds of a decree or order," and a "decree means the formal expression of an adjudication upon any right claimed or defence set up in a Civil Court when such adjudication, so far as regards the Court expressing it, decides the suit or appeal....." It is obvious from the explanations to s. 13 of that Act that the decree which is the formal expression of the decision of the Judge may finally decide as between the parties matters which have not been set up as grounds of defence or attack.

Under such circumstances it appears to us that for findings to operate as *res judicata* they must have been findings upon which the decree or some operative part of it was made, and must have been findings which were necessary for the making of the decree in the way in which it or some operative part of it was made, and that it is the decree read in the light of such findings, and not the findings in the judgment apart from the decree, which finally, within the meaning of s. 13 of Act No. XIV of 1882, decides the matters in issue or which might and ought to have been in

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issue (Explanation II) between the parties in the suit. If the decree is inconsistent with the findings, the decree prevails over the findings which are inconsistent with it. For an extreme example, if a plaintiff sued for an instalment alleged to be due under a bond alleged to have been made by the defendant in the plaintiff's favor and the defendant pleaded that the bond had been forged by the plaintiff and was not the defendant's bond, and the Court, having found that the bond had been forged by the plaintiff and was not the defendant's [192] bond, and there being no other issue, yet gave the plaintiff a decree for the instalment claimed, it appears to us that the finding that the bond had been forged by the plaintiff and was not the defendant's bond could not operate as *res judicata* in a future suit between the same parties on the bond, because the decree was inconsistent with the finding, and so far as the decree spoke for itself it decided that the defendant was liable upon the bond.

In *Ghela Icharam v. Sankalchand Jetha* (1), Sir Charles Sargent, C.J., and Fulton, J., held that, when an issue is not necessary for the decision of a suit a decree couched in general terms does not cover the finding on that issue. With that negative proposition we entirely agree. But it is not clear to us that the converse affirmative proposition that a decree couched concluded in general terms covers every finding which is necessary for the decision of the suit is correct in all cases. For example, the finding of the Principal Sudder Ameen in Bunwari Lall's suit upon the issue raised as to the validity of Bunwari Lall's adoption was a finding necessary *in limine* for the decision of the suit in the Court of the Principal Sudder Ameen, for if the validity of the adoption had not been established, Bunwari Lall had no legal right to ask for, and the Principal Sudder Ameen was not competent to express a decision on the validity of the patni lease, the plaintiff in that event having failed to prove that he had any interest affected by the lease, or any right to question its validity, and being on such finding an absolute stranger to all title necessary to support the suit. The decree of the Principal Sudder Ameen, dismissing Bunwari Lall's suit not having been based upon his finding that Bunwari Lall had been validly adopted, and having been made in spite of that finding, it would appear to follow from the passage which we have quoted from the judgment of their Lordships of the Privy Council in *Rajah Run Bahadoor Singh v. Mussumut Lachoo Koer*, that if there had been no appeal by Krishna Behary Roy from the decree of the Principal Sudder Ameen, the finding as to the validity of the adoption of Bunwari Lall could not have operated as *res judicata*. It is obvious to us that their Lordships [193] of the Privy Council in *Krishna Behari Roy v. Brojeswari Chowdranee* (2) referred to the finding of the Principal Sudder Ameen only as one of the historical steps in the case leading up to the appeal to the High Court, and that when their Lordships said:—"There exists, therefore, a final and complete judgment upon the issue raised, either at the instance of Krishna Behari Roy, or which he adopted, on the very question which he seeks again to raise in this suit,"—they were referring to the decision of the High Court, which had dismissed Krishna Behari Roy's appeal, which was confined to the question of the validity of the adoption. The question as to whether Krishna Behari Roy had any right of appeal against the decree of the Principal Sudder Ameen, which had dismissed Bunwari Lall's suit without granting by it any declaration that the adoption was valid, does not appear to have been raised before their Lordships. From

(1) 18 B. 597.

(2) 2 I. A. 283.

the passage which we have already quoted from the judgment of their Lordships in *Rajah Run Bahadoor Singh v. Musammatt Lachoo Koer* (1), it may be inferred that if objection had been taken that Krishna Behari Roy had no right of appeal from the decree of the Principal Sudder Ameen, their Lordships would have held that he had no such right, as he could have supported the decree of the Principal Sudder Ameen dismissing Bunwari Lal's suit on the ground that the Principal Sudder Ameen ought to have decided the question of the adoption in his, Krishna Behari Roy's, favor.

That a finding on an issue raising the question of the plaintiff's title may be necessary to the decision of the suit, and yet under some peculiar circumstances may not operate as *res judicata* on that question of title, although the decree could not have been made as it was made so as to be a good decree unless the issue as to the plaintiff's title had been found as it was found, may be inferred from the decision of their Lordships of the Privy Council in *Rajah Run Bahadoor Singh v. Musammatt Lachoo Koer* (1). In that case their Lordships held on two grounds that the finding of the Civil Court on the question of separation did not operate in the subsequent [194] suit as *res judicata*, the first ground being apparently that the Rent Court which tried the first suit was not a Court of jurisdiction competent to try the subsequent suit. The second ground of their Lordships' decision we shall give in their own words as it depended to some extent upon matters which are not otherwise explained in the report of the case in L. R. 12 I. A. 23. The second ground was as follows:—"Having regard, however, to the subject-matter of the suit, to the form of the issue (which has been above set out) and to some expressions of the learned Judge, their Lordships are further of opinion that the question of title was no more than incidental and subsidiary to the main question, viz., whether any, and what, rent was due from the tenant, and that on this ground also the judgment was not conclusive." It is obvious from the issue as to separation which is set out at p. 34 of L. R. 12 I. A., and from the fact that Run Bahadoor had intervened in the rent suit alleging that he and his deceased brother, whose widow the plaintiff in the rent suit was, had been joint members of the Hindu family, that a finding that the brothers had been joint and had not separated would have been fatal to the widow's suit in the Rent Court, and in that sense the issue as to separation was necessary to the decision of the rent suit. In the rent suit the widow in fact obtained her decree for the rent.

The result appears to us to be that a finding in a judgment to operate as *res judicata*, the Court being a Court of jurisdiction competent to try the subsequent suit, must be material and necessary to support the precise and particular ground or grounds on which the decree or some operative part of it was made, otherwise the finding must be considered either as superseded by the decree, or as entirely immaterial, or as no more than incidental and subsidiary to the main question in the suit, although in the latter case the finding may have been necessary to the decision of the suit.

The finding of fact to operate as *res judicata*, need not have been the sole finding of fact upon which the decree was made, but it must have been a material and necessary finding of fact, material and necessary in the sense that the fact must have been found [195] as it was found in the judgment, and could not have been found otherwise, for the decree as

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(1) 12 I. A. 23 (34).

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it was made to have been a good result in law from the fact or facts so found. Further, if there were two findings of fact either of which would justify in law the making of the decree which was made, that one of such two findings of fact which should in the logical sequence of necessary issues have been first found, and the finding of which would have rendered the other of such two findings unnecessary for the making of the decree which was made, is the finding which can in our opinion operate as *res judicata*. For example, if A, alleging himself to be the legal representative of B, deceased, sues C for breach of a contract which A alleges was made between B and C on the 1st of January 1890, and C pleads that A is not the legal representative of B, and further that the contract was not one binding upon a minor, and that he, C, was at the date of the contract a minor; and the Court finds that A is not the legal representative of B, and that C on the 1st January 1890, was a minor and that the contract was one which by reason of his minority when it was made was not binding on him, and makes a decree dismissing the plaintiff's suit, it appears to us that of those two findings that which would operate as *res judicata* between the parties was the finding that A was not the legal representative of B, because, until A had established his title to sue upon the contract as the legal representative of B, the defendant C could not be put to proof of his minority on the first of January 1890, and on the finding that A was not the legal representative of B, it became and was immaterial whether C was or was not a minor on the 1st of January 1890. In our opinion a matter cannot be said to be "directly and substantially in issue," within the meaning of the first paragraph of s. 13, Act No. XIV of 1882, unless and until it is or becomes material for the decision of the suit to find as to it. The framing of issues under s. 146 of Act No. XIV of 1882, on which at that stage of the suit the right decision of the case appears to the Court to depend, does not of itself make the matter to which such issues relate "directly and substantially in issue," within the meaning of s. 13, although, when the finding upon any one or more of the issues is sufficient for the decision of the suit, it may be [196] desirable, as was pointed out in *Tarakant Banerji v. Puddomoney Dasse* (1) and in *Devarakonda Narasamma v. Devarkonda Kanaya* (2), that the Court should state in its judgment its finding or decision upon each separate issue which it had framed.

Issues, as pointed out by James, L. J., in *Robinson v. Duleep Singh* (3) "are only a proceeding in a cause for the purpose of ascertaining a fact for the guidance of the Court in dealing with the right. If it were otherwise, a decision of a Court upon a matter as to which an issue had been framed might operate under s. 13 as *res judicata*, if the finding was not at variance with the decree, although the issue and the matter in dispute to which it referred were or became absolutely immaterial to the decision of the suit; and although the decree would have been a good decree in law on the material facts found, no matter how the issue as to that immaterial matter in dispute had been found. If the above view be correct, the finding of the Munsif that Rs. 188-7-4 was due upon the bond which was relied upon as *res judicata* in *Mohan Lal v. Ram Dial* (4) did not operate as *res judicata qua* the precise amount due at the time when the suit for the return of the bond was instituted, although it did operate as *res judicata* on the simple question upon which the right to a decree in

(1) 5 W. R. P.C. 63.
(3) 11 Ch. D. 798 (813).

(2) 4 M. 134.
(4) 2 A. 843.

the suit depended, namely, whether at the time when that suit was instituted the debt for which the bond had been given was or was not discharged.

Applying the conclusion at which we have arrived to this case, the finding in the judgment of the Munsif in the previous suit as to the plaintiff's title could not operate in this or in any future suit as *res judicata*, as the decree of the Munsif dismissing the plaintiff's suit, which was for a declaration of his title, was made on another and different ground, that ground being that the proviso to s. 42 of the Specific Relief Act, 1877, (Act No. I of 1877) applied, as the plaintiff in that suit for a declaration of title was not in possession and was consequently in a position to seek in that suit the further relief of a decree for possession, which he had not claimed. [197] On the finding of the Munsif that the plaintiff was not in possession the proviso to s. 42 of the Specific Relief Act, 1877, (Act No. I of 1877) applied, and on its application the Munsif was not in our opinion competent to try the question of title, as the statute law prohibited him from giving effect by declaration to any finding that the plaintiff was entitled to the property. It is obvious that, had the Munsif inserted in his decree that finding as to the plaintiff's title, he would have been acting in violation of the proviso to s. 42 of Act No. I of 1877. The finding as to the plaintiff's title in the previous suit, as it could have resulted in no relief being granted to him in that suit, was immaterial, and it certainly was, in any point of view, under the circumstances unnecessary to the decision of that suit. Even if the decision of the Full Bench in *Niamut Khan v. Phadu Bullia* (1) were correct in its application in the particular case before the Calcutta Full Bench, it could not be applied in this case before us, because the insertion in the decree in the first suit of a finding that the plaintiff had established his title would have been a declaration that he had the title which he claimed. Similarly no declaration of title could be made in a suit dismissed under s. 4 of the Indian Limitation Act, 1877 (Act No. XV of 1877), as a Court has no power in a suit barred by limitation to do otherwise than dismiss the suit on that ground. In our opinion in a suit, as, for example, that of Bunwari Lal against the patnidar, in which in order to try the other issue between the parties, it is first necessary to ascertain the title, the right or the status of a party, and a finding is expressed in the judgment upon an issue as to such title, right or status in favor of one party, but the suit is disposed of in favor of the other party by a decree on findings on other issues, the decree is not in conformity with the judgment unless it contains a declaration of such title, right or status in accordance with the finding in the judgment on that issue, provided that the statute law does not limit the form of decree to be made in the particular case, or prohibit the Court from making a declaration in the circumstances of the case.

[198] If the practice which in our opinion is the correct practice were followed in the preparation of decrees, most of these difficult questions as to the application of s. 13 of Act No. XIV of 1882 could not arise. We may further say on this subject that in our opinion when the decree is wholly in favour of the party in whose favour the finding as to the title, right or status is, such a declaration, unless expressly asked for, is unnecessary, as the decree in such a party's favour necessarily implies that the question of title, right or status was decided in his favour. That seems to

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follow from a consideration of explanation II of s. 13 of Act No. XIV of 1882. For example, if Bunwari Lall's suit against the patnidar had been decreed, the necessary implication would have been that he had been validly adopted. Similarly, if Shaikh Enaetoollah's first suit had been decreed, the decree for the enhanced rent would necessarily have implied that the tenure was one which allowed of the rent being enhanced and that the other circumstances existed which entitled the landlord to a decree for enhanced rent.

The result is that we allow this appeal and set aside the order of this Court with costs, and dismiss with costs the appeal to this Court, and restore and affirm the decree of the District Judge.

Appeal decreed.

17 A. 198 (P.C.)=22 I.A. 31=6 Sar. P.C.J. 551.

PRIVY COUNCIL.

PRESENT :

Lords Hobhouse and Davey, and Sir R. Couch.

[On appeal from the High Court at Allahabad.]

BETI MAHARANI (*Plaintiff*) v. THE COLLECTOR OF ETAWAH
(*Defendant*). [15th and 16th November and 15th December, 1894.]

Limitation—Act XV of 1877, ss. 15 and 19—Attachment of debt by third party—Civil Procedure Code, ss. 268, 485 and 486—Attachment not prohibitory of suit by creditor against debtor—Acknowledgment of debt—Sarbarakar's powers.

An attachment before judgment under s. 485, Civil Procedure, issued by a Court at the instance of a third party, prohibited the creditor from recovering, and the debtor from paying, the debt:—*Held*, that an order in those terms was not an order [199] staying the institution of a suit within the meaning of s. 15 of the Limitation Act, No. XV of 1877.

Shib Singh v. Sita Ram (1) referred to and approved,—the same rule relating to all attachments whether before or after judgment, couched in similar terms. The person restrained from receiving payment may, nevertheless, assert his right in a suit for the money due.

A debtor, since deceased, had executed a bond to his creditor. The heir of the debtor having been disqualified, and a sarbarakar of the estate having been appointed, the latter had executed a *mukhtarnamah* or power of attorney empowering an agent to act in reference to the land, and the charges thereon. The agent admitted the debt:—

Held, that, on the construction of the power given to him, authority to the agent to acknowledge a personal liability of the debtor and his heir, within the meaning of s. 19 of Act No. XV of 1877, could not be implied.

It was doubted whether the sarbarakar, not having been appointed guardian of the heir, could have made such an acknowledgment herself.

Another acknowledgment, a notice from the Collector, as agent for the Court of Wards, admitting the estate's indebtedness to the original holder of the bond, was relied upon. In addition to the bond-debt now in suit, another sum, due on a mortgage was claimed by the same creditor, and the terms of the notice would apply to either:—

Held, that, the debt referred to in the notice not having been identified with the bond-debt in suit, acknowledgment of the latter by the Collector was not established within s. 19.

The oral evidence of the Collector as to his intention was not admissible to construe the notice, but accompanying circumstances might be shown and considered.

[R., 30 A. 422 (444)=5 A.L.J. 375 (F.B.)=A.W.N. (1908) 175=4 M.L.T. 49 (57); 26 B. 221=3 Bom. L.R. 817 (F.B.); 35 C. 575 (611); 34 M. 221 (225)=6 Ind. Cas. 407=8 M.L.T. 105=20 M.L.J. 808; 10 Ind. Cas. 569.]

APPEAL from a decree (1) (19th February 1892) of the High Court reversing a decree (8th April 1889) of the Subordinate Judge of the Mainpuri district.

The plaintiff-appellant held, by assignment on the 7th March 1887, a registered bond for Rs. 7,000, and interest, executed on the 20th June 1876 by the late Lala Laik Singh, a Zamindar owing the taluka Harchandpur in the Etawah district, in favour of the firm of Gopaljee, Kishen Das; the bond was payable on the 1st November 1876. Laik Singh died shortly after that date, and his widow also. His nephew Pirthi Singh was his heir, but [200] being of unsound mind was declared disqualified; and his wife, Raj Kuar, was appointed by the Collector of the district to be sarbarakar of the estate, remaining in that capacity till her husband's death in 1887. She was not appointed his guardian under Act XXXV of 1858. After succeeding to the estate Raj Kuar petitioned, on the 10th April 1888, that it should be taken under the charge of the Court of Wards (s. 194, Act XIX of 1873) and this was done. Whilst acting as sarbarakar, she, on the 12th February 1880, executed a mukhtarnamah or power of attorney, reciting that land was in her possession as manager for her husband as well as in her own right, and appointing Ajudhia Prasad, and three other persons, to be her am-mukhtars, to whom she gave the following powers:—

"The said mukhtars may on the authority of this general power of attorney make assessment and realization of revenue, and write out sarkas and pottas and have them registered, and institute in any of the Courts of the said districts cases for arrears of rent, or cases relating to dealings, or firms, or indigo factories, &c., or institute criminal cases, or present appeals or applications for review of judgment in the competent Court, or put down verification endorsement on any petition or application under their own signatures, or with their hand put down signature on my behalf, or appoint any one as pleader or mukhtar in any case and in any Court, or constitute themselves mukhtars for any particular case, or themselves put questions and give replies, orally or in writing, in Court, or themselves conduct the defence of any case, or themselves take objection in any case, or present any miscellaneous petitions in any Court, or in any case cause depositions to be taken down and put down their signatures, or obtain copies of judgments, decrees and other papers from Court, or take back documents from Courts, or realise moneys due to me from Court or any other person on receipts signed by them, or deposit in Court on my behalf money payable to others, or by taking out execution effect attachment and sale, or after effecting on their own authority attachment as against defaulting cultivators, apply to the Court for sale, or accept any compromise or arbitration in [201] any case, or cause any joint village to be partitioned by any arbitration or Court, or take possession of any property, or bring about dispossession of any person, or institute suits for the determination, abatement or enhancement of rent, or take in Court any proceedings under the laws in force for the time being in respect of the zamindari, dealings, and trade firms, or carry out any orders of the Court and put down signatures or give the lease of my zamindari villages to any person and take the zar-peshgi (money in advances) on receipt signed by them, or take for my lease by hypothecating my property, or purchase at private or auction-sale any new property for me, or present in a competent Court any application for, and obtain certificate of, sarbarahkari or inheritance in respect

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of any property in my name, or obtain the permission of the District Judge to contract fresh debts on the security of my property for paying off the old debts of my ancestors Lala Laik Singn and Thakurani Amrai Kuar, and in accordance therewith write documents on my behalf, and after my signature present it in the office of the Registrar or Sub-Registrar for registration, and after verifying its contents put down their own signatures, and themselves take any amount of the cash that may be fixed in regard to the document in the presence of the Registrar or Sub-Registrar, or they may, for the purpose of extending the period of repayment of old debts or reducing the interest, renew any document executed by the aforesaid ancestors by hypothecation of my property, and after obtaining my signature have it registered and verify its contents, and put down their signatures at the time of registration, or for the purposes of my business take loan up to Rs. 1,000 as a parol debt from any person, or institute suits in Court for the debts due to me, or Lala Laik Singh, or his deceased wife, or take out execution of the decrees of the time of the Lala Sahib or Thakurani Sahib and realise the money on giving them receipts, or sue the karindas of my ilakas for rendition of accounts, or dismiss any servant for his unfitness or in view of economy. All this, if done by the said mukhtars, is, and hereafter shall be, accepted and satisfied by me as done by myself. I have therefore executed this by way of a general power of attorney that it may serve as evidence and be of use when needed. Dated 12th February 1880."

[202] The plaint on the 6th of November 1888 claimed, besides the principal, interest amounting to Rs. 15,365 from the agent of the Court of Wards, joining Thakurani Raj Kuar as a defendant, and stated that Ajudhia Prasad, mukhtar-am of the estate, had acknowledged the debt on the 14th of October 1882; relying also on an acknowledgment in a notice from the Collector in April 1888. It also declared that, on the 17th of May 1881, the debt had been attached by prohibitory order whereby part of the time that had elapsed had been excluded from calculation in the period of limitation.

The Collector of Etawah, as agent of the Court of Wards, depended on the six years' bar; and issues were fixed as to three principal points: first, whether Ajudhia Prasad had been competent to acknowledge as authorized agent; secondly, whether the Collector's notice contained an acknowledgment; thirdly, as to the effect of the attachment.

The attachment was issued on the 17th of May 1881 in a suit which Rani Kishori, a creditor of Gopalji, Kishen Das, brought against that firm. At that time the bond was said to be in the possession of Sah Kirpa Ram, another creditor, who sued both the firm and the Rani. To obviate a risk of loss of the bond by limitation, an order was made by the Mainpuri Court, summoning Ajudhia Prasad, as mukhtar-am of Raj Kuar, and on the 14th October 1882 the following was recorded:—

"The witness, on looking at a bond executed by Laik Singh, dated 20th June, 1876, for Rs. 7,000, in favor of Gopalji, Kishen Das, stated:—'This document is correct and the lady with whom I am employed is liable. By looking into the accounts it will be ascertained as to what sum of money is due under this bond on account of the balance; and whatever sum may be found due under the bond in accordance with a proper account, the lady with whom I am employed is liable for the same. She is liable as the heir of Laik Singh.'"

The Subordinate Judge, in his judgment in this suit, considered that on the construction of the mukhtarnamah of the 12th of Feb-[203] ruary

1880, Ajudhia Prasad was not a duly authorized agent of the sarbarakar within the meaning of section 19, explanation 2. This was not reversed by the High Court; and the first of the above issues was found against the plaintiff. As to the second of them, the Courts below differed. The point on which they differed was whether, there being two distinct debts due to Gopalji, Kishen Das, from the estate, one on a mortgage bond, and the other on the bond now in suit, the notice given by the Collector had been shown to relate to the latter. The first Court held that the Collector, exercising the powers of the Court of Wards, had made an acknowledgment, as he could (the Court citing *Kamla Kuar v. Har Sahai*) (1), and that his notice related to both the debts.

The High Court, on the other hand, decided that there had been no acknowledgment by the Collector of liability on the part of the estate for this debt in particular. The Judges (STRAIGHT and TYRRELL, JJ.), referred to the oral explanation by the Collector which was on the record, and to the surrounding circumstances; and held that there was no acknowledgment by him in the sense of section 19.

On the third of the above points the Courts also differed. The Subordinate Judge, following *Shunmugam v. Moidin* (2), was of opinion that limitation should not be taken to have run whilst the order of attachment of 1881 was in force. His conclusion was that the suit was brought within time; and he decreed the claim. The High Court differed from the Madras High Court as to the effect of an attachment, and following the decision in *Shib Singh v. Sitā Ram* (3) held that the attachment of 1881 had not prohibited a suit for the debt. Accordingly the decree of the first Court was reversed, and the suit was dismissed as barred by limitation. The judgment of the High Court is reported in I. L. R., 14 All. 162.

On this appeal—

Mr. H. A. Giffard, Q. C., and Mr. H. Cowell, for the appellant, argued that the suit was not barred by limitation, and that the [204] judgment of the High Court should be reversed. The notice issued in April 1882 to Gopalji, Kishen Das was within the period of limitation, and operated under section 19. The time of the continuance of the attachment should be excluded, and on this point the Subordinate Judge had rightly followed the decision of the Madras High Court. The effect of the Collector's notice of April 1882 was to admit indebtedness. It imported a promise to pay the amount that might be found to be due on the accounts being taken; and to deal with this as an acknowledgment accorded with the principle acted upon in English cases. They referred to *Quincey v. Sharpe* (4). At the same time reliance was placed on Ajudhia's acknowledgment in October, 1882, as giving a fresh starting point for limitation. Should that acknowledgment be found wanting in any essential point, at all events the suspension of the running of limitation whilst the attachment issued in *Rani Kishori v. Gopalji, Kishen Das*, was upon the debt came in aid of the appellant under section 15. With regard to Ajudhia, the acknowledgment in his statement should be held equivalent to one that might have been made to the same effect by Raj Kuar herself, as it was within the scope of his authority under the power of attorney executed by her in 1880 as sarbarakar. She obtained time by means of Ajudhia's representation, and could not disavow her agent's statement. Also the terms of the power given to him, if they did not directly authorize acknowledgment in so

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(1) 8 A.W.N. (1888) 187.

(2) 8 M. 229.

(3) 13 A. 76.

(4) 1 Exch. D. 72.

1894 many words, authorized him to enter into compromises and to do other
DEC. 15. acts, which included the exercise of the authority in question. Again, in
 — reference to the attachment of 1881, the decision in *Shunmugam v.*
PRIVY *Moidin* (1) was referred to, and it was submitted that it was correct; not
COUNCIL. so, that in *Shib Singh v. Sita Ram* (2). Lastly, it was argued that if such
 — an order as was prescribed by Form No. 162 in the schedule of the Code of
17 A. 198 Civil Procedure was not within the meaning of section 15, then there was
(P.C.) = 22 no kind of order other than that in an injunction to which section 15
I.A. 31 = could relate. Unless the order in that form was within section 15,
6 Sar. P.C.J. the word "order" in that section would be unmeaning. But the
551. **[205]** words were "injunction or order," and they should receive their
 full meaning. An "injunction" was issued upon a party to a suit, but
 "orders" were made upon others as well. For the creditor to bring a
 suit, unless special measures were taken, must result in there being
 conflicting orders as to the disposal of the same debt, and thus, it was
 submitted, the order of attachment would be infringed if the suit were
 brought whilst that order was in force.

Mr. *A. Cohen*, Q.C., and Mr. *J. H. A. Branson*, for the Collector of
 Etawah, argued that the decree below was right. The suit was barred
 by time. Their principal argument was that the notice issued by the
 Collector in 1888 was not an acknowledgment of liability valid for the
 purposes of section 19, which required that the acknowledgment should
 be fixed upon some property or right. *Ajudhia's* acknowledgment of 1882
 had been rightly dealt with as insufficiently authorized in the judgment
 of the Court of first instance. At the same time, the suspension of
 limitation claimed to have been caused by the issue of the attachment
 could not be allowed for the reasons given in *Shib Singh v. Sita Ram* (2),
 which had been rightly decided. With regard, then, to the Collector's
 notice, the argument was that the evidence showed that the Collector had
 received information that two separate debts were claimed as due from the
 estate to Gopalji, Kishen Das, viz., the debt now in suit, and another debt
 secured by a mortgage-bond. The Collector's notice did not refer in
 terms to the debt now sued for, nor did it necessarily refer to both the debts.
 On the contrary, its terms were fully satisfied by its being held to refer to
 the mortgage-debt alone. Reference was made to *Dharma Vithal v. Govind*
Sadvalkar (3). It was not apparent on the notice that it was intended
 to be an admission of the debt now in suit, but it appeared to be a notice
 to creditors to bring in claims. They referred to *Scott v. Jones* (4),
Warburton v. Stephens (5), *In re River Steamer Company* (6), *Everett v.*
Robertson (7), *Ex parte Topping* (8), Leake on Contracts, 865, part IV,
 c. 11.

[206] Mr. *H. A. Giffard*, Q.C., replied.

Afterwards, on the 15th December 1894, their Lordships' judgment
 was delivered by LORD HOBHOUSE.

JUDGMENT.

This appeal raises questions under the Indian Limitation Act, 1877.
 The suit is brought on a bond for Rs. 7,000 executed on the 20th
 June 1876 by Lala Laik Singh, whose estate is now under the manage-
 ment of the Court of Wards, in favour of the firm of Gopalji, Kishen Das.

(1) 8 M. 229.

(4) 4 Cl. & Fin. 382.

(6) L. R. 6 Oh. App. 822.

(8) 34 L. J. Bank. 44 = 4 D. G. J. & S. 551.

(2) 13 A. 76.

(5) L. R. 43 Oh. Div. 39.

(7) 1 E. & E. 16 = 28 L.J.Q. B. 23.

(3) 8 B. 99 (102).

The plaintiff, who is now appellant, is assignee of the bond. The defendant, the Collector of Etawah, represents the Court of Wards.

The debt was made payable on the 1st November 1876. Nothing has been paid on it. The suit was brought on the 6th November 1888, more than 12 years after the date of payment. The term of limitation is six years ; so that the plaintiff has to prove circumstances which interfere with this running of time. Those circumstances are three in number :— First, an acknowledgment of the debt made by one Ajudhia Prasad on the 14th October 1882 ; secondly, a notice given by the Deputy Collector of Etawah in April 1888 ; thirdly, an order made by the Subordinate Judge of Mainpuri on 17th May 1881 for attachment of the bond, which remained in force till 7th March 1887. If there has been a valid acknowledgment by Ajudhia, and also by the Court of Wards, as contended, the right of suit is saved ; or if the attachment prevented the running of time, and there has been either acknowledgment by Ajudhia or by the Court of Wards, there is the same result. But unless the plaintiff can establish one of those combinations of events the suit is barred.

When Ajudhia made acknowledgment the position of affairs was as follows :—Laik the bond-debtor died without issue, leaving a widow, on whose death his nephew Pirthi succeeded to his estate. Pirthi became incompetent to manage his property, and his wife Raj Kuar was appointed by the Collector to be sarbarahkar or manager. She never was his guardian. In February 1880 she executed a general power of attorney to Ajudhia. The order of attachment was granted in the suit of one Rani Kishori, a creditor of the firm of bond-holders. After this, and apparently with an eye to [207] the running of time, Ajudhia was summoned and examined by the Court.

His deposition is a clear acknowledgment of the liability of Laik. He identifies the bond in suit and another, and adds—"I consider my master Laik Singh to be the debtor." Perhaps that may properly be taken in the plaintiff's favour, as meaning that the debt was due from Laik's assets, or from his heir. But then arises the question whether he was "an agent duly authorized in that behalf" within the meaning of section 19 of the Limitation Act. The Subordinate Judge decided that he was not. In the High Court Mr. Justice Tyrrell took the same view, and Mr. Justice Straight inclined to the contrary view. At that time Pirthi was liable to answer the bond to the extent of Laik's assets, but it was a personal debt of Laik, not specifically charged on his estate, which could only be made liable by suit. The question then is, first, whether Raj Kuar herself was an agent duly authorized to acknowledge Pirthi's liability ; and secondly, whether Ajudhia was so authorized.

The office of sarbarahkar has regard, as their Lordships understand, to the lands with which the Collector is concerned, and not to the person or the personal property of the landholder. If so, it is difficult to see how a sarbarahkar, not being guardian, can be authorized to admit a personal liability. The point has not been carefully inquired into, and in the absence of accurate knowledge their Lordships will only say that Raj Kuar's authority seems very doubtful. But they think it clear that, supposing she had it, she did not delegate it to Ajudhia. Her expressed objects had reference to the lands of her husband, of which she was the sarbarahkar, and to other lands of which she was herself the proprietress. "Therefore," she says, "as regards the entire property possessed by me and my husband for the present and future, in my present capacity, and in such capacity as I may possess hereafter," she appoints four persons, of

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(P.C.) = 22
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6 Sar. P.C.J.
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whom Ajudhia is one, to be general attorneys. Then she specifies a number of things that they may do. The Subordinate Judge has subjected the instrument to a very careful examination for the purpose of showing the scope of their powers. Every [208] one of them may be referred, and indeed most readily refers, to the lands of Pirthi and Raj Kuar. There is a power to obtain the permission of the District Judge to contract fresh debts "on the security of any property" for the purpose of paying off old debts of Laik; and again a power to re-new documents of hypothecation for the purpose of extending the period of repayment. Both these powers have reference to charges on land; and in both cases the attorneys are to prepare documents for Raj Kuar's own signature prior to registration. Their Lordships agree with the decision below that the document does not contemplate such an act as an acknowledgment of Pirthi's personal liability; and they need not examine the further question whether the fact which Ajudhia states in his deposition, that Pirthi had then regained his capacity, affects the authority given by Raj Kuar.

Their Lordships now pass to the notice given by the Court of Wards, which is as follows:—

"Whereas the 'riyat' of Harchandpur, tahsil Phaphund, is under the management of the Court of Wards, and it has been ascertained that money is due to you by the 'raises' of Harchandpur, therefore notice is hereby given to you to attend either in person or through a mukhtar at the Collector's office at Etawah in my Court on 17th April 1888, at 10 A.M., together with the deeds relating to the accounts, and you will be questioned about the debt."

It was issued between the 12th and 17th of April 1888. At that time Pirthi was dead and Raj Kuar was his heir. Raj Kuar was desirous of being declared disqualified and of putting her estate under the management of the Court of Wards. Her first application seems to have been made on the 10th April, and the Court must have acted immediately without waiting for formal orders, which were not issued till a later time. But it must be taken that the Court's act would bind the ward Raj Kuar and that the notice is the act of the Court. The question is whether, supposing the bond to be still alive, it acknowledges liability on that bond.

[209] The notice is certainly a very imprudent one. Though it ends by saying that the creditor will be questioned about the debt, it begins by saying that it has been ascertained that money is due from the "raises" of Harchandpur; and if that statement can be applied to any particular debt it is an acknowledgment of liability to pay whatever may be found due on account of that debt. How then does the plaintiff show that the notice applies to the bond in suit? It is not addressed to the plaintiff but to Kishen Das. But there were two bond-debts claimed by Kishen Das. One is the bond in suit, and the other is a mortgage-bond for Rs. 14,000 executed on the 25th January 1875. Their Lordships cannot follow the learned Judges of the High Court in admitting the Collector to give oral evidence of his intentions for the purpose of construing the notice. But they may for that purpose properly look at the surrounding circumstances. Indeed it is only by reference to extrinsic facts that the general words of the notice can be applied to any specific subject. If it were found that there was no other account between Kishen Das and the "raises" of Harchandpur than that of the bond in suit, the notice would clearly fasten on the bond in suit. But there have been produced certain papers from the Collector's office, at the instance of both parties to the suit. One is a

list of creditors up to April 1888. Another is a report dated the 13th April 1888 forwarded by the Tahsildar to the Collector with another list of creditors made up to June, 1886 and stated to have been filed with some record of that year. Each of these three documents exhibits both bonds, draws the distinction between the simple bond and the mortgage-bond, and states that the former is barred. In this state of facts it is impossible for the plaintiff to contend that the general words of the notice are not satisfied by reference to the mortgage-bond, or that they constitute an acknowledgment of liability in respect of the property or right sued for, as is required by section 19 of the Limitation Act.

The two foregoing points being decided against the plaintiff, the suit would be barred by time even if the period covered by the prohibitory order were excluded. But that question is just as much [210] in issue as the two others, and has been argued quite as carefully; and it must apply to so many cases that their Lordships think it better to express the conclusions at which they have been able to arrive.

Section 15 of the Limitation Act of 1877 runs as follows :—

“ In computing the period of limitation prescribed for any suit, the institution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it is issued or made, and the day on which it was withdrawn, shall be excluded.”

As above mentioned, the order in question was issued before decree in the suit of Rani Kishori against Kishen Das. There is no copy of it in the record, which is very unfortunate because the present point turns upon its terms; but it is admitted by the defendant's written statement to have been issued, to have been in force from the 17th of May 1881 to the 7th of March 1887, and to prohibit payment of the bond in suit. It was doubtless in one of the forms contemplated by those sections of the Civil Procedure Code which relate to attachments. The order is said by the High Court to have been made under s. 485 of the Code, and the form given for such an order is No. 161. That only directs the bailiff of the Court to attach the property of the defendant, and to report to the Court how he has executed the warrant. Their Lordships cannot find any form which exactly fits this case. Perhaps the order followed Form 139 which applies to attachments after decree, or Form 162 which applies to property in the possession of somebody who claims a lien on it. Each requires some supplement to make it altogether intelligible, but the prohibition effected by each is in accordance with the defendant's admission; that is to say, the defendant is restrained from receiving, and the person liable to him from paying or delivering to him or to any one else.

An order in those terms is not an order staying the institution of a suit. There would be no violation of it until the restrained creditor came to receive his debt from the restrained debtor. And [211] the institution of a suit might for more than one reason be a very proper proceeding on the part of the restrained creditor, as for example in this case, to avoid the bar by time, though it might also be prudent to let the Court which had issued the order know what he was about. Their Lordships think that the High Court have taken the correct view of this matter. In the case of *Shib Singh v. Sita Ram* (1), the defendant

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pleaded in bar to a suit that the plaintiff was prohibited by an order of this kind, but the plea was overruled. In the present case Mr. Justice Straight says: "What I understand section 268 to mean is, that the debt is not to be realized by the judgment-debtor, who is a creditor of some third party, and not that he is to refrain from, in the ordinary course of law, putting his claim into Court, and asserting his right to such money as may be due to him." Section 268 relates to attachment after decree, but the same rule must apply to all attachments couched in similar terms. The result is that their Lordships agree with the conclusions of the High Court, and will humbly advise Her Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant:—*Messrs. Ranken, Ford, Ford and Chester.*
Solicitor for the respondent:—*The Solicitor, India Office.*

17 A. 211 (F.B.)=15 A.W.N. (1893) 61.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Mahmood and Mr. Justice Knox.

REFERENCE UNDER ACT NO. I OF 1879 (INDIAN STAMP ACT),
s. 49. [25th January, 1892.]

Act No. I of 1879 (Indian Stamp Act), s. 3, sub-s. (4), cl. (b)—Stamp—Bond—Promissory note.

Held, that a document by which the executant promised to pay to the person named therein a certain sum of money on a certain date with interest was not "attested by a witness" within the meaning of cl. (b) of sub-s. 4 of s. 3 of Act No. I of 1879, merely by reason of its bearing on the face of it a statement by the scribe of the document that the document was correct and was written by his pen.

[F., 3 P.L.R. 1902; R., 4 Bom. L.R. 912.]

[212] THIS was a reference under s. 49 of Act No. I of 1879, made through the District Judge of Rae Bareilly by the Munsif of Partabgarh of the question whether a certain document should or should not be stamped as a bond within the meaning of cl. (b), sub-s. (4) of s. 3 of Act No. I of 1879.

The terms of the document were as follows:—"To Swasti Sri Sahu Ram Adhin Nandu, resident of village Bachhla, taluqa Patti Saifabad, pargana Belkher, tahsil Patti, district Partabgarh (who tenders his) greeting (Ram Ram) to him. May God bless you. Further, I execute a promissory note (*rukka*) for Rs. 31-5-6 on account of the balance of my account which I promise to pay without any plea and objection on Aghan Badi 15th, 1296 F., adding interest at Re. 1 per cent. and will make no objection.

Written on Miti Magh Sudi 2nd, 1295 F., with the pen of Jamna Lal (of) Ram Ganj.

Signed (*Alabd.*).

Signature of Ramman, Ahir.

The promissory note (*rukka*) written is correct.

Rs. 31-5-6 taken is correct; with the pen of Jamna Lal (of) Ram Ganj.

The mark made by Ramman is apparent."

On this reference the Court (EDGE, C. J., MAHMOOD and KNOX, JJ.) made the following order :—

ORDER.

The case reported in I. L. R., 10 Mad. 158, does not apply to the facts of this case. The document in this case is not in our opinion "attested by a witness" within the meaning of cl. (b) of sub-s. (4) of s. 3 of Act No. I of 1879. What is said to be an attestation is merely a statement in writing by the scribe of the document that the document was correct and was written by his pen. We therefore answer the question referred to us by saying that the document in question cannot be treated as a bond as defined in cl. (b) of sub-s. (4) of s. 3 of Act No. I of 1879.

17 A. 213 (F.B.) = 15 A.W.N. (1895) 61.

FULL BENCH.

[213] Before Sir John Edge, Kt., Chief Justice. Mr. Justice Tyrrell, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Burkitt and Mr. Justice Aikman.

WAJID ALI SHAH (*Petitioner*) v. NAWAL KISHORE (*Opposite Party*).
[2nd June, 1893.]

Civil Procedure Code, ss. 623, 625, 541—*Review of judgment*—*Application for review not to be accompanied by copy of judgment, decree or order sought to be reviewed*—*Act No. XV of 1877 (Indian Limitation Act)*, s. 12.

It is not necessary that an application for review of judgment should be accompanied by a copy of the decree, order or judgment sought to be reviewed.

[R., 2 O.C. 302.]

THIS was a reference to the Full Bench made by Edge, C.J., and Aikman, J., of the question whether an application for review must necessarily be accompanied by a copy of the decree or order, and, unless the Court dispenses with it, by a copy of the judgment, sought to be reviewed.

A second appeal (No. 578 of 1891) had been dismissed by the High Court on a point of limitation, and on the appellant (petitioner) applying for review of the judgment dismissing his appeal, the vakil for the respondent took objection that the application for review was not accompanied by a copy of the decree or of the judgment against which review was sought, one at least of which, he contended, was required by s. 625 read with s. 541 of the Code of Civil Procedure, and impliedly by s. 12 of the Indian Limitation Act, 1877. Hence, the reference as above stated.

Mr. J. Simeon, for the petitioner.

Pandit Baldeo Ram Dave, for the opposite party.

JUDGMENT.

EDGE, C.J.—The question which has been referred to the Full Bench in this case is :—Is it necessary to the validity of an application for the review of a judgment under s. 623 of the Code of Civil Procedure that the application should be accompanied by a copy of the decree or order to which it relates, and by a copy of the judgment, unless the Court dispenses therewith? The section upon which it is contended that an application for the

* Miscellaneous application in Second Appeal No. 578 of 1891.

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review of a judgment must be accompanied by a copy of the decree or order, and, unless the Court dispenses with it, by a copy of the judgment is s. 625 of the [214] Code of Civil Procedure. That section is as follows:—"The rules hereinbefore contained as to the form of making appeals shall apply *mutatis mutandis* to applications for review." It is contended that the words "form of making appeals" as used in that section mean the manner of making appeals, and that "the form" in s. 625 is not restricted to the sense in which the word "form" is used in s. 541 of the Code of Civil Procedure. In the first paragraph of s. 541 it is enacted that—"the appeal shall be made in the form of a memorandum in writing presented by the appellant and shall be accompanied by a copy of the decree appealed against, and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded."

The contention to which we have been referring has been supported by references to certain decisions anterior in point of date to the coming into force of Act No. VIII of 1859, by a reference to the Rules of the High Court of Calcutta, by a reference to the decision of Mr. Justice Marriott in *Adarji Edulji Golakhana v. Manikji Edulji* (1), as to which it may be remarked that the learned Judge gave no reasons for his judgment, and by a reference to s. 12 of Act No. XV of 1877.

It appears to me that if the Legislature had intended that an application for a review of judgment should not merely be in the form of a memorandum setting forth concisely and under distinct heads the grounds of the application, but should be accompanied by a copy of the decree or order, or of the judgment, the Legislature would have said so in express terms. It also appears to me that, grammatically regarded, s. 625 has the same meaning as if it had been drafted as follows:—"The rules hereinbefore contained as to the form in which appeals may be made shall apply *mutatis mutandis* to applications for review." The form of making appeals mentioned in s. 625 in my opinion means the form in which appeals may be made, and consequently, if we look back to s. 541, we find that the appeal should be made in the form of a memorandum in writing presented by the appellant. The documents which must by [215] law accompany the memorandum in writing are not included in the form in which an appeal is to be made, as can plainly be seen from an ordinary reading of s. 541. That section prescribes the form in which an appeal should be made, and enacts that the appeal shall be accompanied by certain documents.

If the question depended solely on a construction and comparison of ss. 625 and 541 of the Code of Civil Procedure, I would have had no doubt that all which was required by s. 625 was the presentation of a memorandum in writing by the applicant containing particulars similar to those required in the case of a memorandum of appeal. My doubt, and I believe that of some of my brother Judges, has not been caused by anything to be found in the Code of Civil Procedure, but by a section contained in a separate Act, I refer to s. 12 of Act No. XV of 1877. Mr. Baldeo Ram's able argument based on s. 12 of Act No. XV of 1877 considerably impressed me. His argument was that as that section enacted that the time requisite for obtaining a copy of the decree or order and a copy of the judgment should be excluded from the period of limitation prescribed for an appeal or for an application for review of judgment, the inference was that such copies were equally necessary for the purpose of

(1) 4 B. 414.

making an application for a review of judgment as for the purpose of presenting an appeal. It appears to me, however, that if we are to construe s. 625 of the Code of Civil Procedure by the second and third paragraphs of s. 12 of Act No. XV of 1877, we would have to put a similar construction on some section or other in Chapter XXXVII of the Code of Civil Procedure and hold that where an application to set aside an award is made it would necessarily follow from the fourth paragraph of s. 12 of Act No. XV of 1877 that with the application to set aside the award a copy of the award should be filed, as we find that the fourth paragraph of s. 12 of Act No. XV of 1877 excludes from the period of limitation prescribed for an application to set aside an award the time requisite for obtaining a copy of the award. There is nothing in Chapter XXXVII of the Code of Civil Procedure, so far as I can see, which suggests that it is necessary to the validity of an application to set [216] aside an award that a copy of the award should be filed with the application, or at the time when the application is made.

It is possible that the second, third and fourth paragraphs of s. 12 of Act No. XV of 1877 were enacted, so far as applications for review of judgment or to set aside an award are concerned, to meet cases in which a person interested in applying for a review of judgment or to set aside an award might desire to inform himself accurately by a perusal of the copy of the decree or order or judgment, as the case might be, as to what its actual contents were and as to any legal or other objections there might be to it. The Legislature may have intended that persons under such circumstances should not by the law of limitation be compelled to hurry into an application for review of judgment or into an application to set aside an award until they had full opportunity of considering the terms of the decree or order or judgment.

I fully recognize the fact that statutes must, as far as possible, be construed so as to produce harmony and not discord, but in this case no discord would result from holding that an application for review of judgment need not under s. 625 of the Code of Civil Procedure be accompanied by a copy of the decree, order or judgment sought to be reviewed. It has never been the practice in this Court in applications for review of judgment to require that the applicant should file a copy of any decree, order or judgment. Under the rules of this Court, so far as they are concerned, it is not necessary to file a copy of any decree, order or judgment along with an application for review of judgment. My answer to this reference to the Full Bench is that in my opinion an application for review of judgment is perfectly legal, although it is not accompanied by a copy of the decree, order or judgment sought to be reviewed.

TYRRELL, J.—I quite agree. In the majority of cases of applications for review of a judgment, order or decree, copies of the judgment, order or decree would be superfluous and unnecessary to the purposes of the application, the records being usually in the record-room of the Court moved to review. To require the production of [217] such copies would be to impose a needless, and therefore onerous outlay on litigants. I agree in the learned Chief Justice's answer to the reference.

KNOX, J.—I agree in the learned Chief Justice's answer to the reference and in the reasons given by him for that answer.

BLAIR, J.—I quite agree with the learned Chief Justice's answer to the reference and with the reasons given by him.

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BURKITT, J.—I concur in the interpretation put by the learned Chief Justice on s. 625 read with s. 541 of the Code of Civil Procedure, and in the reasons given for the conclusion at which he has arrived. In my opinion it cannot, be gathered from s. 625, read with s. 541, that these sections impose on a litigant the burden of procuring and paying for a copy of the decree, order or judgment which he seeks to have reviewed. In the absence of any such precise provision I do not see why this Court should impose on an applicant for review the burden of procuring a copy of the judgment decree or order sought to be reviewed, which, I may add, in most cases might be superfluous as the record would be in the Court whose order was sought to be reviewed. I agree in the answer proposed by the learned Chief Justice.

AIKMAN, J.—The interpretation which Mr. *Baldeo Ram* contends we should put on s. 625 of the Code of Civil Procedure, would have the effect of altering what I understand has been the settled practice of this Court for many years. It would impose additional expense on parties, which, as has been pointed out by my brother Tyrrell, would not be attended with any corresponding advantage, for the Court which has to deal with the application would in most cases have the record in its own custody. I should be very unwilling to put upon the section an interpretation which would have those results, unless it were quite clear to me that that was the meaning of the Legislature. I am not satisfied that the Legislature had this in its mind when it framed s. 625. I agree with the learned Chief Justice and my brother Judges.

Application allowed.

17 A. 218 (F.B.)=15 A.W.N. (1895) 63.

[218] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Burkitt and Mr. Justice Aikman.

GOPAL DAS (*Applicant*) v. BIHARI LAL (*Opposite Party*).^{*}
[6th June 1893.]

Civil Procedure, Code, s. 351, cl. (d)—Insolvency—"Other act of bad faith"—Act of bad faith committed by applicant for declaration of insolvency antecedently to his application.

The expression "any other act of bad faith" as used in s. 351 cl. (d) of the Code of Civil Procedure means any act of bad faith not before mentioned in s. 351 which bears directly upon the conduct of the debtor in the matters leading up to his application for insolvency, and will not exclude any act of bad faith by which he has incurred a then still subsisting liability to any of his creditors, whether the particular creditor is or is not the creditor whose decree is in execution, and whether or not the bad faith is connected with the liability which has resulted in that decree. *Bavachi Packi v. Pierce, Leslie & Co.* (1) approved. *Salamat Ali v. Minahan* (2) distinguished.

[F., 26 A. 517 = 1 A.L.J. 259 = A.W.N. (1904), 93.]

^{*} First appeal No. 129 of 1892 from an order of G.F.G. Forbes, Esq., Officiating Judge of Allahabad, dated the 29th June 1892.

N.B. This is cited as First Appeal from order No. 192 of 1892 in 15 A.W.N. (1895), 63, Ed.

(1) 2 M. 219.

(2) 4 A. 337.

THIS was a reference to a Full Bench of the Court made by Tyrrell and Blair, JJ. The facts of the case sufficiently appear from the referring order, which is as follows:—

"One Babu Gopal Das was judgment-debtor under a decree which ordered him to pay to the decree-holder moneys which the judgment-debtor had dishonestly appropriated to his own use. When the decree came to execution the judgment-debtor made an application under s. 344 of the Code of Civil Procedure. At the trial the District Judge of Allahabad dismissed the application, holding that it was bad and must be defeated under s. 351 (d) of the Code. Mr. *Fateh Chand*, for the appellant, contended that the judge erred in going behind the matter of the application as such and considering the nature of the particular debt for which the decree had been put in execution; that is to say, considering whether that debt was or was not tainted with bad faith. A ruling of this Court under similar circumstances in I.L.R. 4 All. 337 is in favor of this contention. In that judgment it was held that under the terms of s. 351 it was no part of the Judge's duty to go behind the decree and see in what way the debt had been [219] incurred. We should have followed this ruling, which, to some extent at least, commends itself to us; but we were confronted with authorities for the contrary proposition, which are not without weight. In 12 B. L. R. App. 12, *Pontifex, J.*, referred to some conflicting decisions upon this point, and in I. L. R. 2 Mad. 219 it was held by Innes and Forbes JJ., that the words of cl. (d) of s. 351 'the matter of the application' embrace the insolvency and all the facts and circumstances material to explain the insolvency. We think that the question is sufficiently important to be referred for decision to a Full Bench and it is accordingly referred."

Mr. *Fateh Chand* and Babu *Datti Lal*, for the appellant.

Pandit *Sundar Lal* and Munshi *Madho Prasad*, for the respondent.

The judgment of the Court (EDGE, C. J., TYRRELL, KNOX, BLAIR, BURKITT and AIKMAN, JJ.) was delivered by EDGE, C. J.—

JUDGMENT.

In this case Bihari Lal obtained a decree against Babu Gopal Das in his capacity of trustee. He also was entitled under a decree in appeal in the suit to costs. Bihari Lal proceeded to execute the decree. In execution of that decree Babu Gopal Das was arrested. Babu Gopal Das applied under s. 344 of the Code of Civil Procedure to be declared an insolvent. The Court, taking into consideration the bad faith and fraud in the matter of the misappropriation of the trust funds in respect of which the decree was obtained, refused to declare Babu Gopal Das an insolvent. From that order Babu Gopal Das has appealed to this Court.

It has been contended that the Court was not justified under s. 351 of the Code of Civil Procedure in rejecting the application of Babu Gopal Das, and could not for the purposes of that section take into consideration what were the circumstances under which the liability which ended in the decree in execution arose. In support of that contention Mr. *Fateh Chand*, for the appellant, cited the cases of *In the matter of—a prisoner in the Great Jail* (1), *In re Soopersaud* (2), *In re Khettsay Das* (3), *Butler v. Lloyd* (4), [220] *Smith v. Boggs* (5), *In re Gurudas Bose* (6) and

(1) 1 Ind. Jur. 8.

(3) 3 B. L. R. App. 14.

(5) 5 B. L. R. App. 21.

(2) 2 Ind. Jur. N. S. 20.

(4) 12 B. L. R. App. 12.

(6) 7 B. L. R. App. 23.

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1893 *Salamat Ali v. Minahan* (1), and he referred us to *Bavachi Packi v. Pierce, Leslie Co.* (2) as opposed to his contention.

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BENCH. To dispose of these cases to which we have been referred in Lower Bengal, it is difficult as to some of them to ascertain whether Act No. VIII of 1859 was or was not the Act which applied. In some of them s. 281 of Act No. VIII of 1859 appears to have been the section upon which the decision was based. None of those cases were decided on the construction of s. 351 of the present Code of Civil Procedure. There is one decision on the construction of s. 281 of Act No. VIII of 1859, but that decision cannot in our opinion be applied to the construction of s. 351 of Act No. XIV of 1882. The object of the two sections was essentially different, and the effect of an order under one of those sections is different from the effect of an order under the other. The governing words in s. 281 of Act No. VIII of 1859, as far as those cases were concerned, were the words by which the plaintiff "may make proof that the defendant, for the purpose of procuring his discharge without satisfying the decree, has wilfully concealed property or his rights or his interests therein, or fraudulently transferred or removed property or committed any other act of bad faith." It is obvious that the "other act of bad faith," to be within that section, must have been committed by the defendant for the purpose of procuring his discharge without satisfying the decree. The discharge in that case was the discharge from jail, and not from the debt. Section 281 of Act No. VIII of 1859, dealt only with the question between the particular creditor who had caused his judgment-debtor to be arrested and the particular judgment-debtor who was arrested, whereas s. 351 of the Code of Civil Procedure deals with the order to be made upon an application to declare a judgment-debtor an insolvent, which declaration, if made, would affect not only the creditor who was executing his decree against the person or the property of the judgment-debtor, but all the scheduled creditors.

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[221] Section 351 of Act No. XIV of 1882 is essentially different in its terms to s. 281 of Act No. VIII of 1859. It is true the matters to be inquired into in cl. (b) of s. 351 are confined to concealments, transfers and removals of property subsequent to the institution of the suit in which the decree in execution was passed with intent to defeat creditors. Clause (c) of s. 351 relates to matters which might be anterior or might be subsequent to the institution of the suit in which the decree in execution was passed, and certainly authorises an inquiry into matters preceding the application to be declared an insolvent. It is contended, however, that the other act of bad faith mentioned in cl. (d) of s. 351 must be an act of bad faith in or during the pendency of the application to be declared an insolvent. In our opinion there is nothing in cl. (d) to so limit the scope of the inquiry. If the contention of the judgment-debtor were correct, the general words "any other act of bad faith regarding the matter of the application" in cl. (d) could not be construed as *ejusdem generis* with the words in clauses (b) and (c). It appears to us that "any other act of bad faith" mentioned in cl. (d) means any act of bad faith not in s. 351 before mentioned which bore directly upon the conduct of the debtor in the matters leading up to his application for insolvency, and would not exclude any act of bad faith by which he had incurred a then still subsisting liability to any of his creditors, whether the particular creditor was or was not the creditor whose decree was in execution, and whether or not the bad faith

(1) 4 A. 337.

(2) 2 M. 219.

was connected with the liability which resulted in that decree. In our opinion the High Court of Madras in *Bavachi Packi v. Pierce, Leslie & Co.* (1) correctly held in reference to the construction of cl. (d) of s. 351 that "the matter of the application embraces the insolvency and all the facts and circumstances material to explain the insolvency." This view is inconsistent with a decision of this Court in *Salamat Ali v. Minahan* (2). It is to be observed that in that case this Court was influenced by the findings of facts.

With this expression of opinion the Bench which referred the question will be left to deal with the appeal.

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17 A. 222 (F.B.) = 15 A.W.N. (1895) 64.

[222] FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox,
Mr. Justice Blair, Mr. Justice Banerji and Mr. Justice Burkitt.*

SABHAJIT (*Applicant*) v. SRI GOPAL (*Opposite Party*).
[24th July, 1894.]

Civil Procedure Code, ss. 335, 334, 2, 244—Execution of decree—Application by usufructuary mortgagee ejected by auction-purchaser to be restored to possession—Representative of party to suit—Auction purchaser, who is also assignee of decree.

In a suit for sale upon a mortgage the plaintiff having obtained a decree assigned the same, and the assignee brought the property decreed to be sold to sale and purchased it himself and obtained possession. A usufructuary mortgagee of the property who had been a party to the suit and in whose favour the decree was, in so far that it declared his right to continue in possession, applied to be restored to possession and obtained an order in his favor. Thereupon the assignee, auction-purchaser, applied in revision to have the order restoring the usufructuary mortgagee to possession set aside.

Held that the order in question was an order which could properly be made under s. 335 of the Code of Civil Procedure, and being unappealable, an application for revision thereof might lie.

The auction-purchaser, though he happened also to be the assignee of the decree, was not a representative of a party to the suit within the meaning of s. 244, nor was the usufructuary mortgagee a judgment-debtor within the meaning of s. 334 or 335, but he was a person other than a judgment-debtor within the meaning of s. 335.

[Not F., 26 A. 447 = A.W.N. (1904) 61; F., 18 A. 36; 22 A. 450; R., 31 A. 82 (99) = 6 A.L.J. 71 = 5 M.L.T. 185 = 1 Ind.Cas. 416 (423); 20 A.W.N. 42; 2 Ind. Cas. 284 = 12 O.C. 109 (110).]

THE facts of this case were as follows :—

One Kundan Lal brought a suit upon a mortgage for sale of a four-biswa share in a certain village, the defendants to that suit being Sita Ram and Daya Kishan, the predecessors in title of Sri Gopal. The defendants pleaded that they were in possession under two mortgages of the 20th of January 1856 and the 5th of July 1869. The Court of first instance dismissed that suit, but the appellate Court decreed the plaintiff's claim subject to the rights of the defendants under their prior mortgages. Kundan Lal having thus obtained his decree for sale, sold the same to Sabhajit, who in execution thereof brought the mortgaged property to sale and purchased it himself and obtained possession. Thereupon Sri Gopal claiming as heir

* Application No. 9 of 1894, for revision of an order of Babu Ganga Saran, Subordinate Judge of Aligarh, dated the 25th November 1893.

(1) 2 M. 219.

(2) 4 A. 337.

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to Sita Ram and Daya Kishan applied to be restored possession of the property mortgaged. The auction-purchaser [223] resisted this application on the allegation that Sita Ram and Daya Kishan were never in possession as mortgagees, but had obtained possession merely as auction-purchasers under a simple money decree. The Court (Subordinate Judge of Aligarh) found that Sita Ram and Daya Kishan had been in possession as mortgagees, and allowing Sri Gopal's application made an order that he should be reinstated.

The auction-purchaser thereupon applied to the High Court for revision of the order of the Subordinate Judge above mentioned.

This application coming before a single Judge was by him referred to a Division Bench and thence by Tyrrell and Burkitt, JJ., to the Full Bench.

Mr. *A. H. S. Reid*, for the applicant.

Babu *Jogindro Nath Chaudhri* and Munshi *Gobind Prasad*, for the opposite party.

The judgment of the Court (EDGE, C. J., KNOX, BLAIR, BANERJI and BURKITT, JJ.) was delivered by EDGE, C. J.—

JUDGMENT.

This is an application under s. 622 of Act No. XIV of 1882. The assignee of a decree-holder, plaintiff, brought the property which had been decreed to be sold to sale and purchased it himself. He obtained possession. Thereupon a party to the suit in whose favor the decree was in this sense that it directed that the sale should not affect his interests, which were those of a usufructuary mortgage in possession, applied to the Court executing the decree to put him again in possession and dispossess the auction-purchaser. The Court passed an order reinstating the usufructuary mortgagee in possession, and that is the order which is questioned in this application for revision.

It was objected that this application does not lie, it being contended that the order in question was one made under s. 244 of Act No XIV of 1882. Another contention in support of the objection was that, if the order was made under s. 335 of Act No. XIV of 1882, the auction-purchaser had a remedy by suit to establish his title to possession.

[224] On the other side it was contended that the order was one made in fact under s. 335, but one which could not be made in law under that section, it being contended that the usufructuary mortgagee was a person coming within the description of a "judgment-debtor" as that term is used in s. 335. That contention was carried further, and it was argued that, although the Court might have had jurisdiction to make such an order under s. 244, it having in fact made the order under s. 335, this application in revision lay. It was also contended on behalf of the applicant that the Court will exercise its discretion under s. 622, although the appellant had under the last clause of s. 335 a right of suit given to him.

The preliminary objection could not be decided by us without going into the case in order to ascertain under what section this order could lawfully have been made. As to the contention that this was a case to which s. 244 applied, that was supported on two lines of argument. One was that s. 334 was the section which applied in this case, and that on the authority of *Muttia v. Appasami* (1) an order passed on a matter within s. 334 was an order made under s. 244. We need not say whether we agree with or differ from the view of the Madras High Court on that point. Until it is

(1) 13 M. 504.

necessary to do so we reserve our right to consider whether an order under s. 334 is an order under s. 244. The other line on which it was contended that s. 244 applied was this:—It was said that the auction-purchaser was, as the assignee of the plaintiff in the suit, a representative of a party to the suit. His opponent, the usufructuary mortgagee undoubtedly was a party to the suit. The usufructuary mortgagee was a party in whose favor a decree, so far as he was concerned, was made. It has been decided by this Court, and it is a matter upon which we are all agreed, that a purchaser at an auction-sale under a decree is not, as such purchaser, a representative of a party or a party to the suit in which the decree was passed, although if such auction-purchaser was a transferee, within the meaning of s. 232 of Act No. XIV of 1882, of the decree, he might be, as such transferee, a representative of a party to the suit for the [225] purpose of s. 244 of that Code. In this particular matter with which we have now to deal the auction-purchaser stands simply in the position of auction-purchaser and does not stand in the position of a plaintiff or a decree-holder. Rightly or wrongly he got into possession and now claims to be put back into possession, not as a decree-holder, for as such he had no right to possession, but as the auction-purchaser at a sale held under the decree. It is a pure accident that the person who was the transferee of the decree of the plaintiff is also the auction-purchaser, and, so far as the auction-purchaser's rights as such are concerned, they must be regarded as if he and the transferee of the decree were two different persons. The decree had been executed. In our opinion the auction-purchaser was not as such in the only position in which he could appear here in this matter either a party or the representative of a party to the suit. The reason why it is not necessary for us to express an opinion as to the decision of the High Court at Madras to which we have referred is that, in our view of the law, the usufructuary mortgagee, although a party to the suit, was not a judgment-debtor within the meaning of s. 334 or s. 335. A judgment-debtor is defined in s. 2 of Act No. XIV of 1882; and this particular mortgagee was not party against whom either a decree or an order relating to this matter had been passed, and consequently did not come within the description of s. 334, and did come within the description of a party other than a judgment-debtor in s. 335. In our opinion the Court below had jurisdiction to entertain the application of the usufructuary mortgagee and to make the order which it did make under s. 335 of Act No. XIV of 1882.

There is a preliminary objection to this application in revision which has not been taken and which relieves us from the necessity of deciding whether or not any effective suit to have the decree under which the sale was made construed, could, having regard to the circumstances of this case, to the fact that the auction-purchaser as such took such title as he obtained at the sale under the decree and such other title as he had as the transferee of the decree, and to the fact that the usufructuary mortgagee was a party to the decree, [226] have been brought by either of these parties against the other under the last clause of s. 335, in relation to the order of the Court the subject of this application, and consequently relieves us from having to decide whether this is a case in which we ought to exercise our discretion by reason of a right of suit being open to the applicant.

The preliminary point is that in no view of this application does it

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come within s. 622 of Act No. XIV of 1882. The Court below exercised a jurisdiction vested in it. It exercised that jurisdiction lawfully and regularly under the section of the Code applicable to the case. There was no circumstance in this case which brought it within s. 622. It is not necessary to express any opinion as to the merits of this application. We dismiss the application with costs.

Application dismissed.

17 A. 226 = 15 A.W.N. (1895) 70.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Aikman.

GHURE AND ANOTHER (*Defendants*) v. MAN SINGH AND ANOTHER
(*Plaintiffs*)* [20th January, 1895.]

Pre-emption—Wajib-ul-arz—Partition of village originally one into three separate mahals—New record of village custom framed on partition—Rules of the Board of Revenue of the 13th November, 1875—Act No. XIX of 1873 (N.W.P. Land Revenue Act), s. 257.

Where at the settlement of a village constituting a single mahal a record of rights was framed giving certain pre-emptive rights to the co-sharers in the village, but subsequently the village was divided by perfect partition into three separate mahals, and in accordance with the rules of the Board of Revenue of the 13th November 1875, issued under s. 257 of Act No. XIX of 1873, a new record of village customs was framed which did not give to the sharers in any one of new mahals any right of pre-emption in respect of land situated in another mahal, it was held that the latter record of village customs was a valid and binding document and no right of pre-emption existed in favour of the co-sharers in any one mahal in respect of land situated in another mahal.

Per AIKMAN, J.—Where a village, originally one, is divided by perfect partition into two or more mahals, unless at the time of partition a right of pre-emption is specifically reserved by the co-sharers in respect of lands lying outside any given [227] mahal, such right of pre-emption is not to be presumed from the mere fact that when the village formed but one mahal the co-sharers had pre-emptive rights against each other.

Motee Sah v. Musummat Goklee (1) and *Jai Ram v. Mahabir Rai* (2) referred to.

Under the above circumstances the mere retention of a community of interest in certain property such, e.g., as roads, &c., will not give the sharers in one mahal any right of pre-emption over land situated in another. *Nazir-ud-din v. Kadir Bakhsh*, (3) referred to; *Gokal Singh v. Mannu Lal* (4) dissented from.

[F., 20 A. 92; R., 22 A. 1 (F.B.); 27 A. 602 = 2 A.L.J. 313 = A.W.N. (1905) 115; 15 A.W.N. 233.]

THIS was a suit for pre-emption. The village in which the share in respect of which pre-emption was claimed originally consisted of a single mahal and under the *wajib-ul-arz* prepared at the settlement the co-sharers in this mahal had pre-emptive rights *inter se*. In 1881 the village, was divided by perfect partition into three separate mahals and a separate *wajib-ul-arz* was framed for each mahal by the officer making the partition. These new *wajib-ul-arzes* did not provide for pre-emption by a sharer in one mahal of land situated in another mahal. Under these circumstances, the plaintiffs being co-sharers in one of the mahals into which the village

* First Appeal No. 125 of 1894, from an order of H. G. Pearse, Esq., District Judge of Agra, dated the 29th August, 1894.

(1) S.D.A. N.W.P. 1861, Vol. II, 506, 507.
(3) 14 A.W.N. (1894) 193.

(2) 7 A. 720.
(4) 7 A. 772.

had been divided brought their suit to pre-empt land situated in another mahal. The Court of first instance (Subordinate Judge of Agra) found that the *wajib-ul-arz* prepared for each mahal on partition was a valid document and that under it the plaintiffs had no right of partition in respect of land situated in another mahal.

The plaintiffs appealed. The lower appellate Court found that the new *wajib-ul-arz* had been prepared by the partition amin and was not signed by the co-sharers or by the officer making the partition, and did not supersede the older *wajib-ul-arz* prepared at the settlement. That Court accordingly allowed the appeal and remanded the case under s. 562 of Act No. XIV of 1882 for trial on the merits.

From this order of remand the defendants appealed to the High Court.

[228] Pandit *Moti Lal* and Pandit *Baldeo Ram Dave*, for the appellants.

Mr. *T. Conlan*, Pandit *Sundar Lal* and Pandit *Madan Mohan Malaviya*, for the respondents.

JUDGMENT.

KNOX, J.—This is an appeal from an order passed by the District Judge of Agra in an appeal before him, whereby he set aside a decree passed by the Subordinate Judge of Agra, and remanded the case under s. 562 of the Code of Civil Procedure, for determination of certain issues which were raised before the Subordinate Judge, and which issues the Subordinate Judge, in consequence of his finding upon the first issue raised, had not determined. In order to understand the case, it will be necessary to briefly set out the contentions between the parties. The respondents before us were plaintiffs in the Court of first instance. Their claim was to enforce a right of pre-emption over certain land which had been sold by one Umrao Beg to one Ghure. The respondents before us and Umrao Beg were none of them residents in the village of Chanderbhanpore. Chanderbhanpore originally consisted of one mahal. In 1881, this mahal was divided by perfect partition into three perfect mahals, respectively termed mahal Umrao Beg, mahal Mogal Beg and mahal *Ghair Khwahindagan*. The share of land in dispute is situate in mahal Umrao Beg, and it is admitted that since the perfect partition took place the plaintiffs'-respondents are not shareholders in that mahal Umrao Beg, they are sharers in the mahal termed *Ghair Khwahindagan*. They base their claim to enforce the right of pre-emption over the property situate in mahal Umrao Beg, not upon any record of village customs prepared after partition, but upon a record of village customs, which forms part of the record of rights drawn up at the Settlement which was completed in the days when the village of Chanderbhanpore still consisted of one single mahal. The vendees of the share in dispute, who were defendants in the Court of first instance, and are appellants before us, resisted the claim of pre-emption on the ground that a record of village custom, which they say was prepared after perfect partition, conferred no rights of pre-emption in favor of the [229] shareholders over the land situate in their mahal. The Court of first instance considered the record of village custom which was prepared at the time of partition to be a good and valid document, and as it conferred no pre-emptive rights in favour of the shareholders of the other mahal, dismissed the claim brought by the respondents. The lower appellate Court treated the document prepared after partition, as being no valid record of village custom; held that it could not supersede the record of village custom

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which had been prepared at the village settlement, and hence issued an order of remand, in order that the rights of the parties might be determined by the provisions contained in that document. It is contended before us that this was an illegal order, inasmuch as the learned Judge was wrong in holding that the record of village custom prepared in 1881 was not a good document. It is contended that the document is a genuine record of village custom and has been in existence for years without being questioned by any of the parties; and that record being a good document, and conferring no claim upon the respondents, the respondents were in no way entitled to pre-empt, and their claim should have been dismissed. The issue thus clearly raised before us is, whether the record of village custom prepared at the time of partition is, or is not, a good and valid document. It has been admitted, and very properly admitted, by the learned pleader for the respondents, that if it is a good and valid document, and if it be held to govern the rights of parties in the present case, the respondents' claim must fail.

A good many questions of considerable difficulty were raised in the course of the hearing, and we have had the benefit of arguments which on both sides have been prepared with great care and thoroughness. Had it been necessary to decide some of the points so raised, the case would have been one for the consideration of a Full Bench of this Court. I am of opinion that the matters directly and substantially raised in this appeal can be determined apart from those questions. The record of village custom in this case has been prepared in accordance with the rules which were issued by the Board of Revenue on the 13th of November 1875, [230] and under the powers given them by clause (f), section 257 of Act No. XIX of 1873. The preface to those rules shows that the rules had received the sanction of Government. It was not prepared under the rules which issued in 1885 and superseded the rules of 1875. In the present case moreover we are not dealing with a record of village custom which has simply been blindly taken from the record which was prepared at settlement and repeated *totidem verbis* without any consideration whether the rules prepared at settlement did apply to the state of things which ensued upon the great revolution which must take place in every village which was once undivided but has come to be divided into two or more separate and perfect mahals. The record of village custom is part of a larger document which is known as the record of village rights and the existence of which is necessary to every mahal. There can be no such thing in law as a mahal for which a separate record of rights has not been framed. This is evident from the way in which the term "mahal" has been defined in s. 3, sub-s. (1) of Act No. XIX of 1873. The record of rights in every mahal is no ordinary document; it is a document which by law is entitled to so much weight that by one of the provisions (*i.e.*, s. 91) of Act No. XIX of 1873, all entries in it when properly made and attested are presumed to be true until the contrary is proved. The authority for the preparation of the document is contained in rule 23 of the rules above quoted of the 13th of November 1875. Under that rule, when a perfect partition is approaching completion,—“The map and rough schedule shall then be returned to the Amin who shall forthwith make out records of the new mahals or pattisin the same form as the records of settlement prescribed under the rules of settlement under XIX of 1873.” This rule, it will be seen, refers us back to certain rules issued by the Board, under the powers given them in s. 257 (e) and (f) of Act No. XIX of 1873, on the 28th of September 1875. The important rules for the purposes of this appeal are

rules Nos. 30, 49 and 51. Rule No. 23 of the Circular of the 13th of November 1875 lays down no provision concerning any attestation. All that it requires is that the records of the new mahal be made out in the same form as the [231] records of settlement. It must not be forgotten that no partition record, which includes the record of rights made for the partition of mahals, is complete until it has been sanctioned by the Collector of the district. Even if the partition has been made by an Assistant Collector, the law still requires that it be reported to the Collector of the district for sanction and confirmation. That sanction and confirmation can never take place without formal attestation by the Collector of the district signed by his signature to the records prepared at partition. A still further safeguard is provided by the appeal which s. 132 of Act No. XIX of 1873 gives to the Commissioner of the division from the confirming order of the Collector of the district up to one year from the date from which the partition took effect. It may be that in view of the safeguard thus provided by law the Board of Revenue did not consider it necessary to lay down a rule prescribing that the entries made in the record of rights prepared at partition should be attested in the particular manner provided by rule 49 of the rules of the 28th of September 1875, when the record of rights is prepared for the first time at settlement. Be that as it may, the highest weight that can attach to an objection that the record or a portion of it has not been attested or that the attestation of them has not been required by any rule, is that the record is not one to which the provision of s. 91 of Act No. XIX of 1873 does apply. Now in this case the respondents do not ask us to presume anything upon the strength of the document prepared at the time of partition; they rely on the document prepared at the time of settlement. Upon that document they stand or fall, and their claim will not prevail, even if it be, which we do not think is the case, that the document prepared after partition is not a document to which the provisions of s. 91 apply. Recognising the importance of the record of village custom prepared at the settlement so far as the interests of his clients were concerned, the learned pleader for the respondents laboured at great length and with much persistency to the effect that the record still held good and governed the present case. He laid great stress upon the fact that it was a record of custom [232] prevalent in the village and governing all within the local area of the village. His foundation rests upon the somewhat slender fact that the record of village custom contains in one place the word "*riwaj*." The word occurs at the introduction to that portion of the record of village custom which deals with the subject of pre-emption. He also laid great stress upon the fact that in dealing with pre-emption the record gives a preference to those who are shareholders in the "*deh*." His argument was that, however much the village of Chanderbhanpore might have been split up into separate mahals, there still remained one "*deh*," and that his clients were shareholders in that "*deh*." Assuming for the present that the record of village custom does set out that pre-emption in Chanderbhanpore at the time when the settlement record was prepared rested upon custom, and not upon contract then prepared among the shareholders, it is necessary to examine with great care and minuteness the exact nature of the custom, the extent to which it prevailed and the persons who were governed by it. We are dealing with a village which bears a Hindu name, the parties before us are Hindus, and the custom, if there be one, of pre-emption, in so far as it extends, is a custom superseding general law. In examining

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the terms in which it is recorded we cannot forget that it was recorded at a time when the village bore its natural and, from a Hindu standpoint, proper form of an undivided village and an undivided mahal. The term "*hissadar deh*" as then used would apply to all who could claim to hold a share in land within a well-defined ring-fence in which all were shareholders, and at a time when there existed no intention of the village brotherhood being separated or the land being broken up into distinct parcels in which some only and not all the village brotherhood would hold a share. It is more than difficult to say that those who then made the record would have recorded that the custom was one which should prevail when the relations of persons and property then subsisting had undergone such a radical change as necessarily ensues when perfect partition takes place. Even where the existence of custom has been proved, it must not be forgotten that it is not custom but the general [233] law which regulates all beyond the custom. Custom moreover is held to be discontinued owing to accidental circumstances. The fact of a perfect partition evidences not a mere accident, but an intention to break up, and to completely break up, the existing state of things. It would require therefore strong proof to establish that a custom which regulated and provided for one set of circumstances still regulates and provides when those circumstances have been wholly altered. We were referred to several cases in support of the doctrine that a record of village custom prepared at the time of settlement still prevails and governs when and after perfect partition has taken place. The first case which we were referred to was that of *Gokal Singh v. Mannu Lal* (1). In that case, however, there was apparently no record of village custom prepared after partition had taken place, and the only record of village custom which was in existence was that prepared at the time of settlement. It was moreover a case in which the contention was that the record of village custom contained covenants made between the parties, and not, as in the present case, a privilege and liberty created by the running of custom. The next case was that of *Matadin v. Mahesh Prasad* (2). This was one of those cases in which the village record of custom prepared after partition was a *verbatim* copy from the record of village customs prepared at the time of settlement. In that case, whether from accident or of design, the record of village custom prepared after partition conferred in express terms a right of pre-emption upon the co-sharers of the *mauza*. In that case the word '*mauza*' was deliberately used after partition had not only been intended but had been completed, and not used as '*deh*' has been in the present case when partition was not yet within the horizon. The next case cited was that of *Kuar Dat Prasad Singh v. Nahar Singh* (3). That was a case in which Mr. Justice Straight, who delivered judgment, was careful to point out that he was at the time dealing with a particular *wajib-ul-arz* and not with cases where, one record of village custom having existed for the purpose of a common village area, and that village area having been divided into separate revenue [234] areas, no record of village custom had been drawn up for the new area. The record of village custom which was under consideration in that case was one which in express terms conferred a right of pre-emption upon share-holders in a *patti* other than that in which the land sought to be pre-empted was situate, and, in the event of refusal by them, conferred

(1) 7 A. 772.

(2) 12 A.W.N. (1892) 100.

(3) 11 A. 257.

the right in equally well-defined terms upon the sharers of the village, and this too after partition had taken place. There remains one case further which need be mentioned, and which was cited by the learned pleader for the respondents. *Shiam Sundar v. Amanant Begam* (1). The record of village custom which had to be interpreted in that case was a record prepared at a time when three villages formed a single mahal, a state of things widely different from the case now under consideration. It was a special case decided under special circumstances, as the judgment shows.

The result then is that the document upon which the respondents base their right and which was the only evidence which they produced in support of that right, is a document prepared at a time when circumstances wholly different from those now in existence prevailed and which never contemplated the existing state of things. We are not prepared to hold that it is sufficient to establish that the custom which did prevail, if there be such a custom, can be held to be a custom governing and ruling the parties in the new and altered state of things. The finding of the learned Judge was erroneous, the order of remand was unnecessary, as the memorandum of appeal filed before him shows. There remains no further matter for decision, and I would, setting aside the order made by the learned Judge, restore that of the Court of first instance and dismiss the respondents' claim.

AIKMAN, J.—This is an appeal by the vendees who were defendants in a pre-emption suit brought by the plaintiffs, who are respondents here. The plaintiffs and the vendor, who is not before us, were co-sharers in a village which at one time formed an undivided mahal. In 1881 the village was divided into three mahals, which it will be sufficient to describe as mahals Nos. I, II and III. The [235] property sold lies within mahal No. I. The plaintiffs own a share in mahal No. III, but own no property in mahal No. I. They came into Court asserting their pre-emptive right in virtue of a *wajib-ul-arz* which was prepared at a time when the village formed but one mahal. The defendants resisted their claim on the ground that a new *wajib-ul-arz* had been prepared at the time of partition by which, if a valid document, it is admitted the plaintiffs have no right to pre-empt. The validity of this document is disputed by the plaintiffs. In my opinion it is valid and furnishes an answer to the plaintiffs' claim. At the time when the partition was carried out, it was under the then existing rules as much a part of the duty of the officer executing the partition to prepare a new *wajib-ul-arz* for each mahal, as it was to prepare a new *jamabandi*. The Board of Revenue, in the rules they have framed for carrying out partitions, prescribed that the officer executing partition is to make out the records of the new mahals in the same form as the records of settlement prescribed under the rules of settlement in Act No. XIX of 1873. Section 90 of that Act lays down that the Board shall from time to time prescribe the form in which the record is to be made, and the manner in which it is to be attested. In the rules relating to partition nothing is said as to the manner in which the new records are to be attested. It was contended on behalf of the plaintiffs, that as the co-sharers had not signed this new *wajib-ul-arz*, it was of no force. It is the custom at settlement that this *wajib-ul-arz* is signed by the co-sharers; but this is not required by the rules framed by the Board (*vide* rule 49, Book Circular No. 15, 28th of September 1875); consequently the mere absence of the

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17 A. 226 =
15 A.W.N.
(1893) 70.

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signatures of the co-sharers would not be sufficient to invalidate the document. It is signed by the officer who executed the partition. As pointed out by my brother Knox, the law gives ample opportunity to the co-sharers to raise any objection, either before the Collector at the time of confirmation or by way of appeal to the Commissioner of the Division, in regard to anything which may have been done at the time of partition. But from 1881 up to May 1893 no objection [236] is shown to have been raised by any co-sharer to the proceedings of the partition amin. I therefore hold that this document would supply a sufficient answer to the plaintiffs' suit. This would be enough to decide the case, but as an important question has been raised as to whether after a partition an owner of land in one mahal can assent a right of pre-emption when a sale is made of property situated in another mahal, I think it necessary to give my opinion in regard to this also.

Partitions are of two kinds—perfect and imperfect. In the case of an 'imperfect' partition it has never been held that a right of pre-emption disappears with the partition. In the case of *Ram Pershad v. Buljeet Singh* (1) it was remarked:—"It is true that there has been a partition, but it was an imperfect one. The lands were divided, but the joint liability of all to the Government revenue remains. Therefore the property is still one *mahal*, the whole of the lands of which are liable for the Government revenue. In this state of imperfect partition it is decided by various cases that the condition as to pre-emption in the old *wajib-ul-arz* remains in force." It is different in the case of 'perfect' partition. In the case of *Motee Sah v. Musummat Goklee* (2) the Judges say, with regard to such a partition:—"An essential condition of the existence of a right of pre-emption is that the parties claiming such a right shall be co-parceners in the same estate as those against whom the claim is made, a relation between the parties which is extinguished by the very operation of partition and the separate proprietorship thereby established." In the case of *Jai Ram v. Mahabir Rai* (3) Mr. Justice Oldfield said:—"The condition as to pre-emption only affected the shareholders of the mahal as long as they remained shareholders, and ceased to have effect upon those shareholders and their property who separated themselves and their property by forming a separate mahal. The plaintiff could after separation exercise no right of pre-emption against and in respect of shareholders and property as so separated, nor could the separated shareholders exercise any right of pre-emption against the [237] plaintiff and his property remaining in the mahal from which they had separated." And in the same case Mahmood, J., held that the terms of an old *wajib-ul-arz* were superseded by a partition at which a new *wajib-ul-arz* was framed which created rights of pre-emption amongst the co-sharers of the new mahals.

The case principally relied on by the respondents, and a case which is undoubtedly in their favour, is that of *Gokal Singh v. Mannu Lal* (4) quoted by my brother Knox. With every respect to the learned Judges who were parties to that decision I am unable to concur with them. It was there held that there may still be some community of interest and also a considerable community of things held and used in common by all the inhabitants, such for instance as roads, drains and other things which are necessary to all. Hence even after partition something is still left in common, and with reference to the merits of this case there remained

(1) N.W.P.H.C.R. (1867) 252 = 2 Agra 252.

(2) S.D.A. N.W.P. (1861) Vol. II. 506 (507).

(3) 7 A. 720.

(4) 7 A. 772.

enough community of interest to justify the preference given by the *wajib-ul-arz* to partners in the village over strangers in respect of the right of pre-emption. With reference to the reason here assigned I would quote a passage from a recent decision of this Court, *Nazir-ud-din v. Kadir Bakhsh* (1). "In the present case, although the pre-emption according to the *wajib-ul-arz* is to be according to the Muhammadan law, still it is to be a pre-emption for co-sharers, in the mahal and not for persons other than co-sharers, even if such persons may have some right or interest in the *shamilat* lands of the mahal." I am of opinion that unless at the time of partition a right of pre-emption is specifically reserved by the co-sharers in respect of lands lying in the other mahals, such right of pre-emption is not to be presumed from the mere fact that when the village formed but one mahal the co-sharers had pre-emptive rights against each other. In the case of *Mata Din v. Mahesh Prasad* (2) Mahmood, J., said :—"Partition, whether perfect or imperfect, is a matter which relates to the province of the recovery of revenue." But in my view partition relates to much more than the revenue, [238] though it is provided by law that it must be conducted in such a manner that the revenue does not suffer. It is my experience that what gives rise to an application for partition is not so frequently a dispute as to revenue as the presence in the village of some quarrelsome or litigious co-sharer who seeks to take more than the others consider him entitled to. If it were held that notwithstanding partition such a co-sharer could, whenever a sale took place, assert his right of pre-emption in the mahal which had been divided off, this manner of avoiding quarrels would not be put an end to. In the result I have no hesitation in concurring with my brother Knox in holding that this appeal should be decreed.

The order of the Court therefore will be that the order of the lower Court be set aside, the claim of the plaintiffs be dismissed, and the appeal be decreed with special costs in all Courts.

Appeal decreed.

17 A. 238=15 A.W.N. (1895) 56.

APPELLATE CIVIL.

Before Mr. Justice Burkitt.

REFERENCE UNDER S. 28 OF ACT NO. VII OF 1870.*
[6th February, 1895.]

Act No. VI of 1882 (*Indian Companies Act*), ss. 169, 214—*Appeal—Court-fee—Act No. VII of 1870 (Court-fees Act)*, sch. ii, art. 11 (b).

An order under s. 214 of Act No. VI of 1882 (*Indian Companies Act*) is not a decree or an order having the force of a decree, and consequently an appeal from such an order to a High Court is properly stamped, with reference to Act No. VII of 1870 (*Court-fees Act*), sch. ii, art. 11 (b), with a Court-fee stamp of Rs. 2.

[R., 14 C.P.L.R. 100 (103); 1 Ind. Cas. 474 (476)=46 P.R. 1909=72 P.L.R. 1909=41 P.W.R. 1909.]

THIS was a reference under s. 28 of Act No. VII of 1870, by the taxing officer of the Court to the Judge appointed under s. 5 of the Act to decide questions relating to Court-fees of the following question:—

* Reference in First Appeal from Order Nos. 48 to 75 of 1894.

(1) 14 A.W.N. (1894) 193.

(2) 12 A.W.N. (1892) 100.

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17 A. 226=
15 A.W.N.
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17 A. 238=
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(1895) 56.
- Whether on a memorandum of appeal from an order of a District Judge under s. 214 of Act No. VI of 1882 (Indian Companies Act), a fixed Court-fee of Rs. 2 is payable under Act No. VII of 1870, sch. ii, art. 11 (b) or an *ad valorem* fee?
- The facts out of which the reference arose sufficiently appear from the order of the Court thereon.
- [239] Messrs. *A. Strachey* and *H. Vansittart*, in support of the reference.
- Messrs. *W. Wallach* and *A. E. Ryves*, *contra*.

ORDER.

BURKITT, J.—This is a reference from the taxing officer to me as taxing Judge under the provisions of s. 5 of the Court-fees Act. In considering it I have had the great advantage of the assistance of my brothers Knox and Blair, who at my request sat with me to hear it argued. They authorise me to say that they concur in the order I am about to pass and in the reasons for it.

The matter has arisen in the following manner:—During the winding up of the Himalaya Bank, Limited, the Judge of Saharanpur, acting under ss. 162, 163 and 214 of the Companies Acts of 1882 and 1887, directed certain Directors and Officers of the Bank to repay large sums of money to the Bank. Memoranda of appeal to this Court were admitted on a Court-fee stamp of Rs. 2 under art. 11 of the second schedule to the Court-fees Act. Subsequently however the officer whose duty it is to see that fees are paid under the second chapter of the Court-fees Act reported to the Registrar that in his opinion those memoranda of appeal should have borne "*ad valorem* stamps," as he considered they had been presented against orders "having the force of a decree" and therefore were chargeable with Court-fees under art. 1 of the first schedule of the Court-fees Act. The Registrar has referred the question to me for decision.

The question then is, have those memoranda of appeal been presented against orders which have the "force of a decree?" It is contended in the office report that the orders must have the force of a decree, because it is said they, under s. 166 of the Companies Act, can be enforced in the same manner as a decree of a Court made in a suit.

A similar question was raised before the Bombay High Court, and it was then held that a Court-fee of Rs. 2 under art. 11 of the second schedule of the Court-fees Act was sufficient; *vide* [240] the judgment of Mr. Justice Nanabai Haridas on a reference from the taxing officer, dated the 28th of November 1885.

I have come to the same conclusion.

It may be doubtful whether any 'order' in the strict sense of that word, as defined in the Code of Civil Procedure, is passed by the winding up Court under s. 214 of the Companies Act. That section seems to be the complement of s. 162 *et seqq.* of the Act which give to the winding up Court large inquisitorial powers in order to enable it to get in the assets of the Company under liquidation. When by virtue of those powers the Court has satisfied itself that any director, manager, officer, &c., has been guilty of malpractices, the Court may then take action under s. 214, and on the application of a liquidator, creditor, or contributory, after examining into the conduct of the director, manager, etc., may compel the latter to repay money or to contribute to the assets of the Company. The power so given to the Court is clearly a summary power to compel defaulting

directors and other officials to repay money misappropriated or contribute money to the assets of the Company by way of compensation.

It is at least doubtful whether the result of proceedings under s. 214 can be considered to be an 'order.' The proceedings leading up to such an order, if it be an order, are not in the strict and technical sense judicial proceedings at all. No procedure is imposed at any stage, no person need be formally cited, no plaint need be filed, no party has a right to prove his case in such way as he chooses. The whole power is in the Court, which may examine into the conduct of the person complained of, and after such examination may 'compel' repayment or contribution by way of compensation. The word 'compel' seems to contemplate an order entirely distinct from an order adjudicating upon the rights of parties. It presupposes, not a formal adjudication, but simply a conviction in the mind of the Court that such order as it is going to make is just. The Act contemplates no order by way of formal adjudication upon the matter of right. That which it authorises is a compulsory, that is to say an executive, order. But it by no [241] means follows that it is an order having the force of a decree. It certainly is not a decree. It differs from a decree in many essentials and attributes. Section 166 certainly allows it to be enforced in the manner in which decrees of the winding up Court made in any suit pending therein may be enforced. But this is merely a provision as to the procedure which may be observed in enforcing the order. The mode in which an order may be enforced is not necessarily an indication or a criterion of the nature of the order. There is a great difference and no inter-connection between the force of a decree and the method of enforcing it. I have been unable to find any authority as to the meaning of the words 'force of a decree' used in art. 11 of the 2nd schedule of the Court-fees Act. In the case of *Jamsang Devabhai v. Goyabhai Kikabhai*(1), which was a case of a second appeal to the High Court in a question involving a right to partition, it was held, at page 412, that as the appeal was a 'miscellaneous appeal' arising from an order and not from a decree a Court-fee of Rs. 2 was sufficient. The same principle would *prima facie* apply to the present case. Further, as the Court-fees Act is a fiscal enactment, it is one whose provisions are to be construed strictly, and, whenever there is any ambiguity or doubt, in favour of the subject.

Now the words 'having the force of a decree' are not very intelligible. Their meaning has not been interpreted by any authority, and in the present cases I am not prepared to say that the orders in question have such force. I am therefore of opinion that the Rs. 2 Court-fee is sufficient.

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17 A. 238 =
15 A.W.N.
(1895) 56.

(1) 16 B. 408.

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FULL
BENCH.17 A. 241
(F.B.) =
15 A.W.N.
(1895) 68.

17 A. 241 (F.B.) = 15 A.W.N. (1895) 68.

FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Banerji and
Mr. Justice Aikman.*QUEEN-EMPRESS *v.* NANNHU.* [8th February, 1895.]*Criminal Procedure Code, s. 421—Summary rejection of appeal—Court to record reasons
for rejection.*

It is advisable that a Court when rejecting an appeal in a criminal case under the provisions of s. 421 of the Code of Criminal Procedure, 1882, should record [242] shortly its reasons for such rejection in view of the possibility of such order being challenged by an application for revision.

[F., 25 M. 534 = 2 Weir 473; U.B.R. (1906), 2nd Quarter, Crim. Pro. Code, p. 49 = 4 Cr. L.J. 284; R., 19 A. 506 (507) (F.B.); 3 A.L.J. 693 (694) = A.W.N. (1906) 303 = 4 Cr. L.J. 373]

THIS case was referred to a Bench by an order of Aikman, J., of the 26th of January 1895—"with the view of having it determined whether a Sessions Judge or Magistrate, when acting as an appellate Court, can reject an appeal without assigning any reason."

The facts of the case sufficiently appear from the judgment of the Court.

The Government Pleader (Munshi *Ram Prasad*), for the Crown.

JUDGMENT.

EDGE, C.J., BANERJI and AIKMAN, JJ.—This is an application to this Court to exercise its functions in criminal revision. The applicant was convicted of the offence punishable under s. 411 of the Indian Penal Code. The evidence appears to have been conclusive that he was guilty of the offence of which he stood charged. He appealed against the conviction to the Sessions Judge; and the Sessions Judge rejected the appeal, this being the order made:—"Rejected summarily under s. 421, C.P.C." By s. 421, C. P. C., the Sessions Judge meant s. 421 of the Code of Criminal Procedure, 1882.

There is absolutely no doubt that the appeal could not have succeeded. The man was properly convicted and sentenced.

The only question is one which is raised in the Court now and then, *viz.*, whether an order such as that made by the Sessions Judge is sufficient. It is quite plain from the last paragraph of s. 421 of the Code of Criminal Procedure, 1882, that the appellate Court is not bound before rejecting under that section a criminal appeal to send for the record. Without deciding that when a Court acts under the first paragraph of s. 421 of the Code of Criminal Procedure, 1882, it is necessary for the Court to express its views of the case, beyond stating that it considers that there is no sufficient ground for interfering, we think it advisable for Courts of Session and Magistrates when acting as appellate Courts to state shortly in their order the reason or reasons which influence them in coming to the conclusion that there is no sufficient ground for interfering [243] in the case. We do not say that it is necessary to write a judgment in the form prescribed by s. 367 of the Code of Criminal Procedure, 1882, or

* Criminal Revision No. 735 of 1894.

anything like it. We only say that we think it is advisable for those Courts whose orders may be challenged by application in revision to record something which may be a guide for the Court acting in revision.

We dismiss this application.

Application dismissed.

17 A. 243 = 15 A.W.N. (1895) 87.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

RATTANJI (*Decree-Holder*) v. HARI HAR DAT DUBE (*Judgment-Debtor*).^{*}
[24th January, 1895.]

Execution of decree—Attachment of immovable property—Order striking off application for execution but maintaining attachment—Appeal.

A decree-holder in execution of his decree applied for the sale of certain immovable property of his judgment-debtor attachment of which had been obtained before judgment; but on objection being made to the sale he took no further steps to complete the execution of the decree, and the Court struck off the execution-proceedings, maintaining the attachment. Against this order the decree-holder appealed. *Held* that, inasmuch as the order in question was not a judicial disposal of the application for sale and would not preclude the decree-holder from continuing the execution of his decree, an appeal from such order was superfluous and must be dismissed.

THE facts of this case are sufficiently stated in the judgment of the Court.

Pandit Moti Lal Nehru, for the appellant.

Mr. T. Conlan, Mr. Abdul Majid and Pandit Sundar Lal, for the respondent.

JUDGMENT.

BLAIR and BURKITT. JJ.—In our opinion this appeal is quite unnecessary. On the statement of facts it appears that the predecessor in title of the appellant obtained in May 1890, a money decree against the late Raja Hari Har Dat Dube. It further appears that under the provisions of s. 483 of the Code of Civil [244] Procedure, two houses, the property of the Rajah, were attached before judgment. Afterwards, in execution of the decree, an application was made to the Subordinate Judge in July 1890 asking him to direct the sale of the attached houses. The usual sale notifications were issued, and in September 1890, the wife of the judgment-debtor raised objection to the sale, claiming the houses as her own property. The sale was postponed pending the decision of her objections, and also was stayed by order of the District Judge. Eventually, on June the 3rd, 1891, the Subordinate Judge called on the decree-holder to take some other steps in the matter of the execution, and on June the 13th, 1891, as the decree-holder had not taken any such step up to that day, the Subordinate Judge struck off the case, but maintained the attachment. That order is now under appeal. In our opinion that order is nothing more than a temporary adjournment of an adjudication on the original application for sale, and on the objection taken to it. That application is still pending undisposed of, awaiting orders in the

^{*} First Appeal No. 153 of 1891, from an order of Rai Anant Ram, Subordinate Judge of Jaunpur, dated the 13th June 1891.

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17 A. 244
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15 A.W.N.
(1895) 68.

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(1895) 87.

Court of the Subordinate Judge. The order striking it off is in no way a judicial disposal of the application. It does not decide whether the decree can or cannot be executed, in whole or in part, by sale of the attached houses. It contains no order unfavourable to the decree-holder's right to execute the decree, or which in any way prevents the decree-holder from asking the Subordinate Judge now to take up again and dispose judicially of the application made on July the 19th, 1890. Execution by sale of the attached houses has up to the present not been refused by the Subordinate Judge. Indeed, so far as the proceedings have gone, they are in favour of the decree-holder's rights, seeing that a notification for sale was issued, though the sale was subsequently postponed. The application for execution in the way specified in that application has so far simply been shelved undisposed of. Under such circumstances we think there is nothing to appeal against. No order, as the law has been understood since the case of *Dhokal Singh v. Phakkar Singh* (1) and Act No. VI of 1892 has been passed which in any way damnifies the [245] decree-holder. All he has to do is to ask the Subordinate Judge to go on with the proceedings which had been temporarily laid aside in June 1891. When that request is made to the Subordinate Judge it will be for him to consider who is the person against whom, and what the manner in which, execution proceedings are to be continued, and as to that matter his attention is called to s. 234 of the Code of Civil Procedure and to the case of *Hirachand Harjivandas v. Kasturchand Kasidas* (2). It is quite unnecessary and would be premature for us now to enter into the question as to who is the legal representative of the deceased judgment-debtor. As to that matter we express no opinion upon, and draw no inference from, the finding submitted by the Subordinate Judge on the issue remitted for trial by this Court as to whether Rajah Shankar Dat Dube was or was not the legal representative, within the meaning of s. 234, of the deceased judgment-debtor, Rajah Hari Har Dat Dube. As we consider this appeal to have been unnecessarily brought we dismiss it with costs.

Appeal dismissed.

17 A. 245=15 A.W.N. (1895) 66.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

SHANKAR DAT DUBE (*Objector*) v. J. G. HARMAN & CO. (*Decree-holders*).^{*} [1st February, 1895.]

Civil Procedure Code, ss. 234, 244, 278, 283—Execution of decree—Representative of deceased judgment-debtor—Practice—Appeal.

Certain decree-holders obtained during the lifetime of their judgment-debtor attachment of certain immoveable property as belonging to the said judgment-debtor; but on the decree-holders' seeking to bring the property to sale one S. D. came forward with an objection that the property was his and was not liable to sale in execution of the decree in question. Pending the decision of the Court on this objection the decree-holders applied to the Court to have the names of S. D. and the widow of the judgment-debtor (who died about the time the previous objection was filed) placed on the record as representatives of the judgment-debtor. S. D. filed a similar objection to this application also; but both

^{*} First Appeal No. 288 of 1892, from an order of Kunwar Bharat Singh, District Judge of Jaunpur, dated the 6th September 1892.

(1) 15 A. 84.

(2) 18 B. 224.

objections being heard together on the 6th September 1892 were dismissed, and S. D. was placed on the [246] record as representative of the deceased judgment-debtor. On appeal by S. D. against "the order of the District Judge of Jaunpur of the 6th September 1892," it was held that the order making S.D. a party to the execution-proceedings as representative of the judgment-debtor rendered any order as to his former objection superfluous and that order was appealable under s. 244 of the Code of Civil Procedure.

[R., 19 A. 332; 8 O C. 405.]

THE facts of this case are fully stated in the judgment of Burkitt, J. Mr. T. Conlan, Mr. Abdul Majid and Pandit Sundar Lal for the appellant.

Babu Durga Charan Banerji for the respondents.

JUDGMENT.

BURKITT, J.—This is an appeal in a case of execution of a decree. The facts are as follows:—

On the 31st of March 1890, Messrs. Harman & Co., obtained a decree against the late Rajah Hari Har Dat Dube. The first application for execution was made on April 15th, 1890, by the decree-holders, who asked that certain immoveable property (a house) should be attached and sold in satisfaction of the decree. The application was granted, and the attachment of the house was effected on the 24th of April 1890. Those execution-proceedings were struck off on June 30th, 1891, probably to clear the Court's file of pending cases at the end of the half-year; but the attachment was maintained.

The second execution-application was made on July 7th, 1891. In it the decree-holders asked that the house already under attachment should be notified for sale and brought to sale to satisfy the decree. This was allowed, and September 3rd, 1891, was fixed for the sale. Subsequently the sale was twice postponed by the parties and once was stayed by order of the District Judge, in whose Court a suit for the recovery of the entire Jaunpur *riyasat* was pending at the suit of Rajah Shankar Dat against Rajah Hari Har Dat.

Rajah Hari Har Dat died at Madras on January 13th, 1892. On the following day, January 14th, 1892, (but probably before he knew of the death of his brother) Rajah Shankar Dat filed in the [247] execution Court an objection, which purported on its face to have been made under the provisions of s. 278 of the Code of Civil procedure. He objected to the sale of the house on the ground that it was his property by virtue of an agreement, a compromise and decree, that it was not the property of Rajah Hari Har Dat and was not liable to be sold in execution of a decree against the latter. On this objection, notice was ordered to issue to the decree-holders and January 23rd, 1892, was fixed for the hearing. The date for the hearing was postponed from time to time on application by Shankar Dat. Eventually June 30th, 1892, was fixed for the hearing, and on September 6th, 1892, the case was disposed of, the objection raised by Shankar Dat being disallowed, and it was ordered that execution should issue.

But meanwhile the decree-holders had taken other proceedings; for on March 17th, 1892 (in consequence of Rajah Hari Har Dat's death), they applied to the execution Court, asking that the execution-proceedings should be continued against Rani Sahudra Kuar, widow of the deceased Rajah, whom the decree-holders described as heir of the deceased, and

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against Rajah Shankar Dat, who, the application alleged, was in possession of the property of the deceased. The application asked that the names of those two persons should be substituted on the record for Rajah Hari Har Dat's. Notice of this application was sent to Rajah Shankar Dat under s. 248 of the Code of Civil Procedure calling on him to show cause against it on March 29th, 1892. Raja Shankar Dat showed cause on March 25th, 1892, and raised the same objection as he had already set forth in his previous objection on January 14th, 1892, namely, that the property under attachment was his property and was not liable to be taken in execution of a decree against his deceased brother. The consideration of this objection of March 25th, 1892, was from time to time adjourned in the same manner as the consideration of the objection of January 14th, on identical applications made as to each by Shankar Dat, and simultaneously with the former objection it was disallowed on September 6th, 1892, by an order identical with that on the other objection.

[248] Rajah Shankar Dat appealed to the High Court against the order disallowing his objection of the 25th of March 1892. On the case being called on, the respondents' vakil took a preliminary objection to the hearing of the appeal. His objection was founded on s. 283 of the Code of Civil Procedure, and was to the effect that as the appellant had not instituted any suit as permitted by s. 283 to establish his right to the property in dispute, as claimed by him in his objection under s. 278 of the Code on January 14th, 1892, the order made under s. 281 rejecting that objection had become conclusive against the right he then claimed, namely, the right he now sought to establish by the present appeal. We have heard Mr. *Durga Charan* and Mr. *Conlan* at length on this point. On a full consideration we have come to the conclusion that the objection is untenable and unsound. In our opinion the crucial question for our consideration is, would a suit by Shankar Dat in the terms of s. 283 of the Code of Civil Procedure have been maintainable? Now the facts show that Shankar Dat was brought into the execution-proceedings by the decree-holders, who, by their application of March 17th, 1892, treated him as a legal representative of the deceased judgment-debtor. Their application was that the execution might be continued as against him. The application was clearly one made under s. 234 of the Code, inasmuch as by it the decree-holders asserted that Shankar Dat was in possession of certain assets of the deceased judgment-debtor, and asked for sale of those assets in execution of their decree. Notice of that application was, under s. 248 of the Code, served on Shankar Dat and the application for execution in the manner prayed for by the decree-holders was eventually allowed by the execution Court on August 8th, 1892. Mr. *Durga Charan* admits that *this* appeal has been properly framed as an appeal from an order passed under s. 244 of the Code, and that had the decision been the other way his clients would have been entitled to appeal; and considering who the present litigants are, it is clear that the matter decided by the execution Court was one between the decree-holders and the representative of the judgment-debtor. The question decided by the Court was as to the right of the decree-holders to bring to sale [249] certain property as assets belonging to their judgment-debtor in the possession of the appellant, as to which the latter set up an adverse title. Such a question is one arising between the parties or their representatives and relating to the execution of the decree. As such, under the opening clause of s. 244, it could be determined only by an order of the execution Court and not by a

separate suit. If Shankar Dat were to institute the suit mentioned in s. 283 of the Code the only issue which could be raised in that suit is, are the decree-holders entitled to sell the house in dispute as the property of their deceased judgment-debtor? That is the very question which had been decided by the order under s. 244. But, as Shankar Dat was impleaded as a legal representative under s. 234 and as an order had been passed against him in that capacity under s. 244 of the Code, it clearly follows from the opening clause of s. 244 that he could not have maintained the separate suit. His only remedy was by way of appeal from the order. As to a person brought in as a representative after decree it has been held by a Full Bench of the Calcutta High Court in *Punchanun Bandopadhyaya v. Rabia Bibi* (1) following previous decisions, that "an objection taken by a person who has become the representative of a judgment-debtor in the course of the execution of a decree to the effect that the property attached in satisfaction thereof is his own property and not held by him as such representative is a matter cognisable only under s. 244 of the Code, and is not the proper subject-matter of a separate suit by a party against whom an adverse order may have been passed." That case is quite on all fours with the facts in this case. From the moment the appellant Shankar Dat was impleaded as a legal representative holding assets of the deceased judgment-debtor the two proceedings must be taken to have been proceedings under s. 244. Up to that time Shankar Dat no doubt had been a stranger prosecuting a claim under s. 278 to the disputed property. But as soon as, by the citation of the decree-holders under s. 234, he became a representative, he from that time ceased to be a stranger to the execution-proceedings and became a party as representative of the deceased [250] judgment-debtor. The sections 278 to 283 of the Code deal with persons who at the time are strangers to the execution, while s. 244 deals with parties and their representatives, and Shankar Dat was none the less a representative because he was brought in as such after decree and while execution-proceedings were in progress. That being so, we are of opinion that the objection he had filed on January 14th, under s. 278 of the Code as a stranger to the execution-proceedings, fell to the ground and was superseded by the proceedings under s. 244, in which Shankar Dat occupied the position of a representative. That objection was henceforth useless and infructuous, and might well have been laid aside by the Court as if it were a dropped proceeding. We hold that subsequently to March 17th, 1892, there was but one proceeding pending in the execution Court and not two proceedings, and though some orders of adjournment were nominally passed on the objection of January 14th, 1892, and a copy of the order disallowing the objection was written on it also, still in our opinion those acts of the Court were perfectly unnecessary and superfluous. There was but one order and one only on September 6th, 1892, and it did not become two orders because it was written on the petition of objection of January 14th, as well as on that of March 25th, 1892.

Of course if it had been the case that before the proceedings under s. 244 had commenced, i.e., before Shankar Dat had been constituted a legal representative by the application under s. 234, any order allowing or disallowing the objections made by him under s. 278 had been passed, that order made under such circumstances would have been conclusive if no suit had been instituted within one year to contest it. But once a person has been made a representative of a deceased judgment-debtor all ques-

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tions between him and the other party relating to the execution of the decree must be decided under s. 244, and none the less so because that person while a stranger to the execution may have filed an objection under s. 278 of the Code. In our opinion such an objection at once disappears on the commencement of proceedings under s. 244 and any formal order passed on it is superfluous.

[251] For the above reasons we are of opinion that the appellant could not have maintained a suit to establish a right to the property in dispute claimed by him in his objection of January 14th, 1892. We therefore hold that the preliminary objection taken by Mr. *Durga Charan*, which proceeds on the supposition that the order passed on that objection is conclusive within the meaning of s. 283, cannot be supported.

We accordingly proceed to hear the appeal on the merits.

BLAIR, J.—I entirely concur in the conclusion and reasons of my brother, and wish only to add a few words to emphasise my opinion on the nature of the proceedings enquired into. The judgment-creditor was throughout *dominus litis*. It was in his power and at his own choice to proceed with his execution at large without putting upon the record a representative of the judgment-debtor. In such a case a third person, who was neither a party to the suit nor a representative, could have taken objections in the proceedings under s. 278. On the other hand, it was in the option of the judgment-creditor to proceed under s. 234 against a representative of the deceased in possession of the assets in relation to which execution is sought. In my opinion the moment the judgment-creditor chose to introduce into these execution-proceedings the appellant in this case, as a representative holding assets of the original judgment-debtor, he, in point of law, absolutely extinguished any proceedings which had been taken under s. 278. The current of decisions is clear. Section 278 applies only to persons who are not parties to the proceedings. The moment a person who had taken an objection under s. 278 was made by the decree-holder a party to the proceedings he was excluded from the category of persons to whom alone s. 278 applies and included in the category of persons to whom no other section than 244 is applicable. I conceive therefore that there was not in point of law any proceeding under s. 278 before the Judge at the time when he affected to deal with the objection under that section and that all he said or did under that section is an absolute nullity. We now proceed to deal with the appeal.

[252] [On the 4th of February 1895 the appeal was disposed of, being decreed with costs with reference to a previous decision of the same Bench in F. A. No. 268 of 1892, decided on the 29th of January 1895.]

17 A. 252 = 15 A.W.N. (1895) 97.

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Before Mr. Justice Blair and Mr. Justice Burkitt.

THE HIMALAYA BANK, LIMITED, IN LIQUIDATION (*Plaintiff*) v. F. W. QUARRY AND ANOTHER (*Defendants*).^{*} [11th February, 1895.]

Act No. VI of 1882 (*Indian Companies Act*) Part IV, ss. 130, 132—*Company—Winding up*—“Court”—Act No. IV of 1882 (*Transfer of Property Act*), s. 59—*Mortgage by deposit of title-deeds—Mortgage by deposit of title-deeds in Mufassal before the coming into force of Act No. IV of 1882.*

Held that with regard to a Company the registered office of which was at Mussooree “the Court,” as that term is used in Part IV of Act No. VI of 1882 (*Indian Companies Act*), means the Court of the District Judge of Saharanpur, and not that of the Subordinate and Small Cause Court Judge sitting at Mussooree or Dehra.

Up to the 1st of July 1882, being the date of the coming into force of Act No. IV of 1882, there was no difference between the law in the Mufassal and that prevalent in the Presidency towns as to the validity of a mortgage created by a deposit of title deeds with a creditor with intent to secure a debt. *Waghela Rajsanji v. Shekh Masludin* (1); *Varden Seth Sam v. Luckpathy Royjee Lallah* (2); *Bunsee Dhur v. Heera Lall* (3); *Lalji v. Gobind Ram* (4) and *Mirza Muhammad Ali v. Nawab Salat Jang* (5) referred to.

A mortgage effected as above described will cover future advances as well as the existing debt or contemporaneous advance in respect of which it was made. *Ex parte Langston* (6) referred to.

[D., 53 P.W.R. 1907.]

THE facts of this case are as follows :—

This was a suit instituted in the Court of the Subordinate Judge of Dehra Dun, by the Himalaya Bank, Limited, through the Official Liquidator, to recover a sum of Rs. 20,000 alleged to be due from one F. W. Quarry, a Vakil of the High Court, and his wife to the Bank upon an overdrawn joint account. The plaintiff stated that some Rs. 50,000 were in reality due on the account, but, inasmuch [253] as there was little probability of recovering more than the sum specified, the balance of the claim had been relinquished. The plaintiff also claimed a declaration that a deposit of title-deeds relating to property in Mussooree, known as the Powys Cottage estate, said to have been made with the plaintiff-bank on the 3rd of May, 1878, as security for overdrafts on the said account constituted a valid mortgage of the estate, and prayed that a decree might be given for sale, if necessary, of that estate. The plaintiff asked for costs and future interest, and further claimed that the decree might authorize the sale or acceptance of the surrender value in part payment of the Rs. 20,000 of a certain policy of insurance granted on the life of the first defendant in favour of the second defendant by the Positive Government Security Life Insurance Co., and assigned to the Bank by the second defendant on the 28th of October, 1884.

This last claim was admitted on the part of the defendants. As to the other issues raised by the plaintiff the first defendant while the case was before the Subordinate Judge either traversed or declined to admit them. He also stated that if the account were examined it would probably be

^{*} Original suit No. 1 of 1894 decided on the 11th of February 1895.

(1) 14 I. A. 89. (2) 9 M. I. A. 303 (307). (3) N. W. P. H. C. R. (1869) 166.
(4) 6 Sel. Rep. 165 = 7 I.D. (O.S.) 816. (5) 4 Sel. Rep. 168 = 7 I. D. (O.S.) 159.
(6) 17 Ves. 227.

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found that some Rs. 5,000 were due to him for professional services by the plaintiff-bank. The suit, as has been mentioned, was originally filed in the Court of the Subordinate Judge of Dehra Dun, but, when it had reached the stage of issues having been fixed was, on the application of the plaintiff, transferred to the High Court for trial in the exercise of its extraordinary original civil jurisdiction.

Mr. *A. Strachey* and Mr. *H. Vansittart*, for the plaintiff.
Mr. *F. W. Quarry*, for the defendants.

JUDGMENT.

BLAIR, J.—This suit was instituted in the Court of the District Judge of Saharanpur, thence transferred to the High Court by its order of 13th August, 1894, and now comes before us in the exercise of our extraordinary original civil jurisdiction. Mr. *Strachey* and Mr. *Vansittart*, appear for the plaintiff-bank.

The defendant, *F. W. Quarry*, appears in person for himself and as *vakil* for his wife, the second defendant.

[254] He takes the preliminary objection that the whole liquidation proceedings, including the appointment of the liquidator, are invalid, on the ground that they were taken in a Court which had no jurisdiction to entertain such proceedings. The Court in which a suit must be brought for a Company's liquidation, is thus defined by s. 130 of Act No. VI of 1882:—"Court" shall mean the principal Court having original civil jurisdiction in the place in which the principal registered office of the Company is situate."

The principal registered office of the plaintiff Company is at Mussooree. The same person possesses both the powers of a Subordinate Judge and those of a Small Cause Court Judge, and in both capacities holds his Court at Mussooree, in which place no higher Court possessing civil jurisdiction sits. The liquidation proceedings, it was contended, should therefore have been brought in the Court of the Subordinate Judge, and the Court of District Judge at Saharanpur had no jurisdiction. To adopt that construction of s. 130 of Act No. VI of 1882 would require us to read into that section after the word "jurisdiction in" the words "and sitting in the place, &c." No authority was cited in favour of this contention nor was it raised either in the Court below or in this Court upon the hearing of the application to transfer. It was suggested to us that the policy of the Act was to provide prompt and inexpensive means for the disposal of the numerous cases which arise in small liquidations. I am of opinion that the policy of the Act was to provide a Court of high competence to deal with matters often involving large interests and complex questions. We overruled this objection to our jurisdiction, which indeed hardly needed the elaborate refutation of Mr. *Strachey*, who appears for the plaintiff Company. A further objection to our jurisdiction was taken at the close of the first defendant's speech, and was taken for himself only. He claimed as an Englishman to be entitled to have his case tried by sworn Judges, and impeached the enactment of s. 13 of the Oaths Act as *ultra vires* of the Indian Legislature. The contention was not supported by even a decent semblance of legal argument. The inconsecutive and inconclusive observations addressed to us at [255] great length by Mr. *Quarry* were in my opinion a gross abuse of the indulgence of the Court which had been extended to him in his difficult position as uniting the two characters of party and advocate. It was also a scandalous waste of public time. The objection was overruled.

The suit, in so far as it involves matter of contention, is a suit for the payment of Rs. 20,000, and for a declaration that a good and valid mortgage had been made of certain immovable property called Powys Cottage as a security for an overdrawn floating banking account, and, failing payment, for the enforcement of that mortgage.

The Rs. 20,000 is part of a larger sum, probably about Rs. 50,000, alleged to be due, the remainder of the debt being relinquished by the plaintiff Company as beyond hope of recovery.

The material allegations of the plaint are that in 1878, the second defendant was indebted to the plaintiff-bank with which she had a current account, and that on May 3rd, in that year the first defendant, as her agent, deposited with the bank the title-deeds of Powys Cottage as a security. That in 1880, the plaintiff-bank was directed to make a joint account of the separate accounts of the two defendants, which henceforth stood in their joint names, both of them severally operating upon both sides of the account, the title-deeds of Powys Cottage remaining in the possession of the bank as security for the joint account. That on or about October 1884, the first defendant, upon his own account and on that of his wife having promised to effect a good legal mortgage of the Powys Cottage estate, took away for that purpose two of the deeds from the bank. No legal mortgage was ever executed. The defendants in 1891 refused to make the legal mortgage, and the plaintiff alleges that such failure to execute was due to the fraud of the defendants.

The case which was proved differs in some respects from that set up in the plaint. The allegation that the direction to make the account a joint account was given in 1880 was obviously founded [256] upon an entry in the bank's books in that year of Mr. Quarry's name at the corner of the ledger in addition to that of Mrs. Quarry with which that account was headed. It appears on that part of the account for the first time. The liquidator could have had no personal knowledge of the matter, and it was alleged by Mr. *Strachey*, and not denied by Mr. Quarry that no communication had passed in relation to this suit between the liquidator and the only person who possessed a personal knowledge of all facts in relation to the account, Mr. Moss, who had been the bank's manager through the whole period of the bank's existence. It is notorious that Mr. Moss had been confined in Naini Jail from a time prior to the commencement of this suit up to the moment of his appearance in Court as a witness for the plaintiff. Mr. Moss' allegation differs from the plaint in this that he alleges the account to have been a joint account from the very commencement in August 1874, and that from that date continuously the first defendant operated upon both sides of the account. The complaint of Mr. Quarry that his defence had been prejudiced by not having his attention called by the plaint to the items anterior to 1880, seems to me to be groundless; for he had himself applied in a letter of January 9th 1886, (Ex. X) for a pass-book relating to the earlier items, and it is not disputed that the pass-book relating to the whole account had been before him, and had been to some extent examined by him. His letter of January 29th 1886, (Ex. 66) shows that among the items of the vouchers for which he desired copies, none were of an earlier date than 1879. I understand that the vouchers for every item were in Court ready to be produced if asked for, and that Mr. Quarry had been allowed every facility for their inspection.

After carefully considering every case that has been cited in argument, I have come to the conclusion that there is no substance in

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any of the technical contentions argued for the defence. It seems to me that there can be no question whatever that the deposit of deeds as security for an overdrawn account constitutes in English law a good equitable mortgage and in Indian Law a good simple mortgage. It seems to me clear that upon grounds of common [257] sense as well as authority it is reasonable to infer from the continuance for a long time of the deposit of title-deeds that they are intended, as between the parties, as security for a continued contemporaneous over-draft. I feel no doubt, therefore, that if the facts set forth by the plaintiff are proved, a perfectly good and efficient security was created by the deposit of these deeds in 1878, and that they remained as such security until the close of the bank.

[The remainder of the judgment is occupied solely with the questions of fact arising in the case and is, therefore, not reported.]

BURKITT, J.—This suit has been instituted by the Official Liquidator of the Himalaya Bank, Limited, to recover from the defendants the sum of Rs. 20,000 on the allegation that the defendants were on July 8th 1891, in debt to the bank on their joint overdrawn banking account to an amount of more than Rs. 50,000, including interest; but as the plaintiff-bank did not hope to be able to realise more than Rs. 20,000 from the defendants it relinquished its claim to anything more than Rs. 20,000 and asked for a decree for that sum only. The plaint further prayed for a declaration that a deposit of title-deeds alleged to have been made by the first defendant in the bank on May 3rd 1878, is a good and valid mortgage of the Powys Cottage estate in Mussooree, and for an order that if the Rs. 20,000 be not paid the Powys Cottage estate be sold and the proceeds applied towards payment of that sum. There is also a prayer for costs and future interest on Rs. 20,000 from date of suit.

The plaint finally contains a prayer that the plaintiff bank be authorised to sell or accept the surrender value in part payment of the Rs. 20,000 of a certain policy of insurance granted on the life of the first defendant in favour of his wife, the second defendant, by the Positive Government Security Life Insurance Co., Ltd., which had been assigned to the plaintiff-bank by Mrs. Quarry on October 28th 1884. As to this last prayer I may say that the defendants admit the claim of the bank. This question need not again be referred to.

The suit was instituted in the Court of the Subordinate Judge of the Debra Dun district, but, on the application of the plaintiff-[258] bank, was transferred for trial to this Court in the exercise of its extraordinary original civil jurisdiction. The plaintiff-bank was represented at the trial by Mr. Strachey and Mr. Vansittart. The defendants were not represented by counsel, but the first defendant, (who is a vakil of this Court) conducted the defence on his own behalf and also on behalf of his wife, the second defendant, from whom he held a vakalatnamah. Only two witnesses were examined, namely, F. Moss, the late manager of the Himalaya Bank, and the first defendant: the second defendant was not called.

Stated generally—and without going into any details for the present—the case for the bank, on the evidence of the witness Moss and on the numerous exhibits filed, is that in August 1874, a floating current account was opened in the bank in Mrs. Quarry's name under instructions from the first defendant; that both defendants were to operate on that account, both of them paying in and drawing out money; that in May 1878, that account was overdrawn by nearly Rs. 6,500; and that on May 3rd 1878, the title-deeds of the Powys Cottage estate were deposited in the bank by the

first defendant as security. It is further contended that the defendants from time to time promised to execute a regular mortgage of the Powys Cottage estate to the bank, and that two of the title-deeds were in October 1884, handed back to the first defendant for the express purpose of drafting the mortgage; that despite of frequent promises and expressions of regret at the delay by the first defendant the mortgage was not executed, though the overdraft continued to increase, and that the first defendant retained possession of the two title deeds till the bank went into liquidation, when he was ordered to restore them by the Judge of Saharanpur, in whose Court the liquidation proceedings were pending.

No written statement was put in by either defendant, but the Subordinate Judge, before the suit was removed to this Court for trial, questioned the first defendant generally as to the allegations of the plaint. The first defendant in that examination traversed or declined to admit any of the material facts stated in the plaint, except as to the matter of the insurance policy which he admitted. He also, as [259] *vakil* for his wife, adopted a similar line of defence. As to the sum alleged to be due from him, he asserted that, if the accounts were properly examined, it probably would be found that he was owed some Rs. 5,000 or thereabouts by the bank, for professional services, which he had not drawn.

Among the issues framed by the Subordinate Judge is one for which, as far as I can see, no foundation had been laid in the pleadings. It is the first issue, and is as follows:—"Were the proceedings to liquidate the plaintiff-bank taken in a Court which was without jurisdiction for that purpose?" The Subordinate Judge on this issue called on the first defendant to state and support his plea to the jurisdiction of the District Judge of Saharanpur to liquidate the plaintiff-bank. His argument in this Court was that as the "registered office" of the Himalaya Bank, Limited, was at Mussooree in the Dehra Dun district, the Court of the Subordinate Judge of Dehra, a Court which sits in Mussooree for six months in the year and at Dehra during the remaining months, was, under s. 130 of the Indian Companies Act, "the Court" in which the liquidation proceedings should have been taken, and not the Court of the District Judge of Saharanpur. On the basis of this contention it was argued that the appointment of the liquidator by the District Judge was bad and that this suit by the bank in the name of that liquidator could not be maintained. We overruled this contention, as we were of opinion that before we could accept it we should have to read the words "and sitting at" into s. 130 after the words "jurisdiction in" in the third line of that section. The "principal Court having original civil jurisdiction" in Mussooree, where the registered office of the bank was situate, is the Court of the District Judge of Saharanpur and not the Court of the Subordinate Judge of Dehra. The jurisdiction of the District Judge of Saharanpur, as such, extends over the three revenue districts of Muzaffarnagar, Saharanpur and Dehra, in the latter of which Mussooree is situate, and though the District Judge does not usually sit at Mussooree, or indeed at any place other than Saharanpur within his jurisdiction, for civil business, he is none the less throughout all the three [260] revenue districts within his jurisdiction the "principal Court having original civil jurisdiction" in every place within those districts. This is clear from the General Clauses Act (No. I of 1868), ss. 2 and 12, the Bengal, N.-W. P. and Assam Civil Courts Act (No. XII of 1887), s. 10, and Act No. XXI of 1871, s. 3, as modified by Act No. XII of 1891. The District Judge of Saharanpur is therefore "the Court," as that term is used in

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1895 FEB. 11. Part IV of the Companies Act, and the liquidation proceedings were properly taken in his Court at Saharanpur.

ORIGINAL CIVIL. — One of the most important prayers of the plaint is that a mortgage by deposit of title-deeds said to have been made to the Bank in May 1878 should be declared to be a good and valid mortgage. The position taken up by the first defendant as to this is (1) that no such mortgage was in fact made, (2) that a mortgage of the kind known to English law as an equitable mortgage by deposit of title-deeds was unknown to Indian law in the Mufassal (as distinguished from the Presidency towns) and could not be enforced. I propose first to take up and discuss the second contention. Broadly stated, the first defendant's contention is that s. 59 of the Transfer of Property Act, No. IV of 1882, did no more than codify the law as it existed when that Act was passed, and that as the first clause of that section undoubtedly now prevents the creation in the Mufassal of a mortgage by delivery of documents of title to immoveable property by a creditor with intent to create a security for one hundred rupees or upwards, it follows that such a mortgage was unknown to the law in the Mufassal previous to the coming into force of Act No. IV of 1882, and cannot be enforced by suit.

To that contention I am unable to accede. I am of opinion that s. 59 of the Transfer of Property Act did make a very great and important change in the law. Before that Act came into force there was no law at all resembling the Statute of Frauds in force in the Mufassal. There was no enactment which required that a transaction of the nature of a mortgage securing Rs. 100 or upwards should be in writing and registered. The law then made no provision requiring contracts, *e.g.*, of mortgage or sale, to be in [261] any particular form. Contracts might be oral or in writing, but, if reduced to writing, the Registration Act required that in certain circumstances they should be registered. As remarked by Mr. Macpherson at the commencement of Chapter IV of his well known treatise on the Law of Mortgage in British India,—“Previous to the 1st of July 1882, when Act IV of 1882 came into force, parties might throughout India enter into a contract of mortgage in the same manner as they might make any other contract, that is to say, their agreement might be either verbal or in writing.” This extract contains, I have no doubt, a correct exposition of the law as it stood before July 1882, and the defendant has failed to cite any authority to the contrary. “That which a Court, bound to decide according to “justice, equity and good conscience” in the absence of any express enactment, has to look at is the intention of the parties to an agreement, and, on ascertaining that agreement, it is the duty of the Court to enforce it, if it be a lawful contract, without imposing on the parties to it a particular form which the law, as it stood when the contract was made, did not require. Their Lordships of the Privy Council in *Waghela Rajsanji v. Shekh Musludin* (1) interpret “equity and good conscience to mean the rule of English law, if found applicable to Indian society and circumstances.” Now, bearing in mind who the parties to this suit are and the strong probabilities that they intended to contract according to English law, it is difficult to imagine why the alleged contractual agreement (which is one of a nature recognised and enforced by English law) should be considered to be inapplicable to them. In *Varden Seth Sam v. Luckpathy Royjee Lallah* (2), at pages 324 and 325, their Lordships of the Privy Council, applying the rule of “justice, equity and good conscience” and distinguishing between the *lex loci rei*

(1) 14 I.A. 87.

(2) 9 M.I.A. 303 (307).

sitæ (i.e., the Mufassal) and the *lex loci contractus* (i.e., the Presidency town of Madras), held that the former law did not forbid the creation of a lien by a contract such as that sued on in the present case, i.e., by deposit of title-deeds. The first defendant contends that the case is not in point, as the deposit was made within the Presidency town. I however regard [262] the observations of their Lordships as a clear authority for the proposition that no law existed forbidding the creation of a mortgage lien by deposit of title-deeds in the Mufassal of the Madras Presidency. It has not been shown that the law in the N.W.P. Mufassal was different. Similarly in *Bunsee Dhur v. Heera Lall* (1), it was held by this Court that "by the deposit of deeds a security resembling a simple mortgage is created," but the Court was in that case unable to give effect to the security as the opposite party had a registered sale-deed which took effect against the oral agreement by which the security had been created and had had no notice of the lien by deposit. The first defendant, as to that case, contends it was unnecessary for the Court to decide whether a valid mortgage had been created as the registered sale-deed must have prevailed. But surely that is not so. Unless the Court had come to the conclusion that a good mortgage security had been created, it would not have been necessary, in the face of the registered sale-deed, to inquire into the question of notice. And as further authority for the proposition that in the Mufassal no writing was a necessary condition precedent to the creation of a good and valid mortgage or sale before the passing of Act No. IV of 1882, and that there is no Statute of Frauds in force in this country, I would refer to the case of *Lalji v. Gobind Ram Jani* (2) and to *Mirza Muhammad Ali v. Nawab Salat Jang* (3). On the above authorities I have come to the conclusion that up to July 1st, 1882, there was no difference between the law in the Mufassal and that prevalent in the Presidency towns as to the validity of a mortgage created by a deposit of title-deeds with a creditor with intent to secure a debt. Such a transaction is quite consistent with the principles of justice, equity and good conscience as interpreted by the Privy Council, and is not inapplicable to Indian society and circumstances. And even in the absence of authority, I would have but little, if any, difficulty in holding that such contract, if proved, was one which a Court ought to enforce, if not forbidden, as is the case since July 1882, by statute.

[263] It has been held in English cases that the possession of the title-deeds raises a *prima facie* presumption that they are held as security for an advance, so as to give the holder an equitable mortgage, and that such a mortgage can be created without even a word passing. In short an existing debt or a contemporaneous advance, *plus* a deposit of documents of title, is evidence of the creation of an equitable mortgage. "The intent to create such a security may be established by written documents, alone or coupled with parol evidence; by parol evidence only that the deposit was made by way of security; or by the mere inference of an agreement drawn from the very fact of the deposit." (Fisher on the Law of Mortgage, 2nd ed., p. 32.) That such a security may be held to cover future advances as well as the existing debt or contemporaneous advances is shown by the case of *Ex parte Langston* (4) in which the Lord Chancellor is reported to have said:—"It has been long settled that a mere deposit of title-deeds upon an advance of money,

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(1) N.W.P.H.C.R. (1869), 166.

(3) 4 Sel. Rep. 168=7 I.D. (O.S.) 159.

(2) 6 Sel. Rep. 165=7 I.D. (O.S.) 316.

(4) 17 Ves. J. 227.

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without a word passing, gives an equitable lien, and, as the Court would infer from that deposit that the money then advanced should be charged as if there was a written agreement, there is no doubt that if it was made out by oath uncontradicted, additional advances would also be charged. It is not probable that a person having made an advance upon a security which he holds should make further advances without security." Other cases to the same effect will be found cited at p. 789 of White and Tudor's Leading Cases in Equity, in the notes to the case of *Russel v. Russel*, the rule to be deduced from which is stated to be that "a deposit of deeds, whether it be accompanied by a memorandum or not, may, by evidence either written or parol, be held to extend to subsequent advances upon proof that the deposit was originally made as a security for the first as for any subsequent advance, or upon proof that any subsequent advance was made upon the understanding that the deeds were to be a security for it." The same rule is also thus stated in Fisher on Mortgages, 2nd ed., p. 37,— "As to future advances an equitable mortgage may, by parol evidence, and also (as it seems to have been [264] intimated) by inference alone arising from possession of the deeds, be extended to cover such advances."

[The judgment then proceeded to deal with the questions of fact arising in the case, finding that the title-deeds were in fact deposited with the plaintiff-bank by way of security for a then existing debt and for future advances. The Court accordingly gave the plaintiff a decree for the sum claimed, with costs and future interest, with power to the plaintiff in default of payment by August 11th 1895, to bring to sale the Powys Cottage estate.]

17 A. 264 = 15 A.W.N. (1895) 57.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

BITHAL DAS (*Decree-holder*) v. SHANKAR DAT DUBE (*Objector*).^{*}
[12th February, 1895.]

Execution of decree—Act No. IX of 1872 (*Indian Contract Act*), ss. 2 (d), 25, cl. (2), 70—*Contract—Consideration.*

H.D. and S. D., two brothers, constituted a joint Hindu family owning considerable landed property. H.D. having incurred heavy personal debts, the two brothers in 1879 united in applying to have their property taken over by the Court of Wards. This was done, and on the 17th of June 1889, while such property was still under the management of the Court of Wards, the two brothers entered into an agreement whereby H.D. remained as manager of the property with an allowance [of Rs. 12,000 per annum for his support, but ceded to his brother absolutely and unconditionally all his proprietary interest in the family property, and all power to make the family property liable in any way for the payment of his debts. On the 6th of October 1889, the Court of Wards released the property freed from the liabilities imposed upon it by H.D. In 1891 one B.D. obtained in the Court of the Subordinate Judge at Agra a money-decree against H.D. H.D. died in the following year, and, subsequently to his death, B.D. sought to execute his decree against S.D. as representative of H.D. by attachment of property in the hands of S.D. S.D. objected to the attachment and his objection was allowed. B.D. appealed, and on this appeal it was held that

* First Appeal, No. 105 of 1893, from an order of J.W. Muir, Esq., District Judge of Jaunpur, dated the 23rd March 1893.

having regard to the agreement of the 17th of June 1889, above referred to, the property in question could not be attached as the property of H.D. The said agreement was not bad for want of consideration; the consideration being that at the request of his brother, which must be presumed from the circumstances of the case, S.D. had agreed to place his interest in [265] the property under the management of the Court of Wards, and had also foregone, during the ten years that the estate was under the management of the Court of Wards, the greater part of his interest in the profits of the estate, and had refrained on cessation of the Court of Wards' management from suing his brother for an account; and even if this were not so, the agreement would be good either under s. 25, cl. (2) or under s. 70 of Act No. IX of 1872.

[R., 25 B. 146.]

THE facts of this case are fully stated in the judgment of the Court. Mr. *D. N. Banerji*, for the appellant.

Mr. *T. Conlan*, Mr. *Abdul Mojid*, Pandit *Sundar Lal* and Munshi *Kalindi Prasad*, for the respondent.

JUDGMENT.

BURKITT, J. (BLAIR, J., concurring). This is one of the many cases in which execution-creditors of the late Raja Hari Har Dat Dube of Jaunpur have sought to have execution of their decrees against the present Raja Sankar Dat Dube, under s. 234 of the Code of Civil Procedure, on the allegation that Sankar Dat had in his hands assets of his deceased brother on which the creditors were entitled to levy execution.

In the present case the decree-holder appellant, Bithal Das, obtained a decree for some Rs. 6,900 odd, a simple money-decree, against the Raja Hari Har Dat Dube in the Court of the Subordinate Judge of Agra in February 1891. Raja Hari Har Dat Dube died on January 13th 1892. Execution-proceedings were commenced at Agra in May 1892, against Raja Shankar Dat and the widow of Raja Hari Har Dat, who were described as heirs of the deceased and as in possession of his property. The application was clearly one within s. 234 of the Code of Civil Procedure. Notices were issued to the two representatives, and, no appearance having been put in by them, the execution-proceedings were transferred to the Jaunpur Court. Accordingly, in July 1892, the present appellant applied in Jaunpur for execution by attachment of certain immoveable (landed) property and of a sum of money lying in the treasury in deposit. Orders for attachment were issued by the Court on July 27th. Thereupon the Raja Shankar [266] Dat, on August 17th, 1892, objected to the attachment. He denied that he was in possession of any assets of his deceased brother. He asserted that the property which the creditors sought to seize in execution had not been the property of the deceased Hari Har Dat at his death, and that it belonged to him (Shankar Dat) under an agreement of June 17th, 1889, a compromise dated September 4th, 1891, and a decree dated December 23rd, 1891. It was further pleaded in the alternative on behalf of Shankar Dat that he and his deceased brother were at the date of the death of the latter members of a joint undivided family, and that on his brother's death he (Shankar) acquired by survivorship any interest his brother might have had in the property.

In the Court below the District Judge rejected the decree-holder's application for execution. The reason for his order was because the decree-holder had not obtained an order for attachment or sale before the decree of December 23rd, 1891. In other cases in which orders for attachment had issued before that date the Court allowed execution to proceed against the attached property.

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The decree-holder in the present case appeals against the order rejecting his prayer for execution against the property he sought to have attached and sold. The learned counsel who appeared for the appellant addressed to us a very able argument in which he endeavoured to show firstly, that the agreement of June 17th, 1889, was bad for want of consideration, and, secondly, that the two brothers Hari Har Dat and Shankar Dat were separate and were not members of a joint undivided family at the date of the death of the Raja Hari Har Dat.

Before we proceed to discuss these two contentions it is necessary to state a few preliminary facts as to the recent history of the family.

In the year 1875 the Jaunpur *riasat* belonged to Raja Lachmi Narayan and his two first cousins, the Rajas Hari Har Dat and Shankar Dat. The last-named was then a minor, as appears from the *sulahnamah* of January 2nd, 1875, No. 60 of the record, which was executed by the Collector of the district as guardian of Hari Har Dat. That document clearly shows that all [267] the three owners of the *riasat* were then joint, and that the object of this *sulahnamah* was to prevent any separation or partition then or at any future time and to give to the *riasat* the character of an impartible Raj—a character which of course such a modern Raj had not acquired. As to the management, it was provided that it should remain in the eldest member of the family, who was then Raja Lachmi Narayan Dat. The latter apparently did not long survive, and the estate soon became heavily involved in debt; for we find in 1879 the *riasat* was for the purpose of discharging its liabilities taken under the management of the Court of Wards, the then surviving two proprietors, Rajas Hari Har Dat and Shankar Dat, having been declared by Government, on their own application, to be incapable of managing their affairs.

Now there can be no doubt that of the debt in which the estate was involved by far the greatest portion, amounting to several lakhs of rupees, had been contracted by Raja Hari Har Dat. Consequently, when consenting to the Court of Wards taking over his interest in the *riasat*, and so giving a good title to purchasers of any portion of it which the Court of Wards might sell, the Raja Shankar Dat Dube, by his *ikrarnamah* of June 13th, 1879, (No. 61 of the record) expressly reserved any rights he might have against Raja Hari Har Dat in respect of whatever property might be left after the management of the Courts of Wards had come to an end. The Courts of Wards continued in possession of the *riasat* up to October 6th, 1889, *i.e.*, for a period of about ten years, and during that time, by selling some portion of it and by economical management it paid off all the debts and handed over, we are told, some Rs. 11,000 in cash to the owners. But meanwhile, on June 17th, 1889 while the *riasat* was still in the hands of the Court, the two Rajas, Hari Har Dat and Shankar Dat, executed an agreement (No. 62 of the record) by which Raja Hari Har Dat surrendered all his interest in the estate to his brother Shankar Dat. The second, third and part of the fourth paragraphs treat of the management of the *riasat*, and take away from Raja Hari Har Dat all power of contracting debts binding the *riasat* or of in any way incumbering it, and em- [268] power the younger brother to remove Raja Hari Har Dat from the management in case he infringes the agreement. It is also provided that Raja Hari Har Dat is to surrender the position of *lambardar*. Then in the concluding clauses of the fourth paragraph and in the fifth paragraph there is a complete abandonment by Raja Hari Har Dat of all his interest in the estate—except perhaps so far as that Raja Shankar Dat is to pay him

Rs. 12,000 per annum for his "personal expenses"—to Raja Shankar Dat, who undertakes to pay the Rs. 12,000 per annum. The reasons given for this surrender are because Hari Har Dat "had spent a great deal of money on account of my personal expenses," and because the Court of Wards had paid off a sum of nine lakhs of rupees which Hari Har Dat had borrowed and applied to his personal expenses, for which Shankar Dat was "entitled to compensation (to be recouped) which he has not received," and by the concluding words of the fifth paragraph Raja Hari Har Dat agrees that Shankar Dat is the "absolute owner of my right and share in the state, and that I, Raja Hari Har Dat Dube, have no sort of personal proprietary right to the state property except to manage the same." These are the material paragraphs of the agreement.

The learned counsel for the appellant contends as to this agreement of June, 1889, that the consideration for it was the payment of the nine lakhs of rupees to Hari Har Dat's creditors, that that was at the time of the agreement a fully executed and not an executory consideration, and that therefore, with the reference to the definition of the word "consideration" in s. 2 of the Indian Contract Act, that consideration was a bad consideration, and that Raja Shankar Dat took nothing under the agreement. He contends that no express request moving from Hari Har Dat to Shankar Dat had been proved, and that under the circumstances no such request could be inferred or implied.

To this latter contention we cannot accede. It seems to us that when Shankar Dat allowed his interest in the *riyasat* to be taken over by the Court of Wards—which the agreement of June 13th, 1879. (No. 61 of the record), clearly shows he did do—it must be [269] inferred that he did so at the request of Raja Hari Har Dat. It is difficult to see why such a request should not have been made, but it is very easy to understand why such a request must have been made. Shankar Dat, who had not long attained majority, does not appear to have been at all in embarrassed circumstances as for his interest in the *riyasat* was concerned. On the other hand, Hari Har Dat was some lakhs of rupees in debt. It was of vital importance to him that the Court of Wards should intervene to save the estate, and that the intervention could in the nature of things have been obtained only on the condition that both the brothers (who, as we shall subsequently show, were joint owners of the estate) should apply to have themselves declared incapable of managing their affairs, and so put it in the power of the Court of Wards to deal with the joint interests as a whole. Had it been necessary first to separate and partition off Shankar Dat's share—a tedious and costly process—the Court of Wards in all probability would have declined to interfere on behalf of Hari Har Dat. And not merely is it to be inferred from the circumstances of the case that a request did move from Hari Har Dat to Shankar Dat, but also, as it appears that Hari Har Dat adopted and enjoyed the benefit of the consideration by his debts being paid off and his creditors getting money, part at least of which should have gone into Shankar Dat's pocket, such a request will be implied by law. It must also be borne in mind on this matter that all through the ten years 1879-1889, Shankar Dat had to live on a small allowance of from Rs. 250 to Rs. 400 per mensem, instead of being able to enjoy the full income of his relatively unembarrassed interest in the *riyasat*, that that deprivation of income was still continuing at the date of the agreement of June 1889, and also that at the latter date the Court of Wards was still in possession and was still paying off the debts in pursuance

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of the consent thereto by Hari Har Dat shown in the agreement of June 13th, 1879. Further, there can be no doubt that, had Shankar Dat on the cessation of the Court of Wards' management desired a partition, he could have demanded an account from his brother, and that in that account he would not have been charged with the enormous debt which the [270] waste and extravagance of his brother had caused. The result of such an account would in all probability have shown that Hari Har Dat had squandered the whole of his interest. In the agreement of June 13th, 1879, Rajah Shankar Dat expressly reserves his right to demand such an account, and, that being so, his refraining from suing his brother to recover the loss and damage which that brother's extravagance had entailed on him is in our opinion a good consideration for the agreement of June 17th, 1889. And further there is the promise by Shankar Dat to make his brother the generous allowance of Rs. 12,000 per annum, notwithstanding that in all probability Hari Har Dat had by his extravagance wasted and squandered the whole of his interest in the estate. It appears also that Shankar Dat only intended to take Rs. 12,000 per annum for his own personal expenses out of the estate, desiring probably to allow the remainder to accumulate.

For the appellant it was contended that the Rs. 12,000 per annum were to be Hari Har Dat's remuneration for acting as manager. That in our opinion clearly is not so. The allowance was to be paid to him for his "personal expenses," and, as long as he remained manager, he was to be allowed to pay himself that amount out of the income of the estate. But the agreement empowered Shankar Dat to remove his brother from management. In that event the allowance of Rs. 12,000 was not to cease, but was to be paid by Shankar Dat to his brother, and, as before, for "personal expenses." It is quite out of the question to suppose that Rs. 12,000 were to be paid for anything but Hari Har Dat's support. Bearing the past in mind, his services as manager would have been dearly purchased at even Rs. 5 per month, but Shankar Dat probably hoped that under the strict rules as to the way in which the management was to be conducted, contained in the agreement of June 17th, 1889, Hari Har Dat would do better in future.

For the above reasons, we are of opinion that the agreement of June 17th, 1889, was not bad for want of consideration. But, even if such were the case, we should still hold that the agreement might well be supported and held to be a good agreement under the [271] provision of s. 25 (2) and of s. 70 of the Indian Contract Act. By the agreement Hari Har Dat promised to compensate Shankar for an act which the latter had done for him in allowing his interest in the estate to be taken by the Court of Wards for the purpose of enabling the Court to liquidate Hari Har Dat's debts, and the agreement of June 13th, 1879, shows that Shankar Dat did not intend to perform that act gratuitously. We have no hesitation in holding that a very adequate consideration was given for the agreement of June 17th, 1889, and that Hari Har Dat felt he could not resist the claim which Shankar Dat had in the agreement of June 13th, 1879, reserved to himself the right to enforce.

We accordingly find that the agreement of June 17th, 1889, is a good and valid agreement binding on the parties to it, and from the date of its execution Raja Hari Har Dat ceased to have any longer any proprietary interest in the *riyasat*, of which his brother Shankar Dat from that date became the sole and absolute owner, subject only to the obligation of paying Rs. 12,000 per annum to Hari Har Dat for his personal

expenses. Neither the *riasat* nor Hari Har Dat's former interest in it remained any longer liable for any debt which Hari Har Dat might contract after the date of the agreement.

There is no ground whatever for supposing that this agreement was entered into for the purpose of defrauding creditors. At its date all or nearly all the debts had been paid off by the Court of Wards, and in every one of the many cases connected with this *riasat*, which up to the present have been before this Bench, the debts had been contracted after the date of the agreement of June 17th, 1889. For that reason, therefore, and not because (as the lower Court holds) the appellant had not obtained an attachment or an order for sale before the decree of December 23rd, 1891, we hold that the appellant's decree cannot be executed against the property which the appellant desires to have taken in execution of that decree. As to the compromise of September 4th, 1891, and the decree of December 23rd, 1891, passed in terms of the compromise, we are of opinion that they are immaterial. Indeed the decree is [272] only declaratory of the pre-existing title. Raja Shankar Dat's title does not depend on them, or on either of them, but on the agreement of June 1889, by virtue of which he became sole and absolute owner of the *riasat* from June 17th, 1889.

After the above finding, it is hardly necessary to enter into the question as to whether Raja Hari Har Dat and Shankar Dat, were joint in estate; but as the question has been fully argued by the learned counsel on both sides, we think we should express our opinion respecting it. A very few words only are necessary. In our opinion, there is not on record a shred of evidence from which it could be inferred that the two brothers were not joint. The only thing put before us was an allegation, not supported by any evidence, that in the village papers of the *riasat* the two brothers were recorded as each holding an eight-annas share in the various villages which make up the *riasat*. Such a record as that, standing by itself and not supported by any evidence of an intention on the part of the proprietors to hold the estate in future in certain definite shares, or by any evidence of a separate holding by each independent of the other, is in our opinion perfectly immaterial. To hold that such an entry of itself amounts almost to conclusive evidence of partition—as was contended here—would put it in the power of any village patwari to work a partition in a Hindu joint family by recording immediately on the death of a proprietor the names of his sons as holding each some fraction of the estate, instead of recording all of them as holding the whole jointly. Now as to the present case it is hardly necessary to say that the presumption of law as to every Hindu family, and especially as to a family the members of which are brothers, is that it is joint, and that it lies on those who allege the contrary to establish their allegation by evidence. Here no assertion has been made as to the time when the two brothers separated. Reliance is placed only on the alleged record in the village papers and on some loose expressions in the agreements of June 1879, and June 1889. But it is in our opinion clearly manifest that the great object of all the members of the family was to keep the *riasat* joint and undivided. Indeed, as already mentioned, they went so far as to claim for it [273] the dignity of an impartible raj. In the *sulahnamah* of January 2nd, 1875, the *riasat* is treated as the joint property of all three proprietors, the eldest of whom is appointed to be the "*gaddinashin*," and the reason for entering into this *sulahnamah* is stated to be with the object of maintaining the *riasat* by preventing partition. The three owners

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were then certainly joint. It has not been shown that anything happened to change the status of the family up to June 1879, when Exhibit No. 61 was executed. There is nothing to show that Hari Har Dat and Shankar Dat had become separate before 1879, and it is perfectly certain that the Court of Wards took over the estate in 1879 as being the joint property of the two brothers. In the agreement of June 1879, Shankar Dat, whose interest it certainly would have been to separate himself from his brother's liabilities, distinctly declares that the *riasat* is possessed jointly by himself and his brother, and says that the object of the Court of Wards' management was to protect the *riasat*. For the appellant reliance was placed on his statement further on that he and his brother each were proprietors of one moiety; but clearly that statement is made for the purpose, not of indicating any separation, but of explaining that, unless he joined in the application to have his interest in the estate put under the Court, any portion of the estate which might be sold would not fetch a good price. Evidently there was no alteration in the status of the two brothers *inter se* during the ten years of the management of the Court of Wards, and finally in the agreement of June 17th, 1889, they declare that they are owners in equal proportion of the whole *riasat* in "the manner of properties of Hindus" (*bataur jaidad Hanud*). The only oral testimony to which our attention was called was that of one Anand Kishore, an old servant of the family, who, in another execution case, had been called by Raja Shankar Dat to disprove the allegation of separation and partition between him and his brother. Strange to say, the appellant put on the record of this case a copy of the deposition of that witness in the other case (*Peake Allen & Co. v. Raja Shankar Dat and another*) and made it evidence in this case, merely calling Anand Kishore to prove he had made the deposition and letting him be cross-examined [274] for respondent. It was objected here that the copy of the deposition could not be looked at as the witness was alive. To that it is sufficient to reply that it was by appellant's own act that the copy of deposition was put on the record and made evidence in this case. As to this deposition of Anand Kishore we need say no more than that it conclusively disproves any idea of a separation between the two brothers.

For the above reasons, we are of opinion that the appellant, on whom the burden of proof lay, has failed to prove any separation at any time between the brothers, Hari Har Dat and Shankar Dat, and we find that no separation occurred.

We accordingly, though not for exactly the same reasons as those given by the Court below, dismiss this appeal with costs.

Appeal dismissed.

17 A. 274 = 15 A.W.N. (1895), 76.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Aikman.

AMBIKA DAT (Defendant) v. RAM UDIT PANDE AND ANOTHER.
(Plaintiffs)* [12th February, 1895.]

Civil Procedure Code, s. 44—Misjoinder—Cause of action—Pre-emption—Zamindari and appurtenant sir-land sold by separate deeds—Suit to pre-empt both zamindari and sir.

Where a zamindari share and the sir-land held with it were sold to the same vendee by two separate deeds of sale executed on the same day, it was held that a suit to pre-empt both the zamindari share and the sir-land was not liable to be defeated on the ground of misjoinder of causes of action.

[R., 25 A. 229 ; 3 A.L.J. 123 = (1906) A.W.N. 54 ; 6 A.L.J. 926 (1927).]

THIS was a suit for pre-emption under the terms of a *wajib-ul-arz*. The plaintiffs were two co-sharers in the village. The defendants were the vendor, who did not oppose the suit, and the vendee, who was a stranger. The plaintiffs alleged that the vendor had on the 20th of January, 1892, sold to the vendee defendant a certain zamindari share and also certain sir-land attached thereto in one and the same transaction, but that to avoid claims for pre-emption he had caused two fictitious sale-deeds to be prepared, one relating to the zamindari share and the other to the sir-land, and [275] that in both these sale-deeds the price had been stated at more than it really was.

The defendant vendee pleaded *inter alia* that on the plaintiffs' own allegations, the suit was bad for misjoinder of causes of action, there being two separate sale-deeds, the subject of each of which was different.

The Court of first instance (Munsif of Jaunpur), accepting the contention of the defendant, dismissed the suit *in toto*.

The plaintiffs appealed, and the lower appellate Court (Subordinate Judge of Jaunpur), being of opinion that there was no misjoinder, remanded the suit under s. 562 of the Code of Civil Procedure for trial on the merits.

From this order of remand, the defendant vendee appealed to the High Court.

Pandit Sundar Lal, for the appellant.

Munshi Jwala Prasad and Munshi Kalindi Prasad, for the respondent.

JUDGMENT.

KNOX, J.—This is an appeal from an order whereby the Subordinate Judge of Jaunpur remanded to the Court of first instance under the provisions of s. 562 of the Code of Civil Procedure for trial on the merits a suit in which the Munsif of Jaunpur dismissed the claim of the plaintiffs before him, respondents before us, on the ground that the claim as brought, without any leave of the Court obtained under s. 44, was bad for misjoinder of causes of action. The suit was a suit for the recovery of immoveable property, the plaintiffs claiming to have a right of pre-emption over that property. It is true that the property claimed had formed the subject-matter of two distinct deeds of sale to one and the same vendee.

* First Appeal No. 110 of 1894, from an order of Rai Anant Ram, Subordinate Judge of Jaunpur, dated the 30th June, 1894.

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Under one deed of sale the zamindari share was sold, and under the second deed of sale the *sir*-lands comprised in the zamindari were sold to the same vendee. The respondents entered in their plaint that their cause of action *quoad* the whole property claimed accrued on the 22nd of January, 1892, when they expressed their readiness to buy and were refused. The learned Subordinate Judge was perfectly [276] right in holding that this suit was a suit for recovery of immovable property and that no cause of action of a different character had been joined with the suit; in fact, in my opinion, there was one and only one cause of action, *i.e.*, the offer made by the respondents, and the refusal which compelled those respondents to bring a suit, and gave them the cause of action on which they came to the Civil Courts. The order passed by the Subordinate Judge was a good order, and the appeal will have to be dismissed.

AIKMAN, J.—The appellant in this case, by two separate sale-deeds, executed on the 21st of January, 1892, purchased, by one sale-deed the *sir*-land appertaining to a certain zamindari share, and by the other sale-deed the zamindari share itself. The idea with which two separate sale-deeds were executed was probably to evade the provisions of ss. 7 and 9 of the N.W.P. Rent Act (Act No. XII of 1881). The respondents brought a suit to establish a right of pre-emption in respect of this zamindari share and *sir*-land. The vendee resisted the claim on various grounds, one of which was that, as there had been two separate sale-deeds, the suit was bad owing to misjoinder of causes of action. Without entering into the merits of the case, the Munsif of Jaunpur on this plea dismissed the suit. The plaintiffs appealed to the Subordinate Judge, who set aside the decree of the lower Court and remanded the suit under the provisions of s. 562 of the Code for trial on the merits. Against this order of remand the present appeal is brought by the vendee. In my opinion the learned Subordinate Judge was perfectly right in remanding the suit. Section 45 of the Code of Civil Procedure provides that "subject to the rules contained in chapter II and section 44, the plaintiff may unite in the same suit several causes of action against the same defendant or defendants." Chapter II relates only to the place of suing, and has nothing to do with the present case. Section 44 provides that, except in certain specified cases, no cause of action shall be joined with a suit for the recovery of immovable property, or to obtain a declaration of title to immovable property. The Munsif, in support of his order, says that the case is on all-fours with the case of *Harbans Singh v. Lachmina* [277] *Kuar* (1). This case is not in reality on all-fours with the case referred to, for in the latter one pre-emption suit was brought in respect of the sale of properties situate in two different villages, in which possibly the terms of the *wajib-ul-arz* might differ. But even if it had been on all-fours, I find myself unable to hold that the terms of s. 44 apply to this case. In the case of *Chidambara Pillai v. Ramasami Pillai* (2) it was held that s. 44 prohibits, not the joinder of several causes of action entitling a plaintiff to the recovery of immovable property, but a joinder with such causes of action of causes of action of a different character, except as excepted in the section. I quite concur with the interpretation there put upon the provisions of s. 44. Even if the Munsif was right in thinking that s. 44 applied, this was certainly a case in which he should have given leave under that section. The Munsif ignored the desirability of preventing a multiplicity of suits and overlooked the principle which is

(1) 3 A.W.N. (1883) 230.

(2) 5 M. 161.

embodied in the opening section of chapter IV of the Code of Civil Procedure, which deals with the frame of a suit.

I concur in the order proposed by my brother Knox.

The order of the Court will be that the appeal is dismissed with costs.

Appeal dismissed.

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APPELLATE
CIVIL.

17 A. 274—
15 A.W.N.
(1895) 76.

17 A. 277=15 A.W.N. (1895) 74.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Aikman.

TODAR MAL (*Plaintiff*) v. SAID MUHAMMAD AND OTHERS (*Defendants*).^{*}
[13th February, 1895.]

Civil Procedure Code, s. 174—Non-attendance of witnesses in obedience to a summons—Lawful excuse.

There is no obligation on a Civil Court to issue a warrant for the arrest of a witness who having been summoned, has failed to attend when it is shown to the Court that the absence of such witness is due to the non-payment or non-tender by the person at whose instance the summons had been issued of the necessary expenses of such witness as specified in s. 160 of the Code of Civil Procedure.

THIS was a suit for recovery of possession of a certain bagh, the plaintiff asserting his title to be based, as to one-half, on a purchase at an auction sale in execution of a decree, and as to the other half on a [278] private purchase from the owners. The claim was met by the plea of adverse possession, the defendants alleging that the plaintiff had in fact never held possession of the bagh within twelve years before suit. The Court of first instance (Munsif of Etah) put the plaintiff to proof of his possession, and finding that he had failed to prove his possession within twelve years prior to the suit dismissed the suit with costs.

The plaintiff appealed, urging (1) that the burden of proof had been wrongly laid by the Court of first instance, (2) that the plaintiff's possession was proved by the evidence on the record, and (3) that the Court was wrong in disallowing the plaintiff's application for the summoning of certain witnesses.

The lower appellate Court (Additional Subordinate Judge of Mainpuri) found against the plaintiff-appellant on the three issues raised by his grounds of appeal and dismissed the appeal.

The plaintiff thereupon appealed to the High Court, again urging with greater minuteness his objection in the Court below as to the refusal of the Court to issue a warrant for the arrest of certain witnesses, who had been summoned but had not attended on a date to which the hearing had been adjourned owing to the non-payment by the plaintiff of their diet-money and other expenses. The facts relating especially to this part of the case are set forth in detail in the judgment of the Court.

Mr. H. C. Niblett, for the appellant.

Maulvi Ghulam Mujtaba, for the respondents.

^{*} Second Appeal No. 507 of 1894, from a decree of Syed Siraj-ud-din, Additional Subordinate Judge of Mainpuri, dated the 8th March, 1894, confirming a decree of Maulvi Muhammad Abbas Ali, Munsif of Etah, dated the 11th January, 1893.

1895

JUDGMENT.

FEB. 13.

APPEL-
LATE
CIVIL.17 A. 277 =
15 A.W.N.
(1895) 74.

KNOX and AIKMAN, JJ.—There is but one point for determination in this second appeal. In order to explain that it will be necessary briefly to allude to the procedure adopted by the Court of first instance. The date fixed for the settlement of the issues was, first, the 23rd September, and, again, the 10th November, 1892. On the 10th, the Court records, as a reason for adjournment, that it has permitted the defendants' pleader to be absent for that pleader's private business, and it therefore adjourned the settlement of issues [279] until the 12th. Issues were framed on the 12th November, and the date fixed for the first hearing was the 8th December. Owing to the death of one of the plaintiffs the case was adjourned to the 20th of December, but not until five of the witnesses for the plaintiff had appeared in answer to the summons fixing the 8th December. On the 20th December certain of the witnesses of the plaintiff were again present, but, owing to the illness of the Munsif, the hearing was adjourned until the 11th of January 1893. The witnesses who were present on the 20th were told to attend on the 11th January. On that date, however, two of those witnesses were absent. Instead of proceeding with the witnesses who were present or asking for an adjournment and issue of a fresh summons upon the defaulting witnesses the plaintiff applied to the Court for a warrant of arrest to be issued upon those witnesses. The Court declined to grant such warrant on the ground that the travelling and other expenses of the witnesses had not been paid, a fact which it elicited from the plaintiff himself; it accordingly refused the application and disposed of the suit upon the materials before it. The contention before us is, that the Court was bound to accede to the application made by the plaintiff and to issue a warrant of arrest. It is evident, however, from the provisions of s. 174 of the Code that the Court upon such an application being made to it has discretionary power as to granting or refusing the request, except when the Court has reason to believe that the defaulting witnesses have a lawful excuse for such failure, in which case it is precluded from making an order of arrest. Arguments might be raised as to what does or does not amount to a lawful excuse. From the explanation attached to s. 174, non-payment or non-tender of a sum sufficient to defray the expenses mentioned in s. 160, viz., the travelling or other expenses of the person summoned in passing to and from the Court, and one day's attendance shall be deemed a lawful excuse. The Court had no option after what the plaintiff himself had said but to refuse to issue the warrant of arrest. The pleas taken in the memorandum of appeal entirely fail, and this appeal is dismissed with costs.

Appeal dismissed.

17 A. 280=15 A.W.N. (1895) 69.

[280] APPELLATE CIVIL.

Before Mr. Justice Aikman.

1895

FEB. 19.

APPEL-
LATE
CIVIL.THAKURI (*Plaintiff*) v. KUNDAN AND ANOTHER (*Defendants*).*

[19th February, 1895.]

*Practice—Appeal—Decision of Court based upon ground not specifically urged by appellant—Act No. IV of 1882 (Transfer of Property Act), s. 41.*17 A. 280=
15 A.W.N.
(1895) 69.

Where a Court sees that the rights of one of two innocent parties must be sacrificed, it is entitled to consider whether anything in the conduct of the party who comes into Court and seeks relief has debarred him from asserting his right. The Court is not precluded from basing its decision upon a ground not specifically pleaded by either of the parties.

THE plaintiff, who was the widow of one Chajju, sued for possession of a half share in a certain house on the allegations that the house had been built by her deceased husband and his uncle Khushi jointly and inhabited by them; that after the death of Khushi and Chajju, Murli the son of Khushi had wrongfully mortgaged the whole house in his own name, and that subsequently the house had been brought to sale by the mortgagees. The defendants, auction purchasers, resisted the suit chiefly on the ground that the sole title to the house had been in Khushi and that the plaintiff's husband was separate, and that the plaintiff herself had been out of possession for more than twelve years.

The Court of first instance (Munsif of Muzaffarnagar) found that the house had been built by Khushi and Chajju jointly, and that though the plaintiff had on the death of her husband gone to live with her father's family, she occasionally came to live in the house in dispute, and he gave the plaintiff a decree as claimed.

The defendants, auction purchasers, appealed, and the lower appellate Court (District Judge of Sabaranpur), holding that the case was one to which s. 41 of Act No. IV of 1882 would apply, inasmuch as it appeared that Murli the son of Khushi had for some time been left in ostensibly sole ownership of the house, referred two issues based on that section to the Munsif.

The Munsif returned a finding to the effect that Khushi and his son had since the death of Chajju remained in ostensible owner-ship of the house and that there were no circumstances indicating fraud or concealment in the matter of the mortgage by Murli and the subsequent sale.

The lower appellate Court accordingly on the above finding applying s. 41 of Act No. IV of 1892 dismissed the plaintiff's suit. The plaintiff thereupon appealed to the High Court.

Munshi Viddya Charan Singh, for the appellant.

Mr. Abdul Raoof, for the respondents.

JUDGMENT.

AIKMAN, J.—Musammatt Thakuri, the appellant in this case, brought a suit for possession of one-half of a dwelling-house. Her case was that the house had been jointly built by her husband Chajju and his uncle Khushi; that after Chajju's death, which took place some 18 or 19

* Second Appeal No. 576 of 1894, from a decree of H. Bateman, Esq., District Judge of Sabaranpur, dated the 15th March 1894, reversing a decree of Maulvi Maula Bakhsh, Munsif of Muzaffarnagar, dated the 26th February 1894.

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(1895) 69.

years ago, Khushi's son, Murli, mortgaged the whole of the house to one Chiranji Lal. Chiranji Lal got a decree on his mortgage, in execution of which the house was brought to sale and purchased by the defendants Kundan and Chota, the respondents before me. The Court of first instance (the Munsif of Muzaffarnagar) gave the plaintiff a decree, which was reversed on appeal by the learned District Judge of Saharanpur. The learned Judge was of opinion that s. 41 of the Transfer of Property Act applied to the case and referred to the Munsif for trial two issues based on the terms of that section. The finding of the Munsif was in favour of the respondent. In second appeal it is urged that as s. 41 of the Transfer of Property Act was not expressly pleaded, the learned Judge had no power to take it into consideration in disposing of the case. I cannot accede to this contention. The respondents were, *prima facie*, *bona fide* purchasers for value; and where a Court sees that the rights of one of two innocent parties must be sacrificed, it is entitled to consider whether anything in the conduct of the party who comes into Court and seeks relief has debarred him from asserting his right. Here it is found that for a long term of years no ostensible act of ownership was exercised by the plaintiff over the house, but that, on the contrary, she allowed her husband's cousin to appear and deal with the [282] house as ostensible owner, and that in consequence of his conduct the respondents have been induced to purchase. I observe that plaintiff allowed upwards of four years to elapse from the date of the auction-sale before she took any step to assert her right, and in doing so, although she has made her husband's cousin a defendant to the suit, she has not asked for any relief against him. I think, under the circumstances stated above, the learned Judge was right in dismissing the suit. I dismiss the appeal with costs.

Appeal dismissed.

17 A. 282=15 A.W.N. (1895) 69.

APPELLATE CIVIL.

Before Mr. Justice Aikman.

DURGA SINGH (*Plaintiff*) v. NAURANG SINGH (*Defendant*).^{*}
[19th February, 1895.]

Mortgage—Prior and subsequent mortgagees—Right of prior mortgagees to add to the amount secured by his mortgage outlay incurred in the preservation of the mortgaged property—Act No. IV of 1882 (Transfer of Property Act), s. 63.

Where a mortgagee of agricultural land had with the consent of his mortgagees spent money in repairing a well on the property which had been rendered useless from natural causes, it was held that such mortgagee was entitled, in a suit by a subsequent mortgagee against him for redemption, to add the amount so expended to the mortgage-debt to be paid by the plaintiff before he could obtain the decree for redemption claimed by him.

[F., 10 A.L.J. 124 (129)=16 Ind. Cas. 635 (638).]

THE plaintiff in this case, being a puisne mortgagee, sued for redemption of a prior mortgage on the property mortgaged to him by payment of Rs. 197. The prior mortgagee admitted that the amount due on the

^{*} Second Appeal No. 614 of 1894, from a decree of Rai Anant Ram, Subordinate Judge of Jaunpur, dated the 18th April 1894, modifying a decree of Babu Pramotha Nath Banerji, Munsif of Jaunpur, dated the 29th January 1894.

original mortgage was Rs. 197, but pleaded that certain other money was due to him under a subsequent bond and that the plaintiff was also bound, before he could redeem, to pay Rs. 600, the cost of a well which he had, with the permission of his mortgagors, built upon the land for its benefit.

The mortgagors also filed a written statement to the effect that they had given permission to the defendant-mortgagee to build the well, and that the amount claimed by that defendant was correct.

[283] The Court of first instance (Munsif of Jaunpur) found that the money claimed as due on the second bond of the defendant mortgagee was not recoverable, the bond being unregistered, and that, though the defendant might have spent something in repairing the well, he had not given satisfactory evidence of the amount. It accordingly decreed the plaintiff's claim for redemption at Rs. 197.

The defendant mortgagee appealed. The lower appellate Court (Subordinate Judge of Jaunpur) allowed the appellant a sum of Rs. 100, in respect of his claim for the well, to be added to the amount decreed by the first Court.

The plaintiff thereupon appealed to the High Court.

Mr. *H. C. Niblett*, for the appellant.

Munshi *Madho Prasad*, for the respondent.

JUDGMENT.

AIKMAN, J.—This was a suit by a puisne mortgagee to redeem the mortgage of a prior mortgagee who was under his mortgage in possession of the mortgaged property, namely, certain agricultural land. The plaintiff paid into Court the amount secured by the prior mortgage. In addition to the sum deposited in Court the prior mortgagee claimed to be entitled to certain other payments, amongst others, to Rs. 600 for the construction of a well. The lower Court (the Subordinate Judge of Jaunpur) has held that the plaintiff, before he can redeem, must pay to the respondent the sum of Rs. 100 on account of the outlay on this well. In second appeal the plaintiff contends that, inasmuch as there was no covenant in the original mortgage-deed to pay more than the mortgaged amount, the defendant was not entitled to any compensation for the repairs of the well. In my opinion this plea is without force. It is impossible to provide in a mortgage-deed for all the accidents that may happen to the property mortgaged.

In the present case it has been held proved that a well which was required for the irrigation of the mortgaged land had been ruined through an inundation of the river Gunti, and that the respondent constructed a new one in its place. The mortgagors, who were parties to the suit, filed a written statement admitting [284] that this had been done with their permission. In my opinion whether this new well be looked upon as an accession to the property and so falling within the provisions of s. 63 of the Transfer of Property Act, or whether the outlay on it be regarded as money necessarily spent in the management or preservation of the mortgaged property, the prior mortgagee is in either case entitled to add to the principal amount of his mortgage such reasonable sum as he may be shown to have expended. This disposes of the first ground of appeal. In the second ground it is urged that, the evidence in regard to the amount of the expenditure being unsatisfactory, nothing at all should have been allowed. This plea I cannot sustain. It is true that accurate accounts have not been filed by the defendant showing the exact amount of his outlay, but the sum which has been decreed to him by the lower appellate Court cannot be deemed

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(1895) 69.

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to be in any way exorbitant or in excess of his actual outlay. For the above reasons I dismiss this appeal with costs. I extend the time allowed by the lower Court's decree for the payment of the amount found due up to the 1st of June 1895.

Appeal dismissed.

17 A. 284 = 15 A.W.N. (1895) 46.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Aikman.

MADAN MOHAN LAL AND ANOTHER (*Defendants*) v. KANHAI LAL
(*Plaintiff*).^{*} [20th February, 1895.]

Act No. XV of 1877 (Indian Limitation Act), sch. II, arts. 57, 120—Limitation—Loan on security of moveable property—Suit to recover money by sale of property pledged and also from the defendant personally.

Where a plaintiff who had lent money on the security of moveable property sued to recover the money both by sale of the property pledged and also asked for a decree personally against the defendant, should the amount realised by the sale prove insufficient, it was held that, so far as the plaint prayed for a decree against the defendant personally, art. 57 of the second schedule of Act No. XV of 1877 was applicable; but, so far as the plaintiff sought to enforce his charge against the property pledged, the suit fell within art. 120. *Nim Chand Baboo v. Jagabundhu Ghose* (1) followed.

[F., 24 A. 251 = 22 A.W.N. 43; 27 M. 529 = 13 M.L.J. 445 (F.B.).]

[285] THIS was a suit to recover money advanced on a pledge of certain jewelry. The plaintiff prayed for a decree for sale of the jewelry and also for a decree personally against the defendant. The pledge of the jewelry was evidenced by a memorandum signed by the defendant and another person. The suit was brought more than three, but less than six, years from the time when the loan was made.

The defendant pleaded that the suit was barred by limitation, also that the memorandum relied upon by the plaintiff as evidence of the transaction was not properly stamped and was inadmissible.

The Court of first instance (Munsif of Bareilly), holding that the memorandum in question was a bond or promissory note and applying art. 80 of sch. ii of the Indian Limitation Act, 1877, dismissed the suit as barred by time.

The plaintiff appealed. The lower appellate Court (Subordinate Judge), taking the view that the document in question was a mortgage, held that art. 120 applied and that the suit was within time. It accordingly remanded the suit to the Munsif under s. 562 of the Code of Civil Procedure.

From this order of remand the defendant appealed to the High Court.

Mr. *Roshan Lal*, for the appellants.

Babu *Jogindro Nath Chaudhri* and Lala *Sheo Charan Lal*, for the respondent.

* First Appeal No. 2 of 1894, from an order of Maulvi Jafar Husain, Subordinate Judge of Bareilly, dated the 5th December 1893.

JUDGMENT.

KNOX and AIKMAN, JJ.—This is an appeal from an order passed by the Subordinate Judge of Bareilly in appeal remanding a case under s. 562 of the Civil Procedure Code for trial on the merits. The claim as laid by the plaintiff was to enforce payment of money which had been borrowed from him upon certain jewels which had been pledged with him. The prayer in the plaint, however, is not merely for recovery of money due by sale of the property pledged. There was a further prayer for the recovery of the balance due after sale of the jewelry by proceedings against the persons of [286] the defendants, now appellants. The claim was instituted more than three years from the date when the money had been borrowed and the jewelry pledged. The Court of first instance held that the suit was one governed by art. 80 of the second schedule of the Limitation Act of 1877 and dismissed the suit. The Subordinate Judge was of opinion that there was no express article in the Limitation Act applicable to the suit, and therefore applied art. 120. The question before us was considered by the High Court at Calcutta in *Nim Chand Baboo v. Jagabundhu Ghose* (1). The learned Judges who decided that case were of opinion that, so far as the plaint might pray for a decree for the money lent against the defendant personally it was barred under art. 57; but so far as the plaintiff sought to enforce his charge against the property pledged, the suit fell, not within art. 57, but within art. 120 of the schedule and was therefore not barred. We agree in the opinion there expressed. While, therefore, we dismiss this appeal, we so far modify the order of the lower appellate Court as to direct the Court of first instance to dispose of the suit on the merits with regard to the remarks made above. The respondents will get their costs.

Appeal dismissed.

17 A. 286 = 15 A.W.N. (1895) 78.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Aikman.

BHAGWAN DAS (*Defendant*) v. THE MAHARAJA OF BHARTPUR
AND OTHERS (*Plaintiffs*).^{*} [25th February, 1895.]

Appeal—Order rejecting application for suit to abate—Civil Procedure Code, s. 366.

Held that an order rejecting an application that a suit might be declared to have abated by reason of the death of the plaintiff and the invalidity of an application to the Court to bring his legal representative on to the record was not one of the orders contemplated by s. 366 of the Code of Civil Procedure and that no appeal would lie therefrom.

THE facts of this case are as follows :—

The late Maharaja of Bhartpur was plaintiff in a suit pending in the Court of the Subordinate Judge of Agra. He died on the [287] 12th of December, 1893. An application was made within time to have the name of his successor brought upon the record of the case as plaintiff, and that application was granted. Subsequently, on the 18th of July, 1894, application was made by the defendant alleging that the plaintiff's application

^{*} First Appeal from Order No. 141 of 1894, from an order of Maulvi Aziz-ul-Rahman, Subordinate Judge of Agra, dated the 18th July 1894.

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15 A.W.N.
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17 A. 288 =
15 A.W.N.
(1895) 78.
- for substitution had not been presented by any one authorized to act for the claimant, that no vakalatnamah had been filed, and praying that the suit might be declared to have abated. This application was resisted by the Maharaja. The Court found that no vakalatnamah was then on the record, but that there was evidence that a vakalatnamah had been filed when the application for substitution was made, and rejected the defendant's application.
- The defendant thereupon appealed to the High Court.
Babu *Durga Charan Banerji*, for the appellant.
Mr. *T. Conlan*, Pandit *Sundar Lal* and Lala *Sheo Charan Lal*, for the defendants.

JUDGMENT.

KNOX and AIKMAN, JJ.—Upon this appeal being called on for hearing, two preliminary objections were raised by the learned vakil who appears in the case on behalf of the present ruling Chief of Bhartpur, one of the respondents, plaintiff in the Court of first instance. The first is to the effect that no copy of the decree was filed with the memorandum of appeal and none has been filed up to the present date. The second is to the effect that no appeal lies at all.

It appears that the suit was instituted by the late Maharaja of Bhartpur. He died on the 12th of December, 1890, while the suit was still pending. On the 26th of March, 1894, the present Maharaja applied to the Court to have his name entered on the record in the place of the deceased plaintiff and an order was passed to that effect. On the 18th of July, 1894, an application was presented on behalf of the defendants alleging that the application of the 26th of March, 1894, was an application made by a person who was not authorized to apply and asking that the suit should abate. The Court refused this application made by the defendants and [288] allowed the suit to proceed; and it is from this last order that the present appeal is brought. It is contended that the order falls within the second paragraph of s. 366 of the Code of Civil Procedure, and is therefore appealable under clause 18 of s. 588. We cannot allow this contention. The application of the defendants was not an application contemplated by the second paragraph of s. 366. No appeal lies, and, without pronouncing on the first preliminary objection and acting upon the second, we dismiss this appeal with costs.

Appeal dismissed.

17 A. 288 = 15 A.W.N. (1895) 80.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Aikman.

BARKAT-UN-NISSA (*Defendant*) v. MUHAMMAD ASAD ALI (*Plaintiff*).
[25th February, 1895.]

Civil Procedure Code, s. 53—Amendment of plaint—Pre-emption—Area of property claimed in suit for pre-emption described as less than true area—Limitation.

A Court is not precluded from returning a plaint for amendment because at the time it is returned for amendment the period of limitation for the suit may have expired.

* First Appeal No. 120 of 1894, from an order of H. B. Finlay, Esq., District Judge of Shabjahanpur, dated the 8th August 1894.

The plaintiff in a suit for pre-emption after filing his plaint discovered that the property in suit had been described by mistake as being a slightly less area than it was in reality. *Held* that the Court had power and ought to have allowed the plaint to be amended and that the amendment was not precluded by the fact that the limitation for the suit had expired. *Held* also that such misdescription would not render the suit liable to the objection that the plaintiff had sought to pre-empt only a part of the property sold.

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THIS was a suit for possession of a 2 biswas, 9 biswansis share of a certain village, by right of pre-emption, on the allegations that the plaintiff was entitled to pre-emption under the *wajib-ul-arz*, that the defendant-vendor sold the property in suit on the 22nd of October 1892, at a price of Rs. 1,400 to the defendant-vendee, the price being falsely stated in the sale-deed at Rs. 2,000, and that the [289] plaintiff on coming to know of the sale made a demand of pre-emption but was refused.

17 A. 288 =
15 A.W.N.
(1895) 80.

The defendant vendee pleaded that she had an equal right of pre-emption with the plaintiff, that the *wajib-ul-arz* was not applicable, that no demand was made by the plaintiff, that the price was Rs. 2,000, that the plaintiff had refused to purchase, and that the claim of the plaintiff was for a part only of property sold. The other defendant did not oppose the suit.

The Court of first instance (Subordinate Judge of Shahjahanpur) held that the plaintiff had omitted to claim for a small fraction of the share sold and that the plaint could not, more than a year having elapsed since the cause of action accrued, be amended, and dismissed the suit.

On appeal by the plaintiff the lower appellate Court (District Judge of Shahjahanpur) held that the omission in the plaint was not intentional, but due to a clerical error merely, and that the Court below had power, and ought to have exercised it, to allow the plaintiff to amend. It accordingly remanded the case under s. 562 of the Code of Civil Procedure for trial upon the merits.

From this order of remand the vendee defendant appealed to the High Court.

Mr. *Abdul Majid*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondent.

JUDGMENT.

KNOX and AIKMAN, JJ.—This is a first appeal from an order passed by the District Judge of Shahjahanpur whereby that Judge remanded the suit out of which the appeal before him arose under s. 562 of the Code of Civil Procedure for decision upon its merits. The suit is what is known as a pre-emption suit. Muhammad Asad Ali, the respondent here, was plaintiff: he sued to enforce a right of pre-emption which he claimed over certain property which had been sold by one Muazziz Ali, one of the defendants to the suit, to Musammât Barkat-un-nissa, a second defendant and appellant here. In the plaint under which the suit was instituted the respondent set out in the recital of facts that the share sold by Muazziz Ali to the [290] appellant was a 2 biswas 9 biswansis share. In his prayer for relief he also stated the share as being a 2 biswas 9 biswansis share. In point of fact, as admitted by both parties to this appeal, the property which was sold was not a 2 biswas 9 biswansis share, but a share amounting 2 biswas, 9 biswansis, 15 kachwansis, 11 nanwansis and 2 tanwansis. The portion which was omitted was thus but a small fraction of the whole amount of the property which formed the subject-matter of the bargain between Muazziz Ali and the appellant. The learned Judge held that in

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the interests of justice permission should have been given to the respondent to amend his plaint so as to include along with the property claimed the fractional share which had been omitted. It appears that the respondent on discovering that he had omitted to claim the whole of the property asked for leave to amend his plaint so as to include the whole bargain, but his prayer was refused. In appeal before us it is contended that the Court of first instance was, and is, precluded from permitting the plaint to be amended, because by so doing it would virtually extend the period allowed by law within which a pre-emption suit can be instituted, and that the omission by the respondent to claim a portion of the property which was sold prevents him from enforcing his right over any part of the property and renders his suit liable to dismissal. In support of the first contention we were referred to the case of *Jainti Prasad v. Bachu Singh* (1). That case, however, was of an entirely different character, and the point which arose for decision there is in no way connected with that which we are called upon to decide in the present appeal. The case of *Jainti Prasad* was one in which the plaint presented before a Court of first instance was written upon paper insufficiently stamped and permission was given by the Court before which the plaint was filed to make up the deficiency. The period of grace allowed by the Court extended beyond the time within which the suit could have been instituted. It was held (*vide p. 70*) that "a plaint is a document within the meaning of the Court-fees Act and within the meaning of s. 28, and as a suit can only be instituted by the presentation of a plaint, the presentation [291] of an insufficiently stamped document, which if sufficiently stamped could be treated as a plaint, cannot be regarded in law as the institution of a suit within the meaning of the explanation to s. 4 of the Indian Limitation Act, 1877, or of s. 48 of the Code of Civil Procedure. Section 28 of the Court-fees Act prohibits the Court from regarding any document which ought to be stamped under that Act as of any validity unless and until it is properly stamped."

In the case before us the suit as brought was undoubtedly instituted within time and no question of sufficiency of stamp arises. The whole tenor of the plaint, and we have examined it carefully, satisfies us that the intention of the respondent was to institute a claim for the whole of the property sold to the appellant: it was merely from inadvertence or some other similar cause that he left out of his plaint the small fractional share which has been set out above. The question before us is—is a Court precluded from returning a plaint for amendment if at the time when it is returned for amendment the period of limitation of the suit may have expired?

The section of the Code which authorizes a Court to return plaints for amendment is s. 53. That section empowers a Court at any time before judgment to let a plaint be amended upon such terms as to the payment of costs as the Court thinks fit. Only one circumstance is set out as being a circumstance under which a plaint should not be amended either by a party or by a Court, and that is when the amendment would convert a suit of one character into a suit of another and inconsistent character. Does that circumstance arise in the present case? The suit as instituted was a suit to enforce a right of pre-emption over a 2 biswas 9 biswansis share: the suit as amended would be to enforce the same right of pre-emption over the same 2 biswas 9 biswansis share *plus* a small

fraction. It cannot be said with any show of reason that by the addition of this fractional share the suit brought will be converted into a suit of another and inconsistent character.

As regards the second contention, the case before us is not one in which the pre-emptor is seeking to break up the bargain, or to [292] pick and choose out of the property which has been sold. The learned pleader for the appellant referred us to the case of *Muhammad Vilayat Ali Khan v. Abdul Rab* (1). That was a case not at all in accord with the present case. The reason why the would-be pre-emptor in that suit lost his suit for pre-emption was that he had by his conduct acted in such a way as to lead the parties to the bargain to conclude that he would not be the purchaser of any portion of the property sold. We are satisfied that in the present case, and from the very first, the respondent wished to purchase the whole of the property which was for sale. Both the pleas taken in appeal fail and the appeal before us is dismissed with costs.

Appeal dismissed.

17 A. 292 = 15 A.W.N. (1895) 81.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Aikman.

GHULAM MUHAMMAD (*Defendant*) v. THE HIMALAYA BANK,
"LIMITED," IN LIQUIDATION, THROUGH THE OFFICIAL LIQUIDATOR
(*Plaintiff*).^{*} [27th February, 1895.]

Plaint—Form of *plaint in suit by Company in liquidation—Amendment—Civil Procedure Code*, s. 53—Act No. VI of 1882, (*Indian Companies' Act*), s. 144.

Held that a *plaint in a suit by a Bank in liquidation in which the plaintiff was described as "the Official Liquidator, Himalaya Bank, Limited, in liquidation," and which was also subscribed and verified in the same terms was not a valid plaint having regard to the terms of s. 144 of the Indian Companies' Act, 1882, and that the defect could not be cured by amendment. In re Winterbottom* (2) referred to.

[Overruled, 18 A. 198 (F.B.) ; R., 3 O.C. 347.]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Roshan Lal* and Mr. *J. Simeon*, for the appellant.

The respondent was not represented.

JUDGMENT.

KNOX and AIKMAN, JJ.—This is a first appeal from an order passed by the District Judge of Saharanpur whereby he set aside a [293] decree of the Small Cause Court Judge passed in his capacity of Subordinate Judge and remanded the case for re-trial on the merits under s. 562 of the Code of Civil Procedure. The appellant was defendant in the Court of first instance and the suit brought against him was instituted, as set forth in the plaint, by the "Official Liquidator, Himalaya Bank, Limited, in liquidation, plaintiff." The plaint was also subscribed and verified in the same terms. No written statement seems to have been filed, but it appears that objection was taken by the defendant to the form of the

^{*} First Appeal No. 146 of 1894, from an order of H. Bateman, Esq., District Judge of Saharanpur, dated 10th September 1894.

(1) 11 A. 108.

(2) L.R. 18 Q.B.D. 446.

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suit on the ground that the present plaintiff had no *locus standi*, and the suit should have been instituted in the name of the Himalaya Bank. Upon this an issue was framed as to whether the suit was correct in form. The Subordinate Judge, holding that the form of the suit was wrong, dismissed the plaintiff's claim with costs. The lower appellate Court had the same question raised before it in appeal. The Court considered it to be straw-splitting to dismiss a suit because the suit was laid in the wrong form. In any case it considered that the plaint ought to have been returned for amendment or to have been amended by the Court itself under s. 53, cl. (c) of the Code of Civil Procedure. It accordingly remanded the case for re-trial and added the words—"The lower Court can amend the plaint as suggested above, if it thinks fit to do so." In our opinion the lower appellate Court was wrong in thus holding. The terms of s. 144 of the Indian Companies' Act, 1882, authorize an official liquidator with the sanction of the Court to bring or defend any suit in the name and on behalf of the company. This requirement is distinctly of a formal nature, and a substantial compliance with it is insufficient. In the very same section power is given to the official liquidator to do certain acts in his official name. When such official liquidator is acting in the name and on behalf of the company, it is the company and not the official liquidator who is plaintiff. If we were to authorize an amendment in the case before us, it would not be a mere clerical amendment; it would be the substitution of a person who up to the present moment has never been plaintiff in the suit in place of the person who did in fact sue. Moreover, in the present case it would [294] be permitting a plaintiff whose suit has become barred by limitation to bring the suit so barred, and would be in contravention of the principle laid down in s. 22 of Act No. XV of 1877. The point before us was considered in *In re Winterbottom* (1). In that case Cave, J., observed:—"Although I have struggled against the conclusion, feeling as I do that the debtor has in no way been misled, as appears from his affidavit, yet I have ultimately come to the conclusion that the requirement of the law has not been complied with, and that the proceeding is a proceeding taken in the name of Nicholson, Liquidator, and not the name of the company." So in the present case we have unwillingly come to the conclusion that the suit before us is one in which the plaintiff is the official liquidator and not the Himalaya Bank, Limited, the only person who has a right of action against the appellant.

The appeal must be allowed. We set aside the decree of the lower appellate Court and restore that of the Court of first instance. The appellant will have his costs here and in the lower appellate Court.

Appeal decreed.

17 A. 294 (F.B.) = 15 A.W.N. (1895) 167.

FULL BENCH.

*Before Sir John Edge, Kt, Chief Justice, Mr. Justice Knox,
Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burkitt and
Mr. Justice Aikman.*

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BHAGWAN SINGH, MINOR, UNDER THE GUARDIANSHIP OF MUSAMMAT
SUGHRI KUAR (*Defendants*) v. BHAGWAN SINGH AND OTHERS
(*Plaintiffs*).^{*} [27th June, 1895.]

*Hindu law—Benares School—Adoption—Adoption by one of the regenerate classes of a
mother's sister's son.*

Held by EDGE, C. J., KNOX, BLAIR and BURKITT, JJ., (BANERJI and AIK-
MAN, JJ., dissenting).

The Hindu law of the School of Benares does not prohibit an adoption amongst
the three regenerate classes of a sister's son, of a daughter's son, or of a son of
the sister of the mother of the adopter, and consequently the onus of proving
that such an adoption is prohibited by usage is upon him who alleges that it is
illegal.

[295] The authority in the School of Benares of the Dattaka Mimansa of
Nanda Pandita considered. That Mimansa is not on questions of adoption an
"infallible guide" in the School of Benares, and is not followed when it imposes
on the right of adoption restrictions not to be found in the recognized authori-
ties of the School of Benares.

Held by BANERJI, J. (AIKMAN, J. concurring):—The adoption by a Hindu
belonging to one of the three regenerate classes of his mother's sister's son is pro-
hibited according to the Hindu law of the Benares School. Such prohibition is
not merely directory, but the adoption is absolutely interdicted and void, and
cannot be validated by the rule of *factum valet*.

Held also by BANERJI, J.:—That the Dattaka Chandrika and the Dattaka
Mimansa are works of paramount authority on questions relating to adoption as
well in those parts of India which are governed by the law of the Benares School
as elsewhere.

[*Reversed*, 21 A. 412 (424) (P.C.) = 3 C.W.N. 454 = 1 Bom. L.R. 311 = 7 Sar. 474; R.,
24 A. 195 (197) = 22 A.W.N. 10; 29 A. 495 = 4 A.L.J. 407 = A.W.N. (1907) 121
(128); 3 O.C. 130 (135); D, 27 A. 417 = 2 A.L.J. 36 = A.W.N. (1905) 20; 22 B.
973.]

THIS was a reference to the Full Bench of an appeal in which the
substantial question involved was whether the adoption by a Hindu
belonging to one of the three regenerate classes (a Kshatriya) and subject
to the law of the Mitakshara, or Benares, School of Hindu law of the
son of his mother's sister was, according to that law, a valid adoption or
not. The facts of the case out of which the reference arose, and the
arguments in support of either view of the question, are stated very fully
in the judgment of Edge, C. J.; they are also stated in the judgment of
Banerji, J.

Babu Durga Charan Banerji, for the appellant.

Mr. T. Conlan, Pandit Sundar Lal and Pandit Moti Lal, for the
respondents.

JUDGMENT.

BANERJI, J.—The suit in which this appeal has arisen was brought
by the respondents for the establishment of their right as reversioners to
the estate of one Madho Singh, and for a declaration that the alleged
adoption of the appellant by Madho Singh was void and ineffectual. One

* First Appeal No. 301 of 1892, from the decree of Syed Akbar Husain, Subordinate
Judge of Cawnpore, dated the 23rd September 1892.

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of the grounds on which the alleged adoption was impeached was that the appellant was the son of the sister of Madho Singh's mother. The Court below having held the adoption alleged by the appellant to be invalid, this appeal has been preferred, and the only question which we have to consider and [296] determine is whether the adoption of the mother's sister's son by a person belonging to one of the three regenerate classes is valid according to Hindu law. The parties are Thakurs, that is, members of the regenerate class of *Kshatriyas*. It is not alleged that an adoption such as has been set up in this case is valid according to any special custom prevailing in the caste or in the locality to which the parties belong. The case, therefore, must be decided solely with reference to the rules of Hindu law which govern adoption, and independently of any positive custom other than such as may be presumed to be in existence consistently with Hindu law.

It is not disputed, and indeed it was conceded in argument, that the principles which apply to the question of the adoption of a daughter's son or a sister's son apply equally to the adoption of the mother's sister's son, and that if the adoption of a daughter's son or a sister's son is void among the three higher classes, it is equally void in the case of the mother's sister's son. I may also observe that as regards the present question there is no divergence between the Mitakshara School and the other schools of Hindu law, or between the different sections of the Mitakshara School, and that the rules of law affecting the present question are alike applicable to the different schools. There is also no difference as regards the application of those rules between Brahmins, Kshatriyas, and Vaisyas. It is important to bear these facts in mind in considering the question which we have to decide upon this reference.

The question is one of great importance, affecting as it does a large section of the Hindu community, and in determining it, I shall consider, first, the authority of decided cases; secondly, the authority of modern writers on Hindu law, European and native; and thirdly, the authority of the *Dharma Sastras*, including that of commentators. I attach the greatest importance to the authority of decided cases, because if they have been uniform and consistent, and have extended over a long series of years, the presumption, in my opinion, arises that they have been submitted to and accepted as correctly laying down the law on the subject, and that [297] the usages of the people have been regulated in accordance with them. The rule of *stare decisis* has always been regarded as a very salutary rule, and it should, in my judgment, be applied even to questions of Hindu law, unless it can be shown that the consensus of opinions expressed in the decided cases was based on a grossly erroneous interpretation of the law, or on a total misconception of what the law really is,—a misconception induced by erroneous translations of original texts inaccessible to the Judges, and misrepresentations as to their true meaning and scope. I would go further and hold that even if in some instances the rulings may have been founded on doubtful authorities, they should not, if they have been uniform, and have covered a long period of time, be departed from, even at the risk of perpetuating an error, provided that the error was not so gross and clear as to negative the presumption of acquiescence and usage to which I have referred above. "For" to quote the words of Dr. (now Mr. Justice) Guru Das Banerji (Tagore Law Lectures for 1879, p. 16) "though it is wrong to perpetuate an error, it would hardly be right to rectify the error by unsettling the law and overruling a precedent which

might have long been the basis of men's expectations and conduct." This principle was adopted by a recent Full Bench of the Bombay High Court in *Waman Raghupati Bova v. Krishnaji Kashiraj Bova* (1) where the learned Judges refused to reconsider the question of the authority of the Dattaka Mimansa and the Dattaka Chandrika as high authorities on the subject of adoption, with a view to secure uniformity of decisions; and they refused to reconsider a previous Full Bench ruling on the ground that for the past ten years the decision of the Full Bench had been regarded by the legal profession as having settled the law on the subject. In *Parbati v. Sundar* (2) Petheram, C.J. and Brodhurst, J., were of opinion that they were "bound to follow the authority of a long and uniform course of decisions" on the question of the validity of the adoption of a sister's son. And in the case of *Tulshi Ram v. Bihari Lal* (3) the present learned Chief Justice of this Court decided against the [298] validity of an adoption made by a Hindu widow without the express permission of her husband on the ground that "having regard to the fact that the texts of the early commentators are more or less in conflict, to the fact that no single case which arose in the North-Western Provinces, in Oudh, or in those districts in Lower Bengal in which the Benares School is followed" had been cited in support of the validity of such an adoption, and having regard to the four cases cited" he would expect that any one who would now contend that a Hindu widow subject to the Benares School could make a valid adoption to her deceased husband without express authority given by him, would support that contention by clear proof of general usage in the particular district that an adoption under such circumstances was, in the particular district, recognised as valid by those subject to the Benares School." These observations of the learned Chief Justice apply, in my opinion, with equal force to the present question; and if on this question there exists a long and uniform course of decisions declaring an adoption such as the one set up in this case to be invalid, a Court should, in the words of the learned Chief Justice, expect any one who would now contend that such an adoption is valid to support that contention by clear proof of general usage in the particular district that such an adoption was, in the particular district, recognised as valid.

Bearing these weighty observations of the learned Chief Justice in mind, I will consider the decided cases on the subject which have been cited to us or which I have been able to lay my hands upon. I may remark that the learned vakil who argued the case for the appellant with much ability frankly admitted that with the exception of two cases, and probably a third, to which I shall presently refer, the authority of decided cases in these Provinces, in Bengal, in Madras and in Bombay, had been uniformly against him since the year 1815.

The first case is that of *Doe dem Kora Shankho Takoor v. Bebee Munnee* (4), decided in Bengal on 24th November 1815, in which it was held that a Hindu Brahman cannot adopt his sister's son, as [299] it imports incest. It appears from the names of the parties that this was a case between persons governed by the Mitakshara law.

The next case arose in these provinces, and is that of *Shiblall v. Bishumber* (5) in which Ross and Roberts, JJ., held the adoption of a sister's son to be invalid.

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(1) 14 B. 249.

(2) 8 A. 1.

(3) 12 A. 328.

(4) 2 Mor. Dig. 32 = East's Notes Cases 20.

(5) S.D.A. N.W.P. (1866), 25.

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In *Battas Kuar v. Luchman Singh* (1), it was held by Pearson and Spankie, JJ., in 1875, that the adoption of her brother's son by a widow was invalid. This ruling proceeds on the same principle which applies to the adoption of a daughter's son, a sister's son, or a mother's sister's son, and is an authority for holding that the adoption of the persons last named is void among the three higher classes. The correctness of this ruling has been doubted, and Mr. Mayne in his well-known work on Hindu Law and Usage (§ 125) thinks that the effect of the doctrine laid down in it "is to introduce into the Hindu theory of adoption a second fiction for which there is no foundation." With reference to Mr. Mayne's observations I shall only quote the remarks made by Mr. Siromani in his Commentaries on Hindu law. At page 166 (Second Edition) he says:—"If the learned author knew even the elementary canons of our religious observances he could not have made the erroneous assertions contained in his observations." Adoption being both to the husband and the wife, and an adopted son being as much the son of the wife as of the husband, it is asserted by those who dispute the validity of such an adoption that the test of eligibility according to the rule of *Niyoga* and incongruous relationship (*virudha sambandha*) applies also to the case of an adoption by a female, she being in such case the author of the act of adoption. It is not necessary, however, to enter into a consideration of this question at present and it is immaterial for present purposes whether the ruling is correct or erroneous. There may certainly be two opinions in regard to it. That ruling, however, may fairly be regarded as an authority for the principle on which the adoption in this suit is alleged to be invalid.

[300] In *Parbati v. Sundar* (2), Petheram, C.J., and Brodhurst, J., held in 1885 that a Brahman cannot validly adopt his sister's son. The learned Judges, as I have said above, refused "to disturb the long and uniform course of decisions by all our Courts, from the earliest times, upon this point."

This case was appealed to Her Majesty in Council. Their Lordships decided the appeal on other grounds—*Sundar v. Parbati* (3),—but on the question of adoption they expressed themselves as follows:—"If it were necessary to determine the point, their Lordships would probably have little difficulty in accepting the opinion of the High Court that a Hindu Brahman cannot lawfully adopt his own sister's son" (p. 56). This is a very strong expression of opinion, and although for the purposes of the case before their Lordships it was *obiter*, this expression of opinion, coming as it does from the highest tribunal, is entitled to the greatest weight.

I have not referred to the case of *Luchmee Nauth Rao Naik Kaleya v. Musummat Bhina Baee* (4) because, although in that case the Pandit expressed the opinion that the adoption of a sister's son was invalid, the question was not decided by the Court, as the case was disposed of on other grounds.

The only cases in Upper India in which it is said a contrary view was held were: (i) *Ram Chunder Chatterjea v. Sumboo Chunder Chatterjea* (5), decided in Bengal in August 1810; (ii) a case from the District of Mirzapur, decided on 18th July 1808, being case No. XII in Sir William Macnaghten's Principles and Precedents of Hindu Law, Vol. II, p. 185; and

(1) 7 N.W.P. 117.

(4) 7 S D A. N.W.P. 441.

(2) 8. A. 1.

(5) 1 Mor. Dig. 18.

(3) 12 A. 51.

(iii) *Chowdree Purmessur Dutt Jha v. Hunocman Dutt Roy* (1), decided on 18th December 1837. In the first of these cases the adoption of his sister's son by a Brahman was held to be valid, but according to Sir Francis Macnaghten the doctrine which prevailed in that case was overruled by a subsequent proceeding in the Supreme Court (see *Considerations on Hindu Law*, [301] pp. 166, 168): so that the authority of that case has ceased to be of any value. As for the second case referred to above, Sir William Macnaghten was of opinion that it was a case of *Sudras*. The question put to the pandits was whether a daughter's son who had been adopted by his maternal grandfather was entitled to inherit the estate of the maternal grandfather either as his adopted son or as his daughter's son in preference to his brother and nephews. From the nature of the question put and the answers given, it is evident that the adoption was assumed to be valid, and no question arose as to the validity of the adoption. It does not appear whether the case was one between members of the three higher classes, and as the validity of the adoption was not questioned, Sir William Macnaghten was justified in his conclusion that the parties were *Sudras*, among whom such an adoption is admittedly valid. This case cannot therefore be regarded as an authority in support of the validity of an adoption like the one in question. There is no reason for assuming that the case was not one among *Sudras*. Had the parties concerned in it belonged to the three superior classes, the probabilities are very great that the validity of the adoption would have been called into question. Taking the case in the light most favourable to the appellant, it is not an authority one way or the other. The third case mentioned above was that of the adoption of a sister's son in the *Kritrima* form. As an adoption in that form varies in important particulars from an adoption in the *Dattaka* form, that case is no authority on the question with which we have to deal. It is thus clear that except in one case, which was a case between persons governed by the *Dayabhaga* and not the *Benares* school, and which, again, was apparently overruled in subsequent proceedings, it has been uniformly held by the Courts in Upper India since 1815, that the adoption of a person related to the adopter in the way in which the appellant was related to Madho Singh is invalid.

Turning to the Presidencies of Madras and Bombay we find that it was held in *Narasammal v. Bala Rama Charlu* (2) that the adoption of a sister's son was invalid; that in *Jivani Bhai v. Jivu Bhai* (3) [302] and *Gopalayyan v. Raghupati Ayyan* (4) a similar decision was arrived at; that in *Minakshi v. Ramanada* (5) a Full Bench held that "it is the general rule of Hindu law that there can be no valid adoption unless a legal marriage is possible between the person for whom the adoption is made and the mother of the boy who is adopted in her maiden state." The cases of *Vishnu v. Krishna* (6); *Vayidinada v. Appu* (7), and *Virayya v. Hanumanta* (8), referred to by the learned vakil for the appellant, were decided on the ground of the existence of a special usage sanctioning the adoption in question in each of those cases.

The case of *Ramalinga Pillai v. Sadasiva Pillai* (9) was decided by their Lordships of the Privy Council on the ground that the adoption of the respondent had been admitted by the appellant. The marginal note in the report is misleading, as the case was one really of *Sudras* and not

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(1) 1 Morley 19=6 S.D.A. Rep. 192=Mor. Dig. tit. "Adoption," 61.

(2) 1 M.H.C.R. 420.

(3) 2 M.H.C.R. 462.

(4) 7 M.H.C.R. 250.

(5) 11 M. 49.

(6) 7 M. 3.

(7) 9 M. 44.

(8) 14 M. 459.

(9) 9 M.I.A. 506.

1895 of Vaisyas [see *Jivani Bhai v. Jivu Bhai* (1)]. This case is therefore no
JUNE 27. authority on the question before us.

— In Bombay, so far back as 1821, the Sastri declared in the case of
FULL *Haebut Rao Mankur v. Gobind Rao Balwant Rao Mankur* (2) (cited in
BENCH. West and Bühler's Hindu Law, p. 1027) a son of a daughter, a sister or
a mother's sister to be ineligible for adoption except among Sudras. In
17 A. 294 *Gopal Narhar Safray v. Hanvant Ganesh Safray* (3) it was held that
(F.B.)= Brahmans, Kshatriyas and Vaisyas "are absolutely prohibited from, and
15 A.W.N. incapable of, adopting a daughter's or sister's son or the son of any other
(1895) 167. woman whom they could not marry by reason of propinquity." All the
previous cases were cited and considered and they showed a consensus of
opinion on that side of India on the point. This case was followed in
Bhagirthi Bai v. Radha Bai (4). The only case in which a contrary
opinion was expressed was that of *Ganpat Rao Vireshvar v. Vithoba
Khandappa* (5) in which the parties were Vaisyas; but [303] the judg-
ment was based solely on the decision of the Privy Council in *Ramalinga
Pillai v. Sadasiva Pillai* (6) referred to above, which was really a case of
Sudras; so that the ruling last referred to was founded on a misconcep-
tion and was clearly erroneous.

We have thus, as Mr. Mayne says (§128), "a singularly strong series
of authorities in all parts of India forbidding the adoption of the son of a
daughter, a sister or of an aunt." From a comparison of the reported
cases it appears that the cases affecting the present question were more
numerous in the Southern Presidencies than in Upper India. It is a
well-known fact that the rules of marriage and adoption are more lax in
Southern and Western India than in these Provinces, and consequently
usages of marriage and adoption have come into vogue in those presiden-
cies which have given rise in those presidencies to a larger amount of liti-
gation involving questions of adoption than in Upper India. It has been
truly observed by Mr. Mayne (§92) that "the effect that every adoption
must have upon the devolution of property causes every case that can be
disputed to be brought into Court. Notwithstanding the spiritual benefits
which are supposed to follow from the practice (of adoption) it is doubtful
whether it would ever be heard of if an adopted son was not also an heir.
Paupers have souls to be saved, but they are not in the habit of adopting."
The uniformity of decisions on the question of the validity of the adoption
of a daughter's son, a sister's son or the son of an aunt, and the paucity of
cases in which such decisions were given in Upper India, raise, in my opi-
nion, the irresistible inference that such adoptions are rare, if not unknown,
and that the usage of the Hindus of these provinces is to regard such adop-
tions as invalid and not to resort to them. Had such adoptions been com-
mon or numerous there would undoubtedly have been a large amount of
litigation in connection with them. As every adoption had the effect of
diverting the devolution of property from its ordinary channel every person
who would otherwise have succeeded to the property which passed into the
hands of the adopted son, would undoubtedly have [304] contested the
validity of the adoption and the right set up by the adopted son. Not a
single case in these provinces has been brought to our notice in which
such an adoption was held to be valid, and in the few cases which appa-
rently went into Court it was held to be invalid. It is from a similar
absence of rulings validating an adoption in a similar case, and the

(1) 2 M.H.C.R. 462.

(2) 2 Borrodaile, 87.

(3) 3 B. 273.

(4) 3 B. 298.

(5) 4 B.H.C.R., 130 A.C.J.

(6) 9 M.I.A. 506.

existence in that case of rulings declaring the adoption to be void, that in *Tulshi Ram v. Bihari Lal* (1) a similar inference was drawn by the learned Chief Justice and the other learned Judges of this Court. As in my judgment it may be fairly inferred that the usage of the people of these Provinces is in accordance with the doctrine uniformly laid down by the Courts ever since 1815, and that that doctrine has thus received the sanction of usage, the duty of a Judge in this country, as laid down by their Lordships of the Privy Council, is plain. In *The Collector of Madura v. Mootoo Ramalinga Sathupathy* (2) their Lordships said (at page 436) :—"The duty, therefore, of an European Judge who is under the obligation to administer Hindu law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage. For, under the Hindu system of law, clear proof of usage will outweigh the written text of the law." Having regard to these observations of their Lordships, it is our duty to give effect to the usage which, in my judgment, must be inferred to exist in these provinces, and it is not necessary to consider whether the usage has the sanction of the texts of Hindu law.

It is a fact which does not admit of question that the right of adoption is not, according to Hindu law, a right unrestricted by limitations. On the contrary, that law imposes on the right of adoption various and important limitations as to the capacity of the person adopting, of the person giving in adoption, and of the person taken in adoption; and when any of those capacities is absent or defective an adoption is void according to that law. Where, therefore, [305] an adoption, which is alleged to be valid, is set up in opposition to the right of succession of a person who would, in the absence of an adoption, succeed to the property of a deceased person, the validity of that adoption should, in my opinion, be established by the person who sets up the adoption, and the issue is not on the person who asserts the contrary. Where, as in this case, a uniform course of rulings has pronounced against the validity of an adoption like the one in question, and has thus given rise to an inference of usage, albeit the texts and commentaries may be conflicting, any one asserting such an adoption to be valid must found his assertion on the basis of a specific usage to the contrary, which he must clearly establish. It is, I conceive, a usage of this description to which their Lordships of the Privy Council referred, and it does not seem to me that their Lordships meant to lay down that every disputed question of Hindu law should be decided solely with reference to usage. It has not been alleged in this case that a usage obtains among persons of the class to which the parties to this suit belong or in the particular locality in which this suit has arisen which validates the adoption set up by the appellant.

It may be that a contrary usage prevails in the Western and Southern Presidencies. Having regard to the fact that the rules of marriage and adoption are lax in those presidencies, and are not so strictly enforced there as they are in these provinces (see West and Bühler, p. 888, and I. L. R., 9 All., p. 328), to the fact, for example, that a marriage between the children of a brother and a sister is common in the South, whilst such a marriage is regarded as incestuous in these provinces and is wholly unknown among Hindus of the higher castes, it is not surprising that such

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(2) 12 M.I.A. 397.

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a custom should exist in those presidencies. It may also be that a similar custom prevails in the Punjab, but there is nothing to suggest that it obtains in these provinces or in that portion of Lower Bengal which is governed by the Benares School of Hindu law. Mr. Golap Chandra Sarkar's assertion (Tagore Law Lectures, 1888, p. 335) that instances of the adoption of a daughter's son or sister's son among the Brahmans of Bengal are not rare is, as far [306] as I am aware, not well founded; and I have the authority of a late eminent Hindu Judge of the Calcutta High Court to say that not only is such adoption unknown among the Brahmans of Bengal, but it is rare even among Sudras. In these provinces, except among Jains, who are not ordinarily governed by the Mitakshara law, and who have a special custom of their own, the adoption of a daughter's son or sister's son or a mother's sister's son among the three higher classes, is, as far as my judicial experience goes, uncommon; and in the course of my experience as a judicial officer in these provinces, extending over a period of twenty-three years, I cannot call to mind a single instance, except the present case, in which such an adoption among the three higher castes was alleged to have taken place or was asserted to be valid. The non-existence of any reported case in these provinces in which an adoption of this description was held to be valid, the existence of a uniform and long course of decisions in which such an adoption has been held to be invalid, and the paucity of cases in which the validity of such an adoption was questioned, in my opinion, raise, as I have said in another part of this judgment, the inference of a usage in conformity with the rulings. As it has not been asserted in this case that a contrary usage exists among the particular class or in the particular locality to which the parties to this suit belong, we are, in my judgment, bound to hold, in accordance with the long and uniform course of rulings in all parts of India, that the appellant's adoption was invalid. Having regard to those rulings, to the almost total absence of a conflict of authorities based on reported cases, and to the strong expression of the opinion of their Lordships of the Privy Council on the point in the case of *Sundar v. Parbati* (1) the question can no longer be regarded as *res integra*.

Assuming that the question is still an open one, the next point to be considered is whether the case-law on the subject, to which I have referred above, is in accordance with the rules of Hindu law. That they are in accordance with the authority of modern European text-writers on Hindu law is undoubted, and is indeed [307] conceded. The rule relating to the capacity of the person to be adopted is thus stated in Mayne's Hindu Law and Usage, §. 123 (5th edition, pp. 141 and 142):—"The restrictions upon the selection of a person for adoption appear . . . to rest upon the theory, that as the object of adoption was the performance of religious rites to deceased ancestors, the fiction of sonship must be as close as possible. Hence, in the first place, the nearest male sapinda should be selected, if suitable in other respects, and if possible a brother's son, as he was already in contemplation of law a son to his uncle. If no such near sapinda was available, then one who was more remote; or in default of any such, then one who was of a family which followed the same spiritual guide, or, in the case of Sudras, any member of the caste. . . . In the second place, no one can be adopted whose mother the adopted (*sic.* adopter) could not have legally married." "The rule so laid down,"

(1) 12 A. 51.

says the learned author, as is indeed the fact, " was stated by Mr. Sutherland, both the Macnaghtens and both the Stranges, and, as limited to the three regenerate classes, it has been affirmed by a singularly strong series of authorities in all parts of India as forbidding the adoption of the son of a daughter, or of a sister or of an aunt."

The case-law on the subject is thus supported by the unanimous opinion of celebrated European writers on Hindu law, who have hitherto been held to be high authorities on the subject. The only dissentient opinion is that of Dr. Jolly (Tagore Law Lectures for 1883), who for reasons similar to those expressed by Mr. Mandlik in his able notes to the translation of the Vyavahara Mayukha, thinks that " there is very little, if anything, in the Sanskrit treatises to warrant the formation of such a rule " (p. 163). The authority of European writers, it is contended, is founded on the following passage in Sutherland's Synopsis (Stokes' Hindu Law Books, p. 664):—" The first and fundamental principle is that the person proposed to be adopted be one who by a legal marriage with his mother might have been the legitimate son of the adopter. By the operation of this rule, a sister's son and offspring of other females, whom the adopter could not have espoused, and one of a different class, are [308] excluded from adoption." And it is urged that the rule so laid down is different from that propounded in the Dattaka Mimansa (Sec. V, § 16 *et seq.*) and Dattaka Chandrika (Sec. II, § 8) on which it professes to be founded, that consequently the other European text-writers have been misled into adopting a rule for which there is no foundation in Hindu law, and that the Courts in accepting that rule have been misled by those text-writers. It must be borne in mind that Mr. Sutherland's Synopsis contains what must be regarded as the inferences drawn by him from the two works referred to above. Those two works were literally translated by him from the original Sanskrit into the English language. It is not contended that the translations themselves are erroneous except in regard to minor verbal matters. On the contrary all the recent critics of the rule laid down by Mr. Sutherland have conceded that his translation of the original text bearing upon the present question is correct enough. There is therefore no valid reason for the contention that all other European writers and the learned Judges, both European and Indian, who have pronounced an opinion on the question have been guided simply by the inferences drawn in his Synopsis by Mr. Sutherland from the texts of the Dattaka Mimansa and the Dattaka Chandrika. According to the texts of the Dattaka Mimansa and the Dattaka Chandrika the test of eligibility for adoption is " the capability to have been begotten by the adopter, through appointment, and so forth." (Dattaka Chandrika, Sec. V, § 8, and Dattaka Mimansa, Sec. V, § 16.) The authors of the Dattaka Chandrika and the Dattaka Mimansa referred to the ancient practice of *Niyoga*, i.e., the practice of begetting a child by appointment, which has now become obsolete, and is prohibited in the *Kaliyug*; and Mr. Sutherland apparently confused it with marriage. But, as shown in the judgment of the Full Bench of the Madras High Court in *Minakshi v. Ramanada* (1), marriage was not possible where *Niyoga* was impossible, and therefore, in laying down the rule that it was illegal to adopt the offspring of a female whom the adopter could not have espoused, Mr. Sutherland did not propound a theory which could not be legitimately inferred from the Dattaka Chan- [309] drika and the Dattaka Mimansa. And so far as the question now

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before us is concerned, the European text-writers who have followed Mr. Sutherland have not fallen into gross error. I may add that besides the learned European scholars and Sanskritists who have accepted the rule forbidding the adoption of the son of a daughter or of a sister or of an anut, enunciated by Mr. Mayne in § 123 of the Fifth Edition of his work, namely, Mr. Sutherland, both the Macnaghtens, and both the Stranges, and Messrs. West and Bühler (see Hindu Law, p. 1028), two Hindu lawyers, namely, Babu Shyama Charan Sarkar, the author of the Vyavastha Darpan and the Vyavastha Chandrika, and Mr. Siromani, the author of Commentaries on Hindu Law, have adopted the same rule (see Vyavastha Chandrika, Vol. II, pp. 73 and 75, and Siromani's Commentaries, Second Edition, p. 165 *et seq*). The only writers who have expressed a contrary view are Mr. Mandlik, Mr. Golap Chandra Sarkar and Dr. Jolly. They do not deny that the Dattaka Chandrika, the Dattaka Mimansa, and the works of several other commentators are authorities in support of the view which is opposed to their own. They only question the value of those authorities. How far their objections to the value of those authorities ought to prevail I shall consider later on, but I may observe that notwithstanding the criticisms of Mr. Mandlik, a Full Bench of the Madras High Court in *Minakshi v. Ramanada* (1) and a Full Bench of the Bombay High Court in *Waman Raghupati Bova v. Krishnaji Kashiraj Bova* (2), have upheld the authority of the Dattaka Chandrika and the Dattaka Mimansa on questions of adoption. We have thus not only a uniform course of rulings of all the Courts in India since 1815 in support of the position that the adoption of the mother's sister's son is void, but we have also the almost unanimous opinion of modern writers on Hindu law, European and native, that such adoption is invalid.

Let us now consider whether the case-law and the authority of modern writers on the subject are wholly opposed to and inconsistent with what is regarded as the sacred laws of the Hindus. [310] No doubt the "Hindu law must," as observed by the learned Chief Justice in *Beni Prasad v. Hardai Bibi* (3), "be ascertained from a consideration of the text of that law and of the authoritative commentaries, and not by attempting to construe the mistaken and misleading translations or unauthorized interpolations of English translators" (pages 79 and 80).

The sources of Hindu law, I need hardly point out, are the *Srutis* or *Vedas*, the *Smritis* or the institutes of the sages, and the commentaries and digests. The commentaries and digests were written or compiled by later writers with the object of reconciling discrepancies in the sayings of the sages, and laying down complete and consistent codes of rules on different branches of law. The commentaries and digests, therefore, form an important part of the authorities on Hindu law, and have become, as the learned Judges of the Madras High Court have held, "new law sources." According to Mr. Morley (Introduction to the Digest, p. 201*) "for final authority in deciding questions of law, recourse must be had to Commentaries and Digests," and it is these commentaries which, as pointed out by their Lordships of the Privy Council in the Ramnad case (4), have given rise to the different schools of Hindu law. The Mitakshara, which in these provinces regulates most questions of Hindu law, is itself only a commentary, and so are the Dayabhaga and the Vyavahara Mayukha.

[* In 15 A.W.N. (1895) 167 (172), we find for p. 201, p. 211.]

(1) 11 M. 49.

(2) 14 B. 249.

(3) 14 A. 67.

(4) 12 M.I.A. 397 (435).

which are of supreme authority in the Provinces of Bengal and Bombay respectively.

Among the commentaries on the law of adoption are the Dattaka Mimansa and the Dattaka Chandrika, and both of them, and especially the former, have hitherto been regarded as the highest authorities in the Benares School on questions of adoption. According to Sir William Macnaghten, "in questions relative to the law of adoption, the Dattaka Mimansa and the Dattaka Chandrika are equally respected all over India," and "the former is held to be the infallible guide in the Provinces of Mithila and Benares." (Preliminary Remarks, p. xxiii.) This opinion was accepted by Morley in the Introduction to his Digest (p. 217), and the same appears to have [311] been the view of Mr. Colebrooke (see Strange's Hindu Law, Vol. II, p. 133, edition of 1830), and of Sir Thomas Strange himself. In the letter written by him to Lieutenant-Colonel Blackburne, dated 9th May 1812, Vol. II, p. 184, he said that the Dattaka Mimansa by Nanda Pandita was "the highest authority upon the subject of adoption." The same was the opinion of the eminent Hindu lawyer Babu Shyama Charan Sarkar (Preface to the Vyavastha Chandrika, p. 23, and Preface to the Vyavastha Darpan, p. 13). Mr. Sarbadhikari, in the Tagore Law Lectures for 1880, declared the Dattaka Chandrika and the Dattaka Mimansa to be "the reigning authorities" on adoption in all schools (p. 519), and Mr. Siromani in his Commentaries on Hindu Law has recognised the high authority of those two commentaries on questions of adoption. The late Mr. Justice Dwarka Nath Mitter, one of the most eminent Hindu Judges who ever sat on the Bench, expressed the opinion that the Dattaka Chandrika and the Dattaka Mimansa "are undoubtedly entitled to be considered, and have been always considered, as the highest authorities on the subject of adoption" [*Rajendro Narain Lahoree v. Saroda Sonduree Dabee* (1)] and Mr. Justice Romesh Chandra Mitter, in the judgment of the Full Bench in *Uma Sunker Moitro v. Kali Komul Mozumdar* (2) declared, with the concurrence of his learned colleagues, that the two treatises had been always accepted throughout India as conclusive on questions relating to adoption. Dr. Guru Das Banerji (at present a Judge of the Calcutta High Court), in his Tagore Law Lectures for 1878, considered the Dattaka Mimansa to be the "highest authority in the Benares School in matters of adoption" (p. 364). Mr. Justice Nanabhai Haridas concurred with Sir Michael Westropp, C.J., in holding the two treatises to be of the highest authority in Bombay next to the Vyavahara Mayukha [*Lakshmappa v. Ramava* (3)]. Mr. Justice Muttusami Ayyar in the Full Bench case of *Minakshi v. Ramanada* (4) maintained the high authority of those treatises on questions of adoption. In *Tulshi Ram v. Behari Lal* (5) Mr. [312] Justice Mahmood expressed the opinion that the Dattaka Mimansa of Nanda Pandita was "a very high authority" in the Benares School upon questions of adoption, and that "the authoritativeness of the book, so far as the Benares School was concerned, had been fully recognised" (p. 341); and he did not resile from that opinion in *Beni Prasad v. Hardi Bibi* (6). The authority of the Dattaka Chandrika and the Dattaka Mimansa was recognised by the Lords of the Privy Council in *The Collector of Madura v. Mootoo Ramalinga Sathupathy* (7). Their Lordships said at page 437:—"Of the Dattaka Mimansa of Nanda Pandita

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(1) 15 W. R. 548.

(2) 6 C. 256 (265).

(3) 12 B.H.C.R. 364.

(4) 11 M. 49.

(5) 12 A. 328.

(6) 14 A. 67 (108).

(7) 12 M.I.A. 397.

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and the Dattaka Chandrika of Devan and Bhatta, two treatises on the particular subject of adoption, Sir William Macnaghten says that they are respected all over India, but that when they differ the doctrine of the latter is adhered to in Bengal, and by the southern jurists, while the former is held to be the infalliable guide in the Provinces of Mithila and Benares." In *Waman Raghupati Bova v. Krishnoji Kashiraj Bova* (1), a Full Bench of the Bombay High Court said that the Dattaka Mimansa and Dattaka Chandrika had been regarded in that Court as the leading authorities on the subject of adoption, and that in spite of the criticisms of Mr. Mandlik to the contrary, that Court "did not see reason to depart from the standard it had uniformly applied in appreciating the value of the different text writers." A Full Bench of the Madras High Court also maintained similar views in the case of *Minakshi v. Ramanada* (2) to which I have referred above.

We have thus a singular consensus of opinion as to the high authority of the Dattaka Mimansa and the Dattaka Chandrika on questions of adoption. It is said that those two treatises have become widely known to the Judges and to European text-writers by reason of the fact that they were translated by Mr. Sutherland, and he set a high value on them, and that among Hindu lawyers and the Hindu public they are not known and their authority is not followed. Whatever the state of things may be in the Presidency of Bombay, there does not appear to me to be any warrant for the above [313] statement so far as these Provinces are concerned. Nanda Pandita, the author of the Dattaka Mimansa, was, according to the account furnished to Mr. Mandlik by the well-known Pandit Balshastri of Benares, a resident of that city. His ancestors removed from Bedar in Southern India to Benares. He wrote his commentary on Vishnu entitled *Kesava Vaijayanti*, in 1633 A. C. (Siromani's Hindu Law, p. 37). The Dattaka Mimansa is supposed to be a later work, but as reference is made to it in the *Vaijayanti* (see chap. 24) it seems to have been written before, or at least contemporaneously with, the *Vaijayanti*. It must, therefore, have been written in the early part of the seventeenth century, that is, between two hundred and fifty and three hundred years ago. The Dattaka Chandrika was written a few years earlier, and it is wholly immaterial whether the author of it was a person of the name of Kuvera, a native of Bengal, as Mr. Mandlik says, or Devanand Bhatta, as stated by Mr. Sutherland. There can be no doubt as to the authenticity of that work, and I am not prepared to place any value on the story which Mr. Golap Chandra Sarkar has stated to the contrary in his *Tagore Law Lectures*. A printed edition of both the Dattaka Chandrika and the Dattaka Mimansa appeared in Calcutta in 1817, and a translation of them into English by Mr. Sutherland was published in 1821 (*Morley's Digest*, Introduction, p. 216). From Mr. Sutherland's Preface the translation appears to have been commenced about 1814 and completed in 1819 (*Stokes' Hindu Law Books*, page 529), and the translation apparently did not become known to the public until some time in 1821. There is, however, clear and unmistakable evidence to show that the two works were well known to Hindu pandits and lawyers.

In the second volume of Macnaghten's *Principles and Precedents of Hindu Law*, where he has collected the opinions of Hindu law officers upon questions propounded to them, I find that as authorities for the answers

(1) 14 B. 249.

(2) 11 M. 49.

given to the questions put to the pandits in Case XVIII (pp. 197, 198, 199) they, on 20th April 1810, referred both to the Dattaka Mimamsa and the Dattaka Chandrika. In the case of *Raja Sumsheer Mul v. Rani Dilroj Koonwar* (Case XIV, p. [314] 189), which was a case from the Gorakhpur district and was decided on the 3rd January 1815, the Dattaka Mimamsa was relied upon, and it was distinctly stated in the opinion of the Hindu law officers that the adoption referred to in that case was "allowable according to the Dattaka Mimamsa, which is current in Gorakhpur." Similarly the opinion expressed in Case V (p. 180) on 19th March 1815, was stated to be "conformable to the doctrines of Manu, the Vyavaharatatwa, the *Dattaka Mimamsa* and other law books." In 1823, 1824 and 1826 both the Dattaka Mimamsa and the Dattaka Chandrika were referred to by the pandits in the cases mentioned in pages 175, 179 and 183. Turning, again, to Strange's Hindu Law, I find under "*Responsa Prudentum*," a case decided by the Provincial Court of Masulipatam on 27th July 1809 (Vol. II, p. 103) in which the pandit in his answer referred to the Dattaka Mimamsa and the authority of Sakala quoted in it. Mr. Ellis, in a paper communicated on 16th August 1812, referred "to a correct copy of Nanda Pandita's Dattaka Mimamsa procured at Madras." (Strange's Hindu Law, Vol. II, p. 169). In the case of *Raja Haimunchull Singh v. Koomer Gunseeam Singh* (1) which was a case from the Etawah district, instituted in 1810 and decided in 1813 by the Provincial Court, and in 1817 by the Sadar Dewani Adalat of Bengal, within whose jurisdiction the district of Etawah then was, the pandits referred to the Dattaka Mimamsa "as in force in the zilla Etawah." The pandits of the Provincial Court of Bareilly no doubt referred to the Mitakshara and the Vyavahara Mayukha, a work of authority in Bombay; but it must be borne in mind that the Mayukha also deals with the question of adoption, and being, like the Mitakshara, a commentary on Jajnavalkya, it could with propriety be referred to at the same time with the Mitakshara. It is thus clear that even before Sutherland had commenced to translate the Dattaka Chandrika and the Dattaka Mimamsa, those works were well-known among Hindu pandits as authorities on questions of adoption not only in Northern India, but also in the Presidency of Madras. It is true that no reference is made to them in Colebrooke's Digest of Hindu Law compiled in 1796, but it must be remembered [315] that in the Digest very little prominence was given to the question of adoption. It may be that Jagannath Tarkapanchanan, the author of the Vivadabhangarnava, which is the original of Colebrooke's Digest, was not aware of the Dattaka Chandrika and the Dattaka Mimamsa or did not consider them to be works of authority, but the Privy Council in *Rungama v. Atchama* (2) followed those treatises in preference to Jagannath's work. Besides, whatever may be the authority of Jagannath Tarkapanchanan in the Bengal school he is not regarded as an authority in the Benares school, and his own translator, Mr. Colebrooke, said of him that "we have not here the same veneration for him when he speaks in his own name" (Strange's Hindu Law, Vol. II, p. 176). Mr. Colebrooke, himself, as I have said above, considered the Dattaka Mimamsa to be a work of authority. In a letter which he wrote to Sir John Royds on 14th March 1812, he said with reference to that treatise, that it was "no doubt the best treatise on Hindu adoption" (Strange's Hindu Law, Vol. II, p. 133). I need hardly add that Mr. Sutherland considered the Dattaka Mimamsa and the Dattaka Chandrika to be works

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of great authority. In the Preface to his translation he said "the Dattaka Mimamsa is the most celebrated work extant on the Hindu law of adoption. Its author, Nanda Pandita, has attained considerable literary pre-eminence." "The Dattaka Chandrika . . . is a work of authority, and supposed to have been the ground work of Nanda Pandita's disquisition" (Stokes' Hindu Law Books, p. 527). The reason why, among all others, he selected the two works for translation was that, "justly or unjustly," they were held in estimation, and that such was the fact I have shown from the references made to them by pandits so far back as 1809 and 1810.

It is true that the Dattaka Chandrika and the Dattaka Mimamsa are works of a comparatively recent date, though they are now more than two hundred and fifty years old. But the law of adoption is itself of recent development. In early times when there were twelve modes of affiliating sons, the adopted son held a very unimportant and inferior position. But as with the growth of time the Hindu mind [316] formed different conceptions in regard to the relations of the sexes, and all other forms of affiliation fell into desuetude, adoption came into great prominence, and in modern times the only sons who received recognition were the son born and the adopted son. It is, therefore, natural to expect that it is modern writers only who would deal elaborately and comprehensively with the law of adoption. Two of the earliest treatises which treated solely of adoption appear to have been the Dattaka Chandrika and the Dattaka Mimamsa, and as they have been in existence for nearly three centuries, and have, as I have shown above, been recognised as the highest authorities on questions of adoption, not only by European text-writers, but by almost all the Hindu Judges who have sat on the benches of the different High Courts; by other eminent Judges, European and Indian; by two Full Benches of the Madras and the Bombay High Courts; by their Lordships of the Privy Council; by almost all Hindu text-writers; by Hindu pandits who have since the commencement of the present century expressed opinions on questions of Hindu law, it seems to me to be too late now to ignore the authority of those treatises and in the face of such a strong array of authority one should hesitate to accept the contention of the learned vakil for the appellant that no value should be placed on them. It is noteworthy that so far as the present question is concerned (1) the Sanskara Kaustubha; (2) the Dharma Sindhu; (3) the Dattaka Nirnaya (which are authorities in the Western Presidency, see Mandlik, p. 489); (4) the Dattaka Kaumudi (see Jolly, p. 308, and Golap Chandra Sarkar, p. 327); (5) the Dattaka Darpana; (6) the Dattaka Didhiti; (7) the Dattaka Manjari (see Sarkar, p. 327); and (8) the Dattaka Siromani (see Appendix to Dr. Jolly's Tagore Law Lectures), are of the same opinion as the Dattaka Mimamsa and the Dattaka Chandrika.

It has been observed with great truth by Messrs. West and Bühler (p. 865) that "in the present day it does not seem likely that the fountain heads of the law will be much drawn on for new principles in the Law of Adoption. They are indeed too meagre to afford such principles save through an elaborate process of construc-[317]tive inference. To this they have been subjected by the Hindu writers for many centuries, and the rules deduced by these writers have in their turn been tried and sifted by express or tacit reference to the usages and the peculiarities of Hindu society, until those best suited to its needs have been ascertained and appropriated. The Smritis come nearer than the Veda to modern practice, but the most important authorities are the writers such as have

been referred to, whose expositions have partly embodied and partly fashioned the customary law." A similar view was held by a Full Bench of the High Court of Madras in *Minakshi v. Ramanada* (1) to which I have often referred. The learned Judges said:—"The suggestion made by the appellant's pleader that we should now see whether the commentator's interpretation by analogy was justifiable cannot be adopted. It should be remembered that in several instances the commentaries themselves have become new law-sources, owing to the adoption of the opinion expressed therein by the people as part of the customary law. It is not possible to say beforehand, except by reference to actual usage, whether the opinion of the commentator on any particular point is part of the Hindu law as received by the people; and the only course open to Courts of Justice is, as pointed out by Muttusami Ayyar, J., in the *Sivaganga* case,—*Mutta Vaduganadha Tevar v. Dora Singha Tevar* (2)—to take the commentaries which are accepted generally as authoritative as containing the law applicable to the parties, unless they show by clear evidence that in some special matter the usage of the people is not in accord with them."

These observations, in my opinion, carry great weight and they have my full concurrence. The commentaries, in the present days, are an important factor in determining what in respect of each particular question are the sources of Hindu law, and unless it can be shown that they are in direct violation of established rules of law as propounded by the Sastras, or of ancient usages clearly proved to exist in a particular locality or among a particular class, their authority should not be ignored simply on the ground that some of the [318] arguments advanced by them may be open to criticism. In this view, having regard to the fact that the *Dattaka Mimansa* and the *Dattaka Chandrika* have for three quarters of a century received judicial recognition in all parts of India as works of paramount authority on questions of adoption, any one now attempting to detract from their value must do so on very cogent grounds. Such grounds have not, in my opinion, been established in this case.

It is not disputed that according to Nanda Pandita, the author of the *Dattaka Mimansa*, and to the author of the *Dattaka Chandrika*, the adoption of a daughter's son, a sister's son or a mother's sister's son is absolutely interdicted. Let us see whether this interdiction is supported by the texts of any of the sages, or it is opposed to any such texts.

Both the works rely upon the following text of Sakala, also called Sakalya:—

"Let one of a regenerate tribe destitute of male issue, on that account, adopt as a son the offspring of a sapinda relation particularly: or also, next to him, one born in the same general family: if such exist not, let him adopt one born in another family: except a daughter's son, a sister's son and the son of the mother's sister." (*Datt. Mim.*, sec. II, § 107); and (*Datt. Chand.*, sec. I, § 11.)

The above is Mr. Sutherland's translation and Mr. Golab Chandra Sarkar's translation is also to the same effect. There can be no doubt that the above text of Sakala contains a positive interdiction against the adoption of the son of a daughter, a sister or a mother's sister. It confers a right with a limitation, the limitation being the exclusion of the daughter's son, the sister's son, and the mother's sister's son. As the right exists with the prohibition, whoever exercises the right must abide by the prohibition. On this ground Mr. Golab Chandra Sarkar's argument

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(1) 11 M. 49.

(2) 3 M. 290.

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that the rule being enabling and optional the prohibition is optional also, is, in my judgment, fallacious. No reason having been given for the prohibition, it must, according to Jaimini's rule of construction, be held to be a positive and absolute prohibition, and not a mere direction. [319] Sakala's authority as a Sutra writer is undoubted. The principal *Sakha* of the Rig-Veda is called after his name (see Mandlik's Introduction to the Mayukha, p. 8, and Siromani's Hindu Law, p. 20). He is mentioned in the Smriti Ratnakara as one of the writers of the nine *purva* (prior) Sutras. (Mandlik's Introduction, p. 13, and Siromani, p. 24.) In the Mahabharat he is named as a lawgiver (Mandlik's Introduction, p. 15). In the Preface to the Vyavastha Chandrika (p. 4) he is enumerated among "the sages who wrote on the Dharma Shastra;" and in West and Bühler (p. 28), he is mentioned as a Smriti writer, part of whose writings was in existence. He is also mentioned as a *rishi* in Colebrooke's Essays on the Religion and Philosophy of the Hindus, contributed to the Asiatic Researches in 1798 and 1805. No reason has been shown to us to justify our assuming that the text cited in the Dattaka Chandrika and the Dattaka Mimansa as that of Sakala is not genuine, or that it is incomplete. It is too much to assume that the text was fabricated by the authors of those two treatises. Portions of Sakala's writings are, according to West and Bühler, now extant, and had the text attributed to him not been genuine, there would have been no difficulty in establishing its falsity. It would not certainly have been allowed to go unchallenged for upwards of 250 years, and the several native Hindu lawyers who have written on adoption would not have accepted the rule propounded by him. There is thus the undoubted authority of Sakala in support of the rule of exclusion laid down in the Dattaka Chandrika and the Dattaka Mimansa.

The next authority for Nanda Pandita's conclusion is a text of Saunaka. He, too, was a *rishi* of unquestioned authority. He was referred to as an authority even by Manu. In Chapter III, v. 16, Manu said:—"According to Atri and to (Gotama) the son of Utathya, he who thus marries a woman of the servile class, *if he be a priest*, is degraded instantly; *according to Saunaka* on the birth of a son, *if he be a warrior*." (See Sir William Jones's translation of the Manava Dharma Shastra, edition of 1863, p. 49; also Sacred Books of the East, Vol. XXV, p. 78). The Saunaka Smriti [320] is in existence, and has been partially translated by Dr. Bühler in the Journal of the Asiatic Society, Vol. 35, Part I, p. 149 *et seq.* Portions of his text bearing on the present question are cited in the Dattaka Mimansa (Sec. II, § 74. and sec. V, §§ 16 and 18). A translation of the whole text is given in Mr. Golap Chandra Sarkar's Hindu Law of Adoption, p. 308. That portion of it which has been reproduced in the Vyavahara Mayukha has been translated at pp. 52 and 53 of Mr. Mandlik's book, and Mr. Mandlik has in a subsequent part of his work given a translation of his reading of a portion of the text.

The rule which Nanda Pandita has deduced from the text of Saunaka is that no one is eligible for adoption between whom and the adopter there is incongruity of relationship (*virudha sambandha*), and as the incongruity which exists between a person and his daughter's son or sister's son or his mother's sister's son is such as would prevent the latter being the son of the former, the latter cannot be adopted by the former. "The test for determining whether an affiliation involves incongruous relationship is," according to Nanda Pandita, "the capability to have sprung from (the adopter) himself through an appointment (to raise issue on another's wife) and so forth" (sec. V, § 16).

It must be borne in mind that the object of adoption being the affiliation of a son for spiritual benefit and the perpetuation of lineage, the ancient writers on Hindu law were anxious that the adopted son should, as far as may be, resemble a son born, and be able to confer spiritual benefit with efficacy. "He is to be," as Sir Thomas Strange says (Vol. I, p. 83), "at the least such as that he might have been his son." And as Mr. Mayne says (§ 94) "he was to look as much like a real son as possible, and certainly not to be one who could never have been a son." It was for this reason, it seems, that Manu ordained in Chapter IX, v. 168, that the boy to be adopted was to be *putra sadrisa*, that is, was to resemble or be like a son. For the same reason Saunaka declared that he should be *putra chchhaya baham*, i.e., should "bear the reflection of a son." Neither of them said in what respect the resemblance was to be. [321] With regard to the dictum of Manu, some of his commentators were of opinion that the resemblance was to consist in the adopted son being of the same class as the adopter. With reference to Saunaka's text, Nanda Pandita declared that the resemblance was to consist in "the capability to have sprung from (the adopter) himself, through an appointment (to raise issue on another's wife), and so forth; as (in the case) of the son, of a brother, a near or distant kinsman, and so forth" (Sec. V, § 16); and he deduced the conclusion that "the brother, paternal and maternal uncles, the daughter's son, and that of the sister are excluded: for they bear not resemblance to a son" (§ 17).

It was contended that Saunaka did not intend the words "bearing the reflection of a son" to be a limitation to the adoptee's capacity to be adopted, and that the resemblance was not intended to be antecedent to the ceremony of adoption. In support of this last contention, reference has been made to the translation of the text in question by Dr. Bühler in the Asiatic Researches, p. 160, which is as follows:—"He then should adorn the child which (now) resembles a son of the receiver's body, with the dresses and other (ornaments mentioned before)." And it is said that what is meant is that the boy has by reason of the ceremonies of giving and taking become a resemblance of the son. This contention is not, in my opinion, valid. The passage is thus translated by Mr. Golap Chandra Sarkar (p. 308), and Mr. Mandlik's translation is nearly in the same terms:—

"The giver *being capable of the gift* should give to him with the recitation of the five *riks* commencing with '*ye yajuna*.' (The adopter) having taken (the boy) by both hands . . . having adorned the boy *bearing the reflection of a son* with clothes and the like; having brought him accompanied with dancing . . . should complete the remaining part of the ceremony. The whole context of this passage shows that prior to the performance of all the ceremonies which would complete the adoption, the giver should be a person "capable of the gift," and the boy should be one "bearing the reflection of a son." It cannot, in my opinion, be reasonably [322] contended that the boy "now bears the reflection of a son," because by reason of the adoption he does not become the reflection of a son but for all practical purposes he becomes the actual son of the adopter with all the rights and obligations of a real son, and I am of opinion that the meaning put on the text by Nanda Pandita is its true meaning. It has been fully shown in the judgment of the Full Bench of the Madras High Court in *Minakshi v. Ramanada* (1) that the

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rule of exclusion deduced by Nanda Pandita founded on propinquity and incongruous relationship is not an inconsistent rule, and all I need say is that I concur in that judgment and in the reasons given in it for the conclusion at which the learned Judges arrived. The object of marriage among Hindus is to procreate a son able to confer spiritual benefit, and this cannot be done by the issue of an incestuous marriage. Hence the rules for marriage within prohibited degrees. The same being the object of the procreation of a son through the now obsolete practice of *Niyoga* rules of prohibited relationship in *Niyoga* were also provided. As adoption is resorted to for a similar object, similar rules of exclusion founded on the analogy of *Niyoga* are the necessary consequence of the requirement of Saunaka that the son to be adopted should "bear the reflection of a son" that is, of a son born in wedlock: otherwise the efficacy of adoption would fail, as in that case the son to be adopted would bear the resemblance of the issue of an incestuous connection. Hence the rule propounded by Nanda Pandita in section V, § 20, that "such person is to be adopted as with the mother of whom the adopter might have carnal knowledge," as translated by Sutherland, or "for the mother of whom the adopter may feel sexual love," as translated by Golap Chandra Sarkar, is a legitimate inference from and is warranted by the text of Saunaka that the adopted son should bear the reflection of a son—a text which thus imposes a prohibition on the adoption of persons of the description mentioned in § 20 of section V of the Dattaka Mimansa. As the son of the mother's sister comes within that description of persons the adoption of such a son is interdicted by Saunaka.

[323] Another text of Saunaka on which Nanda Pandita relies is thus stated in § 74, section II of Sutherland's translation:—"Of Kshatriyas, in their own class positively: and [on default of a sapinda kinsman] even in the general family, following the same primitive spiritual guide (Guru): of Vaisyas, from amongst those of the Vaisya class (*Vaisya jateshu*): of Sudras from amongst those of the Sudra class. Of all, and the tribes likewise, [in their own] classes only; and not otherwise. But a daughter's son and a sister's son are affiliated by Sudras. For the three superior tribes, a sister's son is nowhere [mentioned as] a son." The last two sentences are thus rendered by Mr. Mandlik (p. 491):—"A daughter's son or a sister's son is adopted as a son by Sudras alone. In the case of the three classes beginning with the Brahmana, a sister's son [and a daughter's son] are nowhere mentioned as sons."

The last sentence is not quoted in the extract from Saunaka given in the Vyavahara Mayukha (see Mandlik, pp. 52 and 53), and it apparently did not exist in the copy of the Saunaka Smriti which was translated by Dr. Bühler. If that sentence does not appear in the text, the argument that it was a reason for the rule propounded in the text, *viz.*, that a daughter's son and a sister's son can be affiliated by Sudras only, and that by applying Jaimini's rule of interpretation the said rule could be regarded only as directory, and not as mandatory, falls to the ground. If the sentence "for the three superior tribes, a sister's son is nowhere (mentioned as) a son," does as a matter of fact, appear in the text, and the weight of authority is that it does, Saunaka does not use it as a reason for what precedes (although Nanda Pandita thinks that he does), and therefore the text of Saunaka, as a whole, cannot be regarded as a direction merely. The text appears in several manuscript copies of the Saunaka Smriti now in existence. As I read the text, it lays down the rule as to the classes of persons from among whom the boy to be adopted should be selected; and it

provides an exception to that rule in the case of a daughter's son or a sister's son who, it says, is not eligible for adoption except among Sudras, and is forbidden to the three superior classes. This text is, in my opinion, a positive [324] interdiction against the adoption of a daughter's son or a sister's son among the three higher classes and cannot be treated as directory merely.

Referring to this text, Nanda Pandita says in section II, §91:— "The part of the text, (but a daughter's son, &c.,) propounds an exception, as to those of the three first tribes, with respect to the daughter's son and sister's son, inferred from the mention of propinquity in the general." In §92, he says "since (the particle 'but' having an exclusive import) a restriction, by Sudras only, is conveyed; those of the three first tribes are excluded." And the conclusion at which he arrives is, "that the expression 'sister's son' (in the last sentence of Saunaka's text, §74), is illustrative of the daughter's son, and mother's sister's son, and this is proper: for, prohibited connection is common to all three" (§108).

The result of Nanda Pandit's argument is that he deduces the rule of exclusion based on propinquity. For that rule he has, as I have said above, the authority of Sakala, who imposes a positive interdiction. He has also the authority of Saunaka, who, in requiring that the boy to be adopted should bear the reflection of a son, also lays down a prohibition. The remainder of his text, quoted above, also imposes a prohibition, as I have said above. But whether that portion of his text only propounds an existing rule or lays down a rule which is only directory or imposes an absolute interdiction, Nanda Pandita has relied upon it as only illustrative of the rule which he has deduced—an exception to that rule existing in the case of *Sudras* only. For this conclusion he had sufficient authority in the texts of Saunaka. The exception in the case of *Sudras* does not make his rule inconsistent, for, as was observed by Westropp, C.J., in *Gopal Narhar Safray v. Hanmant Ganesh Safray* (1), on the strength of a note supplied to him by that eminent Judge and Sanskritist, Sir Raymond West, "the Hindu law regarded the *Sudras* as slaves, and their marriages as little better than concubinage."

[325] It has been contended that Nanda Pandita's conclusion, and the rules propounded by him, are not supported by any text of *Manu* or *Vasishtha* or *Yajnavalkya*. This is true: but it must also be remembered that those sages did not deal completely and exhaustively with the law of adoption as existing among *Hindus*, and did not lay down full and clear rules as to the qualifications of the persons to be adopted. The absence of any texts in their writings is not therefore surprising, and cannot affect the present question one way or the other.

It is next urged that there is a text of *Yama* which is inconsistent with the rule laid down in the *Dattaka Mimamsa* and the *Dattaka Chandrika*, and which sanctions the adoption of a daughter's son. This text has been quoted by Mr. Mandlik at page 483, and is as follows:—"In the case of a daughter's son and a brother's son, the rule in regard to a sacrifice and the like does not prevail. (The act of adoption) is complete by a verbal gift alone, so says the holy *Yama*." The text evidently refers to ceremonies connected with adoption and is alleged to have been quoted in the *Sarasvativilasa*, which is a work accepted in the Bombay Presidency, but is of no authority in the Benares School. Mr. Mandlik does not vouch

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that the text appears in the *Sarasvativilasa*, but he says that the verse is quoted in the *Dattaka Darpana* with the preamble that "it is said in the *Sarasvativilasa*" that the text referred to was a text of Yama. We have thus for the authenticity of the text the fact that the *Dattaka Darpana* says that it is said in the *Sarasvativilasa* that Yama says that in the case of the adoption of a daughter's son the rule with regard to a sacrifice does not prevail, and thus sanctions by implication the adoption of a daughter's son. This certainly is very meagre evidence of the authenticity of the text attributed to Yama. It is not alleged that the text appears in the *Yama Smriti* and *Yamadharmasastra*, which are now extant and to which reference is made by Mr. Mandlik at pages 295, 296 and 297. Mr. Golap Chandra Sarkar admits at page 334 that he has not seen the text cited in any commentary of note, and that he only heard Pandit Bharat Chandra Siromani repeat it to his pupils. [326] It is noteworthy that Pandit Bharat Chandra Siromani does not refer to the text in his own work on adoption called the *Dattaka Siromani*. This circumstance raises the inference that Pandit Bharat Chandra Siromani himself did not consider the text to be authentic. It is not in the *Yama Sanhita* recently published in Calcutta. Even if the authenticity of the text of Yama be conceded we have a text which is in conflict with the text of Sakala and Saunaka. Now, where there is a conflict of texts "there are," according to Mr. Mandlik (p. 492), "two ways in which our jurists get out of such a difficulty, one is to follow either text; the other is to hold that the two texts refer to different parts of the country. The *Dattaka Nirnaya* quotes an authority for the latter mode of interpretation:—'When *Srutis* or *Smritis* disagree (on any point), a difference of place (where they are adopted) is assumed (for the purpose of reconciling them).'" And Mr. Mandlik thinks "that the existence of the prohibition in reference to some parts of India, and the non-existence of it in reference to others is . . . the real solution of the whole question." The text attributed to Yama may, according to Mr. Mandlik's reasoning, be an authority for the adoption of a daughter's son in the Presidency of Bombay, where the *Sarasvativilasa* is accepted, as an authority, but cannot be regarded as of any value in these provinces, and cannot override the texts of Sakala and Saunaka on which commentaries, recognised as high authorities on this side of India for nearly three centuries, are founded.

In the face of the consensus of authority to which I have referred above, all leading to only one conclusion, I am not prepared to accept the contentions of the learned vakil for the appellant which are founded on the criticisms of Messrs. Mandlik and Sarkar and of Dr. Jolly, most of which are attempts to prove that Nanda Pandita's conclusions are erroneous.

As for Mr. Mandlik's objections they are based mainly on the text of Yama referred to above, and on the existence of a usage in the Bombay Presidency in conflict with the rule laid down in the *Dattaka Mimansa*. I may repeat what I have already said that, [327] notwithstanding Mr. Mandlik's criticisms, the High Courts of Bombay and Madras have in Full Bench refused to accept his views and to ignore the authority of the *Dattaka Mimansa*. Besides, as his arguments have chiefly for their basis the custom of adoption prevailing in the Western Presidency, they have no weight in these provinces. Mr. Golap Chandra Sarkar's principal argument is that as the affirmatory rule as to the choice of the persons to be adopted is directory, the exception to that rule cannot be imperative. This, as I have said above, is a fallacy and the learned vakil for the

appellant has frankly admitted it to be so. Dr. Jolly's objections have reference to the conclusions of Nanda Pandita, the obsolescence of the doctrine of Niyoga, and the incorrectness of Sutherland's marriage theory. These I have already disposed of.

The only other question which has been pressed on our consideration is whether the prohibition against the adoption of a mother's sister's son is directory only or absolute. This point I have already dealt with. In my opinion according to the texts of both Sakala and Saunaka, such adoption is absolutely interdicted and void and cannot be validated by the rule of *factum valet*. The transaction being a nullity, there could be "in such case no *factum*" (per Westropp, C.J., in *Lakshmappa v. Ramana* (1)).

We have thus on the question of the validity of an adoption like that alleged by the appellant the texts of two Smriti writers interdicting such an adoption and no positive text authorizing it. We have against the validity of such an adoption the authority of the Dattaka Mimansa and the Dattaka Chandrika, which have been held to be paramount by almost all modern text writers, European and native: by almost all the Hindu Judges of the different High Courts; by most European and other Judges, some of whom were eminent Sanskrit scholars; by the Full Bench Rulings of two High Courts; by Hindu Pandits and Sastris ever since 1809; and by their Lordships [328] of the Privy Council. We have the further fact that such adoption has been condemned by no less than eight other modern Hindu writers on the law of adoption, to whom I have referred above, who have formed independent opinions of their own and have not blindly followed the Dattaka Mimansa and the Dattaka Chandrika. We have also the fact that since 1815 all the Courts in India have held such adoption to be void, and except a single case in 1810, which Sir Francis Macnaghten says was subsequently overruled, there is not a single reported case in any part of India in which a contrary view was held. We have then against the validity of the appellant's adoption, not only a uniform course of judicial decisions, extending over more than three quarters of a century, but also the inference of the existence of a usage in conformity with what has for such a long period been understood to be, and accepted as the law of the Benares School on the subject, and not the faintest suggestion of the existence of a contrary usage. We have thus against the appellant's contention everything which in these days must be regarded as the sources of Hindu Law, viz., (1) Authorities of Sages and Commentators; (2) Judicial Decisions, and (3) Usage. So that, in the words of that eminent Judge, Mr. Justice Mahmood, "we should be doing nothing more nor less than introducing not only a social, but a religious innovation, and disturbing the accepted rules of succession to property by adopted sons if we were to abrogate the uniform course of decisions in this part of the country dating so far back as 1815." "We should," to quote the same learned Judge, "be shaking settled titles and undoing the uniform judicial exposition of more than half a century of British rule in India, if we were . . . to adopt the argument of the learned vakil for the appellant that ever since 1816 (1815 in this case) the Courts of British India have misunderstood the doctrines of the Benares School of Hindu law as to adoption." *Tulshi Ram v. Behari Lal* (2).

For the above reasons I hold that the alleged adoption of the appellant was void, and I would dismiss this appeal with costs.

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(2) 12 A. 328 (385).

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[329] AIKMAN, J.—I have had the privilege of reading the judgments of the learned Chief Justice and my brother Banerji. It must, I think, be admitted that in his able and exhaustive judgment the Chief Justice has succeeded in demonstrating that the weight of authority against the legality of the adoption which the appellant seeks to set up is not by any means so overwhelming as Mayne and other writers on Hindu law have believed it to be. But when all has been said, I think there is still, as is shown by my brother Banerji in his judgment, strong authority for holding that the adoption is illegal according to Hindu law, and that it is therefore incumbent on the appellant to adduce clear proof of usage if he wishes the adoption to be maintained. This he has not done. It would be difficult for the other side to prove that there is no such usage; but in my humble opinion there is some force in the argument which the learned vakil for the respondents based on the very small number of reported cases in which the legality of such an adoption has been challenged. As Mayne remarks, "the effect that every adoption must have upon the devolution of property causes every case that can be disputed to be brought into Court." It seems to me that, if there were no bar against it, a sonless Hindu would from natural affection prefer to adopt the son of a daughter, a sister, or a mother's sister rather than the son of a more distant kinsman; such an adoption if made would undoubtedly, on the authorities as they at present stand, be eminently capable of being disputed, and I therefore think that it is not unreasonable to draw an inference from the paucity of reported cases against the existence of any such usage. This may not be a very strong argument, but such as it is, it to my mind tells in favour of the respondent. It is true that the authors of the Dattaka Mimansa and Dattaka Chandrika, the special treatises on the subject of adoption, are only commentators. But the works of commentators occupy a peculiar position in Hindu jurisprudence. Wilson, in his introduction to Sir. W. Macnaghten's Principles of Hindu and Muhammadan Law, remarks:—"The law books of the Rishis, even of Manu and Yajnavalkya, although they furnish the groundwork of Hindu jurisprudence, are not regarded as prac-[330]tical guides, except when elaborated by their commentators, as in the case of the Mitakshara, works of preferable weight on the systems of late jurists, or separate treatises on special topics, as inheritance, adoption and the like (p. XV, Introduction)."

The authors of these two treatises pronounce against the legality of an adoption such as that set up by the appellant. The text of * Sakalya, which they each cite, clearly bears out their view, and I do not think we have sufficient ground for supposing that they have either invented or garbled this text.

The authors of these treatises also rely on a text of Caunaka, which contains this passage: "For the three superior tribes, a sister's son is nowhere (mentioned as) a son." In s. II § 108 of the Dattaka Mimansa, the author, Nanda Pandita, referring to the above passage of Caunaka,† holds that the expression "sister's son" is illustrative of the daughter's son and mother's sister's son, and he goes on to say,— "This is proper, for prohibited connection is common to all three." From this and other passages (see in particular Dattaka Mimansa, v. 20) Sutherland has formulated the rule that no one can be adopted whose mother the adopter could not legally have married. If the assertion of Caunaka that "a

* Sakalya Ed.

† Saunaka Ed.

sister's son is nowhere mentioned as a son for the three superior tribes " can be, as Nanda Pandita supposes, looked on as a "reason" for what immediately precedes, this might, applying the rule of construction set forth in the Mimansa of Jaimini, render the preceding passage an admonition and not a positive prohibition. But this course of construction will not affect the broad statement in the passage quoted, as it itself is not followed by any reason. The passage quoted seems to me to be neither a prohibition nor an admonition, but simply the assertion of a fact. The case law on the question has been gone into exhaustively in the judgments of the learned Chief Justice and my brother Banerji.

I regret much that I find myself on the question referred to us unable to agree with the learned Chief Justice and the majority of my colleagues. I concur with my brother Banerji, and hold that [331] the adoption propounded by the appellant is contrary to Hindu law, and is not shown to be sanctioned by any special usage of the caste to which he belongs. I would therefore dismiss this appeal.

EDGE, C. J.—The suit in which this appeal has arisen was brought by the paternal uncles of Madho Singh, deceased, against Bhagwan Singh, a minor, Musammat Matan Kuar, the widow of Madho Singh, and Musammat Sughri Kuar, the mother of Madho Singh, for declarations that the plaintiffs were as reversioners entitled upon the death of Matan Kuar and Sughri Kuar to certain immoveable property which had belonged to Madho Singh in his lifetime, and that an alleged adoption of the defendant Bhagwan was null and ineffectual.

Madho Singh was a sonless and a separated Hindu. The defendant Bhagwan Singh is the natural son of a sister of Madho Singh's mother; and it is alleged by the defendant Bhagwan Singh and denied by the plaintiffs that he was in fact adopted by Madho Singh. That issue as to whether in fact the adoption took place has not yet been tried. The plaintiffs dispute that alleged adoption on several grounds, only one of which need be considered by us at present.

It was in the Court below successfully contended on behalf of the plaintiffs that the defendant, being a son of a sister of the mother of Madho Singh, an adoption of him by Madho Singh was prohibited by, and was illegal under, the Hindu law; and consequently that the adoption alleged by the defendant Bhagwan Singh, if it in fact took place, was void and ineffectual. Syed Akbar Husain, then the Subordinate Judge of Cawnpore (accepting the view of the law expressed in paragraph 118 of Mr. Mayne's Hindu Law and Usage), held that as the parties belonged to one of the three regenerate classes of Hindus, the alleged adoption was prohibited and void, and, without trying any of the other issues in the suit, gave the plaintiffs a decree, declaring the plaintiffs to be entitled as reversioners and the alleged adoption to be void. From that decree the defendant Bhagwan Singh has appealed to this Court. His appeal has been referred to the Full Bench.

[332] It is conceded by both sides and could not be disputed, that amongst Sudras the adoption of the son of a daughter, of the son of a sister, or of the son of a sister of the mother of the adopter is permissible under the Hindu law, but it is contended on behalf of the plaintiffs that the Hindu Law prohibits, and makes illegal, an adoption by any one of the three regenerate classes of a sister's son, of a daughter's son, and of a son of a sister of the mother of the adopter. In support of that contention the Dattaka Mimansa of Nanda Pandita, a text cited in that Mimansa as a text of Sakalya, a text cited in the same Mimansa as a text of Saunaka,

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opinions expressed by Sir Francis Macnaghten in his *Considerations on the Hindu Law as it is Current in Bengal*, by Sir William Macnaghten in his *Principles and Precedents of Hindu Law*, by Sir Thomas Strange in his *Hindu Law*, by Mr Mayne in his *Hindu Law and Usage* and in Messrs. West and Bühler's *Digest of the Hindu Law* and certain decisions of the Courts in India have been relied upon.

It will, I think, be found, on consideration that the case for the plaintiffs depends on the question as to how far the views of Nanda Pandita as expressed in his *Dattaka Mimansa* were justified, and can be relied upon; and if those views were justified, then, upon the equally important question as to how far, if at all, the *Dattaka Mimansa* of Nanda Pandita has been accepted as a commentary of authority by the School of Benares, and as binding upon Hindus of that school.

On the other hand, it has been contended before us on behalf of the defendant that there is no authoritative prohibition in the sacred law of the Hindus against the adoption by one of the three regenerate classes of a daughter's son, of a sister's son, or of a son of a sister of the mother of the adopter; that no such prohibition and no text containing such a prohibition have been accepted or acted upon by the Hindus subject to the Benares School of Hindu law; that the view that such a prohibition existed originated in the *Dattaka Mimansa* of Nanda Pandita, or in the *Dattaka Chandrika*; that the alleged text of Sakalya appeared, so far as can be now [333] ascertained, in the *Dattaka Chandrika* for the first time; that, even if the text in question was in fact a text of Sakalya, Sakalya was not accepted as an authority of importance by the Benares School of Hindu law; that Sakalya was not referred to in the *Mitakshara* or in any book of the Hindus received as an authority by the School of Benares; that no such limitation is to be found in the laws of Manu, in any text of Vasishtha, in any of the Vedas, Srutis or Smritis, or in the *Mitakshara*, or in any other Commentary on the Hindu Law prior in date to the *Dattaka Mimansa* of Nanda Pandita or the *Dattaka Chandrika*. It was also argued on behalf of the defendant that the early English text-writers on the subject were influenced by Mr. Sutherland's Synopsis and by the translation into English of the *Dattaka Mimansa*, at a time when most of the Sanskrit texts were as yet untranslated into English, and that they attributed an undue importance to the *Dattaka Mimansa*, which was merely a Commentary on the Hindu Law of Adoption, written by Nanda Pandita within the last 300 years. Reliance was also placed on behalf of the defendant on certain decisions of Courts in India, and upon the opinions expressed by that eminent Sanskrit scholar and writer on Hindu Law, Professor Jolly (*Outlines of an History of the Hindu Law of Partition, Inheritance and Adoption as contained in the Original Sanskrit Treatises*) and upon the criticisms of the late Vishvanath Narayan Mandlik in his *Vyavahara Mayuka*, and upon certain texts cited in the *Hindu Law of Adoption* of Golap Chundra Sarkar. It was also contended and with much force on behalf of the defendant that, before deciding that in these provinces such a restriction of the right of adoption existed, we should be reasonably satisfied that the adoption by one of the three regenerate classes of a daughter's son, of a sister's son and of a son of a sister of the mother of the adopter was in fact prohibited in authorised texts of the Hindu law and had been accepted and acted upon by the Hindus of the Benares School, and attention was drawn to the fact that in Madras and the Punjab and in Bombay according to Mr. Mandlik, and also in Lower Bengal, if two of the early

cases related to that province and if a statement of Golap Chunder Sarkar was well founded, the alleged prohibition had not [334] been universally accepted or acted upon by Hindus of the regenerate classes.

In approaching a consideration of any disputed question of Hindu law it is well to bear in mind what Sir William Macnaghten truly said in his Preliminary Remarks (pages VI, VII and VIII of the 3rd Edition) to his Principles and Precedents of Hindu Law: "I apprehend that the Hindu Law, in its pure and original state, does not furnish many instances of uncertainty or confusion. The speculations of commentators have done much to unsettle it, and the venality of Pandits has done more.

* * * * * Authorities are frequently cited in support of a particular doctrine, which are indeed genuine passages of law, but applicable to a question wholly different from the subject-matter. Again, authorities may be cited, which are both genuine and applicable to the identical subject treated of, but which are of no weight in the particular province whose doctrine should have been adopted. Further facility for evasion is gained by the confusion between natural and civil obligations. This is the case in the Hindu Law, especially as it obtains in the province of Bengal. It by no means follows that, because an act has been prohibited, it should therefore be considered as illegal. The distinction between the *vinculum juris* and the *vinculum pudoris* is not always discernible."

I may say that from what I had read in Sir William Macnaghten's Principles and Precedents of Hindu Law, in Mr. Sutherland's Synopsis, and in Mr. Mayne's Hindu Law and Usage, I approached the consideration of this appeal under the firm impression that the adoption by Madho Singh of the son of his mother's sister was an adoption prohibited by Hindu law and illegal according to the School of Benares.

The parties in this case are Kshatriyas and are governed by the Benares School of Hindu Law. As Kshatriyas, they belong to one of the three regenerate classes of Hindus. What we have to ascertain is, does the Hindu law as accepted by the Benares School prohibit the adoption by a Kshatriya of the son of his mother's sister, in the sense of making such an adoption illegal and [335] void. So far as this question of adoption is concerned, on the authorities relied upon on behalf of the plaintiffs, if those authorities are reliable and are to be applied by us, a sister's son, a son of a daughter and a son of a mother's sister stand in the same position; all of them are eligible for adoption or none of them are.

It has not been suggested that there is any evidence in this suit of any usage in these Provinces by which the adoption, in the Dattaka form, of the son of a sister of the mother of the adopter, or of his sister's son or of his daughter's son, amongst any of the three regenerate classes is either recognised as valid or prohibited as illegal. Neither side in this case has pleaded or relied upon any custom or usage. If any such usage exists in these Provinces or in the district of Cawnpore in which the parties to the appeal reside, I have no personal knowledge of it, nor with one exception, that in the case of Bohra Brahmans, to which I shall refer at some length later on, have I any judicial notice of any such usage in these provinces. In order to clear the ground, I may say that I have put the question to the other Judges on this Bench, and that there is not one Judge on this Bench who is able to say of his own personal knowledge that there is any custom in any part of these provinces amongst Hindus of the Benares School which either permits or prohibits an adoption of a sister's son, of a daughter's son or of the son of a mother's sister amongst any of the

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three regenerate classes of Hindus. It is hardly necessary to say that no Judge on this Bench is a Hindu who is subject to the School of Benares, and in that respect we all stand upon the same footing of Judges alien to the Hindus of these provinces who are subject the Benares School.

In order to arrive at a conclusion on the important question which we have to decide, I propose to deal with the subject in the following order: I shall begin with the consideration of an argument which has been pressed upon us—that we should, from the paucity of reported cases on this question of adoption in which Hindus who were subject to the School of Benares were concerned, assume that such an adoption as that in this case was by the Hindu law or [336] by usages of the Hindus of that school illegal, and as part of the subject I shall express my opinion as to the side on which the *onus* of proof in this case lies. I shall then consider the ancient texts on this subject, as to which and as to the meaning of which there is no dispute, and which are undoubtedly ancient texts of great authority in the Benares School. I shall then consider whether the Dattaka Mimansa of Nanda Pandita has ever been, as it was stated by Sir William Macnaghten that it was, “an infallible guide” on questions of adoption in the province of Benares, and what its authority in the School of Hindu law of Benares is. I shall then examine the texts on this subject as given in the Dattaka Mimansa of Nanda Pandita and consider how far those texts and his comments on them can be relied upon. I shall then consider the question whether, so far at least as the Hindus of the School of Benares are concerned, the statements and opinions of the English text-book writers, who followed Mr. Sutherland’s statement of the law on this question, and who wrote between 1820 and 1830, can be relied upon as accurate statements of the law. I shall then refer to all the reported cases of which I am aware, which throw any light upon this question and in which the parties were Hindus who were subject to the School of Benares; and lastly, I shall refer to those reported cases in Madras and Bombay on this question of adoption, to the reports of which I have access, and I shall then state the final conclusion on this question before us at which I have arrived.

In the course of the argument we were pressed by the learned vakil for the plaintiffs-respondents to assume, from the fact that there are but few reported cases in which any question arose in the Courts as to the legality or illegality of an adoption by a member of one of the three regenerate classes governed by the law of the Benares School of a sister’s son, of a daughter’s son or of a son of a mother’s sister, either that such an adoption was contrary to the Hindu law accepted and acted upon by those subject to the Benares School, or that there exists a custom which prohibits such an adoption. It appears to me that I am not at liberty to make any [337] assumption based solely on the fact that the legality or illegality of such an adoption amongst Hindus of any of the three regenerate classes has seldom, so far as the reports show, been the subject of litigation between Hindus subject to the School of Benares; and further, that if I did on such materials make any assumption one way or the other, it would just as likely be wrong as right. For all I know, such adoptions may have been of frequent occurrence and seldom questioned, or may have been of infrequent occurrence, and each such adoption may have been questioned in a Court of law. Instances of such adoptions having been treated as valid by those whose interest it was to dispute them may have been sufficiently numerous to deter others from questioning their validity

notwithstanding the prohibition of Nanda Pandita and the non-judicial opinion of Sir William Macnaghten. On the other hand, instances of such adoptions having been made may, from causes other than the existence of a prohibition, have been infrequent. Many Hindus we know are influenced by a desire to keep ancestral property in their particular *got*. When Judges are in ignorance of the fact, it is not only useless but dangerous to indulge in speculations as to what may or may not be the usages amongst Hindus of a particular school, or of Hindus in a particular province or in a particular district. There would be absolutely no certainty as to the correctness of Judicial decisions if Judges were to make assumptions on such materials as the infrequency of litigation concerning matters as to which there was no proof of custom one way or the other, and as to which the general law affecting the matter was not otherwise ascertained or ascertainable. On many other subjects which might come before us we might be pressed with the fact that on such materials we had in this case made an assumption as to the civil and religious rights of the parties, and might be asked in other cases not affecting Hindus or the law of adoption to make assumptions on similar materials. One fact is of more value than a thousand assumptions and will show how unreliable is the argument which is founded on the paucity of reported cases. The Bohra Brahmans are a wealthy subdivision of the Brahman caste in these provinces, possessing much property. In two suits which came in [338] appeal before another Judge of this Court and myself in 1891 (*Chain Sukh Ram v. Parbati* and *Mansa Ram v. Sundar* (1) and to which I shall refer at more length later on, it was proved beyond doubt to the satisfaction of the Hindu Subordinate Judge and of this Court, by witnesses from Delhi and from no less than eight districts of these provinces, that there existed a usage amongst Bohra Brahmans by which the sons of sisters were validly adopted. In that case there were only two instances of such adopted sons not succeeding to the property of the men who had adopted them, and in one of them the adopted son had received from the other members of the family a substantial sum of money for foregoing his claim. There was not the slightest doubt that the Bohra Brahmans of that suit were Hindus and a subdivision of the Brahman caste, although separated from Brahmans as a body. The validity of the same adoption, that of one Prem Sukh by one Baldeo Sahai, had been challenged in a suit which came on appeal before the Court in 1885 (*Parbati v. Sundar* (2)), and was before the Privy Council in appeal in 1889 (*Musammatt Sundar v. Musammatt Parbati* (3)). In all three suits those who challenged the adoption of Prem Sukh did so on the ground that the parties being members of one of the three regenerate classes of Hindus, the prohibition of the Dattaka Mimansa of Nanda Pandita applied to the adoption. Quite recently, and in reference to the hearing of that litigation upon the argument which I am considering, it was suggested that Bohra Brahmans may have been converts to Hinduism from Muhammadanism, although I have always understood that no man could be a Hindu who had not been born a Hindu. However that may be, the only foundation for that suggestion was that apparently the Bohra Brahmans who had continued to reside in Gujrat had, like many Brahmans in other parts of India, become converts to Muhammadanism, which is quite another thing. If those suits, which related to one and the same adoption, had not

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(1) 14 A. 53.

(2) 8 A. 1.

(3) 16 I.A. 186.

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been brought, we should probably have been asked to infer, from the fact that the Bohra Brahmans are as a body possessed of much valuable [339] property, and from the fact that there was no reported case in which the question as to the power of Bohra Brahmans to validly adopt a sister's son was raised, that they were governed by the Dattaka Mimansa of Nanda Pandita, and that adoptions of sister's sons had never taken place amongst them.

Fortunately their Lordships of the Privy Council have in the passage which I shall quote from their judgment in *The Collector of Madura v. Mootoo Ramalinga Sathupathy* (1), stated what the duty of European Judges administering Hindu law is. The passage is as follows:—"The duty, therefore, of an European Judge who is under the obligation to administer Hindu law, is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage. For, under the Hindu system of law, *clear proof of usage* will outweigh the written text of the law." (The italics are mine). It has been contended in this case, on behalf of the plaintiffs, that there is no "disputed doctrine" in this case, that the statements of Nanda Pandita as to the law in his Dattaka Mimansa are conclusive, and that it is for the defendant to prove a usage exempting him from the prohibition of Nanda Pandita in that Mimansa, and not for the plaintiff to prove that the Dattaka Mimansa of Nanda Pandita has been accepted as a binding authority on this question by the School of Benares, or that by a usage amongst the Hindus of that school the general right of adoption has been limited and such adoptions as that in this case have been prohibited. In support of that contention it has been argued on behalf of the plaintiffs that a doctrine is not a "disputed doctrine" within the meaning of the passage which I have quoted from the judgment of their Lordships of the Privy Council if a text can be found quoted by a modern commentator as a text of an ancient authority of the Hindu law which, as quoted, either unequivocally announces the doctrine or has been construed by that modern commentator as announcing the doctrine, although the authenticity [340] of the alleged text is disputed and there is good reason to doubt its authenticity, or the corrections of the construction placed upon it. That to my mind is a vicious argument. It is based on assumptions which for the purposes of arguing his client's case a counsel might put forward, but which cannot be made by a Judge and used by him as the basis, not of a forensic argument but of a judicial decision. It assumes that the text is an ancient text, that it stands alone, or if there are other ancient texts on the same subject that it is in harmony with them and does not qualify them or limit their application, and that it has been rightly construed by the modern commentator and that his construction has been accepted by the School of Hindu Law in which it is sought to be applied. It is obvious to me, for instance, that if no ancient and admitted text permits an adoption without a particular limitation and if another ancient and admitted text imposes that particular limitation on the right of adoption, the two texts are in conflict and there is a disputed doctrine. If the limitation is prohibitive, an adoption which would be valid under one text would be invalid under the other. The two texts would not admit of the same construction and there would be a disputed doctrine.

(1) 12 M. I. A. 397 (436).

What is sought by the plaintiffs in this suit is a declaration that Madho Singh, by reason of his having been a Kshatriya, was incapable of validly adopting the son of his mother's sister, and consequently that the adoption of the defendant Bhagwan Singh by Madho Singh was illegal and void. The consequences of our hastily making such a declaration are so wide-reaching as to make it necessary that we should proceed with the greatest care and circumspection. The principle and the authority, if they can be relied upon, upon which we are asked to make that declaration, apply equally to every adoption of a sister's son and of a daughter's son as to adoptions of the son of a mother's sister, amongst those of the three regenerate classes, who either in these provinces or other parts of India, are subject to the Hindu law of the Benares School. The result of such a declaration, unless it were justified by the Hindu law of the Benares School, or by clear proof of [341] usage, would be to arbitrarily limit the right of adoption recognised by Manu, and other Rishis, and by Hindu commentators, such as the author of the Mitakshara, who are and have been for ages indisputably accepted by Hindus of the Benares School as of paramount authority; it would also cast a doubt upon the efficacy of the funeral and other rites which have been performed by adopted sons, who happened to have been the sons of a sister, of a daughter or of a mother's sister of the adopter, when the adopter belonged to one of the three regenerate classes, in obtaining the release of the soul of the adopter and of the souls of his ancestors from *put* or the hell of the Hindus. Such a declaration would deprive the defendant Bhagwan Singh of all right in reversion to the property claimed in this suit, and would cast doubt upon the title of every such adopted son to the property which he had obtained from his adopting father on the strength of the adoption having been valid.

It appears to me that these plaintiffs claiming such a declaration limiting the right of adoption must, in order to succeed, either rely upon an undoubted text of the sacred law of the Hindus of the Benares School prohibiting such an adoption, or must give clear proof of usage amongst the Hindus of the Benares School excluding and invalidating such an adoption, or, what would be in effect the same thing, must clearly prove that the views as to such an adoption being illegal of a commentator on the Hindu law have been generally accepted and acted upon as correct expositions of the Hindu law on the subject by the Hindus who are subject to the Hindu Law of the Benares School.

A commentator on Hindu law is not a law-giver and has no more authority to alter the text of the Hindu law or to prescribe limitations of the Hindu law of adoption than has any other member of the public. I think in that proposition every orthodox Hindu will agree. The commentary may or may not be intrinsically valuable as a guide to the true construction of the sacred texts of the Hindu law, but it is not itself a sacred text. The opinion propounded in the commentary may lead to the growth and establishment of a usage in accordance with the views so expressed, [342] although such views limit the right under the ancient text, and in such case "clear proof of usage will outweigh the written text of the law." The Hindu Law contains admonitions against the doing of some acts, and positive prohibitions against the doing of other acts. Acts which are positively prohibited are illegal in Hindu law and do not in these provinces effect their object. An act contrary to what is an admonition and is not a positive prohibition may be sinful, but it is neither illegal nor ineffective. The ancient texts of the Hindu law were written according to a system. If they had not been so written it would be frequently

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impossible to decide whether the doing of a particular act was positively prohibited or was merely admonished against in the text as being a moral sin. The Mimansa of Jaimini, to which I shall have to refer later on, tells us what are the rules in this respect for the construing of ancient sacred texts of the Hindus.

Assuming for present purposes the factum of the adoption, the *onus* of proving that the adoption was illegal and invalid is in my opinion upon the plaintiffs, and for these reasons: Manu and the author of the Mitakshara suggest no such limitation of the right of adoption; that sonless Hindus of all classes may adopt a son is beyond question; it is for those who would limit the right of adoption in this case to point to an undisputed and unambiguous sacred text of the Hindu sacred law, if there is one, recognised and acted upon by the School of Benares, or to give clear proof of a usage amongst the Hindus of that school, which limits that right of adoption by making such an adoption as that in the present case illegal; on the assumption that the adoption has in fact taken place, it is for the plaintiffs, who claim a declaration that the adoption was illegal and void, to prove that such an adoption is illegal. It would not be sufficient to prove that the adoption was merely sinful. If the adoption was merely sinful the principle of the maxim *quod fieri non debet factum valet* would apply and the adoption would, although sinful, be valid for all purposes. On the other hand, if an admitted text of the Hindu sacred law of the particular school prohibited an adoption except under certain specified circumstances the *onus* of proving that such a prohibited adoption was by usage valid would be upon the party relying upon such an adoption. Such was the case in *Tulshi Ram v. Behari* (1) in which, contrary to the admitted text of Vasishtha, "Nor let a woman give or accept a son except with the assent of her lord," it was contended that amongst Hindus subject to the School of Benares, in which school the text which I have quoted is received as an admitted text of Vasishtha, an adoption made by a widow to her deceased husband without his express authority was valid. In that case, after referring to cases which had been decided and in which the parties were Hindus subject to the School of Benares (one of those cases was a case from these provinces in the Privy Council) I said, and I think rightly:—"I would expect that any one who would now contend that a Hindu widow subject to the Benares School could make a valid adoption to her deceased husband without express authority given by him would support that contention by clear proof of general usage in the particular district that an adoption under such circumstances was in the particular district recognised as valid by those subject to the Benares School." In the latter case, that of an adoption of a son by a wife or widow to her husband, a text accepted and admitted to be genuine by the School of Benares imposed in prohibitive language the limitation on the general right to adopt, whilst in the case under consideration in this appeal a limitation on the general right to adopt is sought to be imposed first by a text alleged to be a text of Sakalya, but which has never been recognised as genuine by any commentator of authority of the School of Benares, and secondly, by Nanda Pandita's construction of two portions of a text of Saunaka, a construction which has never been accepted as correct by any commentator of authority in the School of Benares, unless indeed it be assumed that Nanda Pandita is in the school of Benares a commentator of authority. I hope to show that any such assumption would be rash in the extreme, and would not be justified by the facts. If it

(1) 12 A. 328.

was permissible for a Judge to make assumptions without justification, the onus of proof would depend on the caprice, bias or lack of information or of consideration [344] of the particular Judge, and not upon principles of law applied to facts which have been either proved or admitted or of which a Judge is allowed to take judicial notice. In such case the rights of litigants might depend upon the means of knowledge of particular facts relied upon by the Judge as of his own knowledge but which were not proved by evidence or admitted by the parties, and it might appear if the Judge were in the witness-box that his knowledge "depended upon mere rumour or hearsay, and that his evidence as to these facts would not have been admissible if he had been examined as a witness." "A Judge cannot, without giving evidence as a witness, import into a case his own knowledge of particular facts," and "his own knowledge and belief on public rumour" are "grounds upon which no Judge is justified in acting." (See the judgments of their Lordships of the Privy Council in *Hurpurshad v. Sheo Dyal* (1) and in *Meethun Bebee v. Busheer Khan* (2). I have made the above observations because it has appeared to me that there was a danger in this case of our imposing the onus of proof upon the wrong parties owing to some of us, myself amongst the number, having been at the commencement of the arguments influenced by preconceived extra-judicial opinions, which, so far as I am concerned, did not rest upon any sure foundation.

Before considering what is the authority to be allowed to the Dattaka Mimansa of Nanda Pandita in this matter, I shall briefly refer to the Hindu text law on this subject as it was known before Nanda Pandita wrote that commentary.

Amongst the earliest of those Rishis to whom the Dharmasutras are attributed was Vasishtha. The holy Yama and Saunaka were of the Sutra period as was also Narada. Whether Manu preceded Vasishtha or came after him, the Code of Manu, as we now have it, contains quotations from Vasishtha. Next in authority and order of date to Manu came Yajnyavalkya. According to Mr. Mayne, the work of Yajnyavalkya "is more than 1,400 years old, but how much older it is impossible to say." Sitting here as a Judge to decide [345] a question of Hindu law between Hindus, it is not for me to express an opinion as to the personality of Manu. It is sufficient to say that orthodox Hindus accept the laws of Manu as having been divinely inspired, and that Manu states that he received the Code from Brahma and communicated it to the sages. That in its present form it is not as it originally was is probable. Sir W. Jones places the Code of Manu in its present form as early as 1280 B. C. So far as I am aware it has not been suggested by any one capable of forming an opinion that it is of a later date in its present form than about 200 B. C. Mr. Mayne, in paragraph 20 of his *Hindu Law and Usage*, 5th edition, says correctly: "The Code of Manu has always been treated by Hindu sages and commentators from the earliest times, as being of paramount authority; an opinion, however, which does not prevent them from treating it as absolute whenever occasion requires." There can be no doubt that in the Benares School of Hindu law the Code of Manu always was and still is of paramount authority.

An adopted (Dattima) son is referred to in the 141st, 142nd, 159th and 168th slokas* of Chapter IX of the Code of Manu. The 168th sloke

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(1) 3 I.A. at p. 286.

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(2) 11 M.I.A. at p. 221.

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as translated by Dr. Bühler (Sacred Books of the East, Vol. XXV, page 361) is as follows :—" 168. That (boy) equal (by caste) whom his mother or his father affectionately give (confirming the gift) with (a libation of) water, in times of distress (to a man) as his son, must be considered as an adopted son (Datrima)."

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Beyond the limitation contained in the 168th sloke, Manu in no way imposed any limitation on the adoption of a son in the *Dattaka* form of adoption.

As to adoption Vasishtha in slokes 1 to 10 of Chapter XV, as translated by Dr. Bühler (Sacred Books of the East, Vol. XIV, pages 75 and 76) says :—

" 1. A man formed of uterine blood and virile seed proceeds from his mother and his father (as an effect) from its cause.

[346] 2. (Therefore) the father and the mother have power to give, to sell, and to abandon their (son).

3. But let him not give or receive (in adoption) an only son.

4. For he (must remain) to continue the line of the ancestors.

5. Let a woman neither give nor receive a son except with her husband's permission.

6. He who desires to adopt a son, shall assemble his kinsmen, announce his intention to the king, make burnt-offerings in the middle of the house, reciting the Vyahritis, and take (as a son) a not remote kinsman, just the nearest amongst his relatives.

7. But if a doubt arises (with respect to an adopted son who is) a remote kinsman, (the adopter) shall set him apart like a Sudra.

8. For it is declared in the Veda, 'Through one he saves many.'

9. If, after an adoption has been made, a legitimate son be born, (the adopted son) shall obtain a fourth part.

10. Provided he be not engaged in (rites) procuring prosperity."

The 3rd of the above slokes contains what read with the 4th sloke has been held by some Courts as a positive prohibition against the adoption of an only son and by this Court and some Judges of other Courts as an admonition only against the adoption of an only son.

The 5th sloke has been the cause of diversity of opinion amongst the Courts in India.

There is not one word in Manu or in Vasishtha implying that a sister's son, a daughter's son or the son of a mother's sister may not be lawfully and validly adopted. It was admitted during the arguments in this case that there is not one word in Yajnyavalkya suggesting that a sister's son or a daughter's son or the son of a mother's sister may not be lawfully and validly adopted. Yajnyavalkya is an undoubted authority in the school of Benares.

[347] It has been assumed on the authority of Sir William Macnaghten (Principles and Precedents of Hindu Law, vol. 1, p. 67) that according to Narada a son of a woman whom the adopter could not have married, such as the son of a sister or the son of a daughter, could not be legally adopted amongst the three regenerate classes. Professor Jolly has translated the Narada Smriti and we have his assurance at page 162 of his *Outlines of an History of the Hindu Law*, that such a rule does not occur in either of the two versions of the Narada Smriti.

As to Yama, Mr. Mandlik in his *Vyavahara Mayukha*, at page 483, says that the *Sarasativilasa* quotes a text of Yama which he gives in Sanskrit and which when translated is as follows :—"In the case of a daughter's son and a brother's son, the rule with regard to a sacrifice and the like

does not prevail. (The act of adoption) is complete by a verbal gift alone. So says the holy Yama." Mr. Mandlik says that the same text was subsequently, on the authority of the *Sarasvativilasa*, quoted in the *Dattaka Darpana* of *Dvaipayana* and was adopted by the Sastris of the Bombay Sudder Dewani Adalat in *Huebut Rao Mankur v. Govind Rao Bulwant Mankur* (1). A slightly different reading of the same text of Yama is given by Golap Chandra Sarkar at page 334 of his *Hindu Law of Adoption* from his recollection of the text as taught by Pandit Bharat Chandra Siromani to his pupils. Golap Chandra Sarkar gives the translation of the text as remembered by him as follows:— "It is not expressly required that burnt-sacrifice and other ceremonies should be performed on adopting the son of a daughter, or of a brother, for it is accomplished in those cases by word of mouth alone." That text of Yama distinctly recognised without any qualification or limitation the right of a Hindu to adopt his daughter's son.

The *Mitakshara*, which is the commentary having as a commentary paramount authority in the Benares School of Hindu Law, treats to some extent of adoption, but, so far as I have been able to ascertain, it does not contain one single word which could suggest [348] that the adoption of the son of a sister, of a daughter or of a mother's sister was prohibited amongst any class of Hindus. Mr. Mayne says in paragraph 26 of his *Hindu Law and Usage*, 5th ed.: "Far the weightiest of all the commentaries is that by *Vijnanesvara* known as the *Mitakshara*. Its authority is supreme in the City and Province of Benares, and it stands at the head of the works referred to as settling the law in the South and West of India." The age of the *Mitakshara* has, according to Mr. Mayne, following West and Bühler (*Mayne's Hindu Law and Usage*, 5th ed., paragraph 26), been fixed by recent research to be the latter part of the eleventh century. It seems to me to be in the highest degree improbable, if any text of the Hindu Law recognised by the School of Hindu law of Benares had contained any direct prohibition, or any text which was construed by that school as indicating a prohibition, against adoptions by any classes of Hindus of a sister's son, or of a daughter's son, or of the son of a mother's sister, that the *Mitakshara* should be entirely silent on such an important limitation of the right of adoption.

I shall reserve what I have to say as to *Saunaka* and *Sakalya* until I am dealing with the *Dattaka Mimansa* of *Nanda Pandita* as it is upon two sentences of a text of *Saunaka* and upon a text given by him as a text of *Sakalya* that *Nanda Pandita* in his commentary bases his assertion that amongst the three regenerate classes, a sister's son, a daughter's son and the son of a mother's sister cannot be adopted.

Unless the construction put upon the text from *Saunaka* by *Nanda Pandita* be correct and unless the text given by *Nanda Pandita* as from *Sakalya* can be relied upon and is a full and complete text, not one single text from the sacred law of the Hindus, and not one passage from any commentator anterior in date to the time when the *Dattaka Mimansa* of *Nanda Pandita* and the *Dattaka Chandrika* were written have been put before us, or, so far as I am aware, exist, which could suggest that a member of any one of the three regenerate classes was prohibited from adopting a son of a sister, of a brother, or of a mother's sister.

[349] It is within my experience that it is apt to be assumed that a

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Hindu Commentator has been accepted as an authority by a particular School of Hindu law if his views on some subjects are found to be in harmony with doctrines of that school. I confess that I have before now made such an assumption. To my mind no more dangerous assumption could be made. The views of the wildest, most inaccurate and most pedantic of commentators would on many subjects probably be found to be in harmony with doctrines admittedly orthodox. It has also sometimes been assumed that a Hindu Commentator is an accepted authority of a particular School of Hindu law because he was born or lived within the district in which the doctrines of that school of law prevailed. In the sacred city of Benares learned men of every school of Hindu law have resided and are to be found. In the case of Nanda Pandita the above assumptions have been made. Nanda Pandita, although he was born in Benares and although he and his family resided in Benares, came, so far as can be ascertained, of a family from Bedar in Southern India which had settled in Benares. Whether Nanda Pandita's family was an old family of Benares, or had come to Benares from Southern India, or elsewhere, it is certain that on some important questions relating to the law of adoption the opinions of Nanda Pandita have been held not to be in accordance with the doctrines of the School of Benares.

Before considering the text of the Dattaka Mimansa it is necessary to consider whether the authority of that commentary is so supreme as it was assumed to be by Sir William Macnaghten when, in referring to the Dattaka Mimansa and the Dattaka Chandrika he said:—"They are equally respected all over India; and where they differ, the doctrine of the latter is adhered to in Bengal and by the southern jurists, while the former is held to be the infallible guide in the provinces of Mithila and Benares." I have been unable to ascertain upon what authority Sir William Macnaghten made that statement in his Preliminary Remarks to his Principles and Precedents of Hindu law. He was no doubt a diligent student of Hindu law, and whilst he was the Registrar of the Sudder [350] Dewani Adalat in Calcutta he carried through the press three volumes of Reports of decided cases. It will appear, I think, from what I shall say later on that Sir William Macnaghten adopted an erroneous view of Mr. Sutherland's on this question of adoption.

It may be doubted from paragraph 30 of the 5th edition of Mr. Mayne's Hindu Law and Usage whether Sir William Macnaghten, then Mr. W. H. Macnaghten, had, when he wrote on the subject, a correct idea of the authority to be allowed to the Dattaka Mimansa or to the Dattaka Chandrika, and it would appear that he and Mr. Sutherland, who translated the Dattaka Chandrika, were under a misapprehension as to the authorship of that commentary.

On some questions the Dattaka Mimansa of Nanda Pandita is in accord, and not in conflict, with the texts and doctrines of the School of Benares, and such authority, if any, as it ever possessed in that school of Hindu law is, I believe, attributable to that fact, and is confined to those questions on which it is in harmony with the texts and doctrines of the Benares School.

It is certain that on some most important and vital questions relating to the law of adoption the doctrines of the Dattaka Mimansa of Nanda Pandita have not been followed; as, for instance, by their Lordships of the Privy Council on the question as to whether when there is a brother's son eligible for adoption a person who was not a brother's son can be

lawfully adopted in *Srimati Uma Deyi v. Gokoolanund Das Mahapatra* (1), in which case it was held that the texts of the Dattaka Mimamsa of Nanda Pandita and the texts of the Dattaka Chandrika, which, their Lordships (at page 50 of the report) said, "do in terms prescribe that a Hindu wishing to adopt a son shall adopt the son of his whole brother, if such a person be in existence and capable of adoption, in preference to any other person," have not the force of law; and by this Court, which has in nearly all questions of Hindu law to administer the Hindu law of the Benares School, on the question as to the adoption of a Brahman aged more than five years in *Ganga Sahai v. Lekhraj Singh* (2), on the question whether a widow can under any circumstance adopt a son to her husband after the husband's death in *Tulshi Ram v. Behari Lal* (3), and in other cases; and on the question of the adoption of an only son in *Beni Prasad v. Hardai Bibi* (4).

The authority of the Dattaka Mimamsa was discussed by Mr. Justice Mahmood in *Ganga Sahai v. Lekraj Singh* (5), and by me in *Beni Prasad v. Hardai Bibi* (6). In *Tulshi Ram v. Behari Lal* (3), Mr. Justice Mahmood assigned to the Dattaka Mimamsa of Nanda Pandita a place of authority in the Benares School as "a book of reference" on the Hindu law of adoption (see page 342 of I.L.R. 12 All.). When that case was before this Court I had not carefully considered what the authority of the Dattaka Mimamsa of Nanda Pandita really was. In that case, although I agreed in the judgment of Mr. Justice Mahmood, I mainly relied upon decided cases in which the parties had been Hindus subject to the Benares School. At the time when the case of *Tulshi Ram v. Behari Lal* was before this Court it was assumed by this Court, but incorrectly, that their Lordships of the Privy Council had in *The Collector of Madura v. Ramalinga Sathupathy* (7), accepted the statement of Sir William Macnaghten that the Dattaka Mimamsa of Nanda Pandita was an infallible guide in the Province of Benares on questions of adoption (see pages 341 and 342 of I.L.R. 12 All.). The incorrect assumption that their Lordships of the Privy Council had adopted the opinion of Sir William Macnaghten, which I have already quoted, influenced, I believe, Judges of this Court and it certainly influenced me until quite recently. In *Beni Prasad v. Hardai Bibi* (4), we were pressed with the argument that we were bound as a Court subordinate to the Privy Council to attach great importance to the fact that their Lordships of the Privy Council had referred to the opinion of Sir William Macnaghten and had not expressed any dissent from it. That argument induced me in that [352] case to allow a position of higher authority to the Dattaka Mimamsa of Nanda Pandita in the School of Benares than I now, on fuller consideration and after further research, believe it to be entitled to.

The two most celebrated translators from Sanskrit into English of works on Hindu law and the two most celebrated writers on subjects of the Hindu law in the early years of this century were Mr. Colebrooke and his nephew Mr. Sutherland. Mr. Colebrooke was Judge of Mirzapur in 1796 and was in 1801 a Judge of the Sudder Court at Calcutta. In 1796 Mr. Colebrooke published his translation of the Digest of Hindu law, which is generally known as Colebrooke's Digest. In 1810 Mr. Colebrooke published his translation of the Mitakshara. In Mirzapur Mr. Colebrooke was in the midst of Hindus who are subject to the School of

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(1) 5 I.A. 40.

(2) 9 A. 253.

(3) 12 A. 328.

(4) 14 A. 67.

(5) 9 A. 253 at pp. 318, 319, 322, 323, 324 et seqq.

(6) 14 A. 67 at p. 81 et seqq.

(7) 12 M.I.A. 397.

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Benares. Mr. Sutherland was in 1815 a Judge at Bhagalpur in Bengal. Bengal Proper, according to Sir William Hunter's Imperial Gazetteer of India (see title "Bengal") is the country which stretches south-east from Bhagalpur to the sea. As the term "Bengal," was used by Mr. Colebrooke, it did not include Mithila (Behar) or the Province of Benares. Mr. Sutherland had prior to 1815 held various subordinate offices connected with the Courts. In 1819 Mr. Sutherland wrote his preface to his translations of the Dattaka Mimansa of Nanda Pandita and of the Dattaka Chandrika. He was then stationed at Monghyr, which is in Bengal. For some years prior to 1812 Mr. Colebrooke and Mr. Sutherland had been corresponding with Sir Thomas Strange on questions of Hindu law, and had been supplying him with references to cases on Hindu law in different Courts, with opinions of Pandits on questions of Hindu law and with their own remarks upon such opinions (see Sir Thomas Strange's Preface to his Hindu Law and the cases, opinions and correspondence printed in the second volume of that work, edition of 1830). One of the greatest authorities in the school of the Daya Bhaga, which is the prevailing school of Hindu law in Bengal Proper, was Jagannatha Tercapanchanana. At some time between 1770 and 1796 he compiled, under the superintendence of Sir William Jones, the Digest of Hindu Law, the [353] translation of which Mr. Colebrooke published in the latter year. According to Mr. Sutherland's Preface of 1819 to his Translations of the Dattaka Mimansa of Nanda Pandita and of the Dattaka Chandrika, the Dattaka Chandrika was supposed to have been the groundwork of Nanda Pandita's Dattaka Mimansa. If the Dattaka Chandrika or the Dattaka Mimansa of Nanda Pandita or their prohibition of the adoption of a sister's son, of a daughter's son, and of the son of a mother's sister were accepted as of authority in Bengal Proper or in the Province of Benares, it is impossible that the fact should have been unknown to Jagannatha Tercapanchanana and to Sir William Jones when Colebrooke's Digest was being compiled; it is also impossible that the fact should have been unknown to Mr. Colebrooke when he was translating that Digest in and prior to 1796 and when in 1810 he published his translation of the Mitakshara: and it is also impossible that the fact should have been unknown to Mr. Sutherland when in 1819 he wrote his preface to his translations of the Dattaka Mimansa of Nanda Pandita and of the Dattaka Chandrika. I hope to show that the Dattaka Mimansa of Nanda Pandita, the Dattaka Chandrika, and this alleged prohibition of the adoption of a sister's son, of a daughter's son, and of the son of a mother's sister were not recognised as authoritative by Sir William Jones and Jagannatha Tercapanchanana when Colebrooke's Digest was being compiled; were not recognised as being authoritative by Mr. Colebrooke when he was translating that Digest; that Mr. Colebrooke in his notes to his translation of the Mitakshara in 1810 does not refer to any such prohibition, and does not suggest that either the Dattaka Mimansa of Nanda Pandita or the Dattaka Chandrika had ever been accepted as of authority in the School of Benares; and that in his account of the Hindu Schools of Law, which is printed at pages 315 to 319 of the first volume of Sir Thomas Strange's Hindu Law, edition of 1830, Mr. Colebrooke not only does not suggest that the Dattaka Mimansa of Nanda Pandita and the Dattaka Chandrika were or that either of them was a work of authority in the School of Benares, but he in fact assigned them, as works of more or less authority, to another and a different school of Hindu law. I shall also show that so little was known in 1819,

[354] as to the Schools of Hindu law, or the districts, in which the rules of the Dattaka Mimansa of Nanda Pandita and the Dattaka Chandrika were accepted and followed, that Mr. Sutherland in 1819, with the reserve of a judicial mind, stated, in the preface to his translations of the Dattaka Mimansa of Nanda Pandita and of the Dattaka Chandrika: "But compiled, as this work has been, under circumstances affording little facility for inquiry or collecting information, he (Mr. Sutherland) has not, from an apprehension of misleading, attempted to debar or restrict the operation of any particular rule to the limits of any particular tract of country: in fact, such precision is scarcely to be attained"—(Stokes' Hindu Law-Books, page 528). I do not know when Sir William Macnaghten wrote his Preliminary Remarks to his Principles and Precedents of Hindu Law; but that work was first published in 1829. I hope to show that nothing had happened between 1796 and 1829, except the publication of Mr. Sutherland's translation of the Dattaka Mimansa of Nanda Pandita in 1821, to justify, or even to suggest that there was any foundation for, Sir William Macnaghten's statement in his Preliminary Remarks that on questions of adoption the Dattaka Mimansa of Nanda Pandita "is held to be the infallible guide in the provinces of Mithila and Benares." I hope further to show that at no time, the present included, would that statement have been correct in fact, or anything but erroneous and misleading.

The Digest of Hindu Law, which is generally known as Colebrooke's Digest, was compiled by the learned Bengal Pandit Jagannatha Tercapanchanana at the suggestion and under the superintendence of Sir William Jones, and was translated from Sanskrit into English by Mr. Colebrooke in 1796. Mr. Colebrooke was at that time living in Mirzapur. The district of Mirzapur adjoins the district of Benares and the Hindu law of the School of Benares is the Hindu law of the Hindus of Mirzapur. We have thus got in the compiler of the Digest a Bengali Pandit of the highest repute as an authority in the School of the Daya Bhaga of Lower Bengal, *i.e.*, Bengal Proper, on questions of Hindu law and we [355] have got in the translator of the Digest an eminent Sanskrit scholar, a diligent student of Hindu law and a writer on subjects of Hindu law, who was living within fifty miles of the city of Benares and in the midst of Hindus who were subject to the School of Benares, and we have got the fact that the Digest was compiled under the superintendence of Sir William Jones, and we know that the object of Sir William Jones was that a comprehensive Digest of Hindu Law should, on public grounds, be produced. We also know that Nanda Pandita had resided at Benares and that he had written his Dattaka Mimansa less than 200 years before the Digest was compiled. We have thus got all the conditions under which, reasonably speaking, it was practically impossible that the Dattaka Mimansa of Nanda Pandita and its prohibitions could have escaped the attention not only of Sir William Jones but of the compiler and of the translator of the Digest, if that Mimansa, its doctrines and prohibitions were by the Hindus, or by the learned, in Lower Bengal or in the Province of Benares, considered as of the slightest authority in the School of the Daya Bhaga or in the School of Benares at the time when the Digest was compiled and was translated, which was the last quarter of the eighteenth century. The Digest consists of texts, upon which comments were made by the compiler. Some notes were added by Mr. Colebrooke. Chapter IV of Book V of Part II of the Digest deals with the law relating to sons legitimate and adopted, as a branch of the Hindu law of succession. The Digest treats of the son given, of the

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age of the son to be given, of the power of parents to give away a son, of the form and ceremony of adoption, of the right of adopting a son if a nephew be living, of the right to maintenance or inheritance of adopted sons, and of various forbidden forms of adoption and of the form then permitted. In reference to the above subjects one or more texts are quoted in the Digest from Manu, Baudhayana, the Calicapurana, Gotama, Vishnu, Sancha, Lichita, Harita, Narada, Yajñawalkya, Devala and Yama. In the compiler's comments on the text set out from those authorities reference is made to the Calicapurana and Pracasa and to Yajñawalkya, Vasishtha, Chandeswara, Manu, Vishnu, Culluca-[356]bhatta, the Retnacara, Vachaspati Misra, Raghunandana, Vachaspati Bhattacharya, and Medhatithi. If the Dattaka Mimamsa of Nanda Pandita was considered to be a work of any authority in Bengal or in the districts subject to the School of Hindu law of Benares at the time when it was being compiled by Jagannatha Tercapanchanana under the supervision of Sir William Jones, or at the time when it was being translated by Mr. Colebrooke, it is most remarkable that there is not one text relating to adoption quoted from either Saunaka or Sakalya and not one single reference made to Saunaka or to Sakalya in any comment of the compiler or note of the translator relating to adoption. If at the time when the Digest was being compiled the Dattaka Mimamsa of Nanda Pandita and the Dattaka Chandrika were respected all over India, and the doctrines of the Dattaka Chandrika were adhered to in Bengal and the Dattaka Mimamsa of Nanda Pandita was held to be the infallible guide in the Provinces of Mithila and Benares, it is impossible to believe that neither of those commentaries should have been known to Jagannatha Tercapanchanana, to Sir William Jones, or to Mr. Colebrooke, or, if they were known to them as works of any authority in Bengal, in Mithila and in the School of Benares, that their importance, and the importance of the comments on the text of Saunaka and of the text cited as a text of Sakalya should not have been recognised by Jagannatha Tercapanchanana, by Sir William Jones, or by Mr. Colebrooke. In this connection it seems to be advisable to quote a passage from paragraph 32 of Mr. Mayne's Hindu Law and Usage, as it gives the unbiased and judicially expressed opinion as to the qualifications of the compiler of Colebrooke's Digest entertained by an eminent Hindu Judge, long since deceased, who was subject to the School of the Daya Bhaga, and who is not now concerned with questions of adoption or with the usages, if any, on this subject amongst the members of any caste of Hindus in Lower Bengal. Mr. Mayne after referring to a criticism of Mr. Colebrooke upon the tendency of Jagannatha Tercapanchanana to enter upon frivolous disquisitions and to discuss the opinions of writers of different schools without distinguishing which is the received doctrine of each school or whether any of [357] them actually prevailed at the time, says:—"This feature drew down upon the Digest the criticism of being 'the best law-book for a counsel and the worst for a Judge.' On the other hand, Mr. Justice Dwarkanath Mitter, who was of the greatest eminence as a Bengal lawyer, lately pronounced a high eulogium upon Jagannatha and his work, of whom he says: 'I venture to affirm that, with the exception of the three leading writers of the Bengal School, namely, the author of the Daya Bhaga, the author of the Dayatatwa, and the author of the Dayakrama Sangraha, the authority of Jagannatha Tercapanchanana is, so far as that school is concerned, higher than that of any writer on Hindu law, living or dead, not even excluding Mr. Colebrooke himself.' It certainly

seems to me that Jagannatha's work has fallen into rather undeserved odium. As a repository of ancient texts, many of which are nowhere else accessible to the English reader, it is simply invaluable. His own Commentary is marked by the minute balancing of conflicting views which is common to all Hindu lawyers. But as he always gives the names of his authorities, a very little trouble will enable the reader to ascertain to what school of law they belong. His own opinion, whenever it can be ascertained, may generally be relied on as representing the orthodox view of the Bengal School."

Mr. Colebrooke published his translation of the *Mitakshara* in 1810. In his notes to the Chapter on Adoption he referred to the views of different schools of Hindu Law and to several commentaries of different schools of Hindu Law, amongst others to Nanda Pandita's *Dattaka Mimansa* and his *Vaijayanti on Vishnu*, to the *Vyavahara Mayukha* of the Mahratta School, the commentary of Vachaspati Misra which is followed by the Mithila School and to the *Viramitrodaya*. Neither in his preface nor in his notes to his translation of the *Mitakshara* does Mr. Colebrooke suggest that the *Dattaka Mimansa* of Nanda Pandita was of any authority whatever in the School of Benares, although he refers to it in his preface as "an excellent treatise on adoption." Mr. Colebrooke draws attention to the fact that Nanda Pandita gives in his *Dattaka* [358] *Mimansa* a different reading of one text to that given by him in his Commentary on *Vishnu*. Mr. Colebrooke points out that Nanda Pandita in his *Dattaka Mimansa* does not allow any power to a widow to adopt and that Nanda Pandita in the same *Mimansa* gives in adoption the preference to a nephew. It is obvious that in 1810 Mr. Colebrooke was well acquainted with the *Dattaka Mimansa* of Nanda Pandita, yet nowhere does he refer to that *Mimansa* as an authority in the School of Benares, or allude to Nanda Pandita's prohibition of the adoption of a sister's son, of a daughter's son or of the son of a mother's sister. If any such prohibition existed in the Benares School of Hindu Law in 1810, Mr. Colebrooke must have known of it and could not have failed to refer to it. Further it is obvious, to my mind, from an "Account by H. T. Colebrooke, Esq., of the Schools of Hindu Law" which is printed at pages 316 to 319 of the first volume of Sir Thomas Strange's *Hindu Law*, edition of 1830, that Mr. Colebrooke did not consider the *Dattaka Mimansa* of Nanda Pandita or the *Dattaka Chandrika* as a work of authority in the School of Benares. At page 317 he said:—"The School of Benares, the prevailing one in Middle India, is chiefly governed by the authority of the *Mitakshara* of *Vyjnaneswara*, a commentary on the institutes of *Yajnyawalkya*. It is implicitly followed in the city and province of Benares, so much so that the ordinary phraseology of references for law opinions of Pandits, from the Native Judges of Court established there, previous to the institution of Adawlut superintended by English Judges and Magistrates, required the Pandit, to whom the reference was addressed, "to consult the *Mitakshara*," and report the exposition of the law there found, applicable to the case propounded. A host of writers might be named, belonging to this school, who expound, illustrate, and defend the *Mitakshara's* interpretation of the law. It may be sufficient to indicate in this place, the *Viramitrodaya* of *Mitra Misra*, and the *Vivada tandava*, and other works of *Camalacara*. They do not, so far as it is at present recollected, dissent upon any material question from their great master. The *Mitakshara* retains much authority likewise in the south and in the west of India. But to that are added, in the penin-

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sula, the *Smriti* [359] *Chandrika* and other works bearing a similar title (as *Dattaka Chandrika*, &c.), compiled by *Devananda Bhatta*, together with the works of *Madhava Acharya*, and especially the commentary on *Parasara*, and likewise the writings of *Nanda Pandita*, including his *Vaijayanti* and *Dattaka Mimansa*; and also some writers of less note." Then follow the commentaries assigned by Mr. Colebrooke to the west of India, to the east of India, to north Behar or Mithila and to Bengal respectively, the term "Bengal" as used by Mr. Colebrooke not including Behar or Benares. If the judicial caution with which Mr. Colebrooke in his Preface to his Translation of the *Daya Bhaga* and the *Mitakshara* referred to the authority of the *Smriti Chandrika* of *Devananda Bhatta* in parts of India had been imitated by Sir William Macnaghten, when referring to the authority of the *Dattaka Mimansa* of *Nanda Pandita* and of the *Dattaka Chandrika*, so many English readers would not have jumped to the conclusion, without enquiry, that the *Dattaka Mimansa* of *Nanda Pandita* was an authority in the School of Benares. *Devananda Bhatta* and his *Smriti Chandrika* are not to be confounded with the author of the *Dattaka Chandrika* and that commentary.

Mr. Sutherland, who was the first translator of the *Dattaka Mimansa* of *Nanda Pandita*, stated in his Preface, dated Mongeer, 1st July 1819, to his translation:—"The *Dattaka Mimansa* is the most celebrated work extant on the Hindu Law of adoption." Now Mongeer (Monghyr) was the chief town and administrative head-quarters of the Monghyr district in Lower Bengal adjoining the districts of Gaya and Patna, which are centres of Hindu religion and of Hindu religious teaching. The *Dattaka Mimansa* was written by *Nanda Pandita*, who was living in Benares in the earlier part of the 17th century, and one of the last of whose commentaries was composed in 1622. It may be assumed that, if the *Dattaka Mimansa* had in 1819 acquired authority in Lower Bengal and was in the Province of Benares treated as an infallible guide on questions of the Hindu law of adoption in the district of Monghyr it must have been well known who its author was, and that he and his family had been residents of Benares. Mr. Sutherland in his Preface of [360] 1819 having erroneously attributed the authorship of the *Dattaka Chandrika* to *Devananda Bhatta*, and referring to the *Dattaka Chandrika* and the *Dattaka Mimansa*, said:—"Having said this much, in explanation of the selection made, the Translator would willingly annex some account of the authors, whose tracts are now presented in an English dress. With very limited opportunity, however, he has failed in ascertaining any particulars relative to them, further than that they are both writers of Southern India." In making that statement so far as it applied to *Nanda Pandita*, Mr. Sutherland must have relied upon erroneous information. It is probable from paragraph 30 of Mr. Mayne's *Hindu Law and Usage* that the author of the *Dattaka Chandrika* was a native and a writer of Lower Bengal and was not, as Mr. Sutherland had been informed, a writer of Southern India. These misconceptions may seem to some to be matters of small importance. They do not appear to me to be unimportant, when we are asked to accept Mr. Sutherland's statement that "the *Dattaka Mimansa* is the most celebrated work extant on the law of adoption," implying that it might be accepted as a standard authority at least in that part of India in which Mr. Sutherland wrote his Preface, and also implying that such information as to its author and as to its authority as Mr. Sutherland had received was reliable. I believe that the earliest reported case of adoption

in which the Dattaka Mimansa of Nanda Pandita was applied was a case from Masulipatam in 1809, which I have not seen. It is not improbable that its application in that case, and the fact that it propounded rules which had not theretofore been suggested, may have brought it into sufficient prominence amongst the lawyers of Madras as to lead Mr. Sutherland and those upon whose information he relied to the conclusion that Nanda Pandita was a writer of Southern India.

As indicating Mr. Sutherland's views of the application of the Dattaka Mimansa in different districts and its recognition as an authority by the various schools of Hindu Law the following passage which I quote from his Preface of 1819 is of importance. He writes:—"In regard to the law of inheritance, important distinctions obtain in the doctrines of the Gaura or Bengal and other schools of law—and this difference has given rise to controversial writing and various tracts, professedly treating on that branch of judicature, as received in the different schools respectively. But the case is not the same in regard to the law of adoption. Some difference of opinion may be indeed observed amongst the individual writers on the subject, but it does not appear that any set of dogmas has been espoused or opposed, as the peculiar doctrine of any particular school. The points on which any difference of opinion obtains are noted in the Synopsis, and the translator has in some instances intimated, what appears to him, the more correct and prevailing doctrine. But compiled, as this work has been, under circumstances affording little facility for enquiry or collecting information, he has not, from an apprehension of misleading, attempted to debar or restrict the operation of any particular rule to the limits of any peculiar tract of country. In fact, such precision is scarcely to be attained." We have the fact that in 1819 Mr. Sutherland did not venture to suggest that on such information as was at his disposal and after such enquiries as he had been able to make, the Dattaka Mimansa of Nanda Pandita or any of its peculiar views were accepted or in force in the province of Benares, in the school of Benares or in any district in which Hindus dwell who were subject to the Benares School. Yet only ten years later, that is to say in 1829, Sir William Macnaghten wrote that the Dattaka Mimansa of Nanda Pandita was accepted as the infallible guide on questions of adoption in the Province of Benares. What had happened in the meantime, that is between 1819 and 1829, to cause the Dattaka Mimansa of Nanda Pandita to be accepted by the Hindus subject to the School of Benares as their infallible guide on subjects of adoption? Absolutely nothing had happened except that Mr. Sutherland's translation from Sanskrit into English of the Dattaka Mimansa of Nanda Pandita had been published in 1821. How many Hindus of the millions subject to the School of Benares knew in 1821 to 1829 enough English to enable them to read and understand Mr. Sutherland's translation? Probably not twenty. The acceptance by Hindus of the views of a commentator and the [362] adapting of their usages to such views are not the work of a day, or of ten years or of twenty. Although usages amongst Hindus vary, and vary materially even in adjoining districts, Hindus are essentially conservative as to their usages, and usages, although they differ, are in most cases the growth of centuries amongst them. More than seventy years have elapsed since Mr. Sutherland's translation of the Dattaka Mimansa was published, and nearly three hundred years have elapsed since that Mimansa was written, and yet on several vital questions of the law of adoption the usages of Hindus

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subject to the School of Benares remain directly in conflict with the rules of that Mimansa ; but we are asked to assume, without one particle of evidence to support the assumption, that on this particular question of adoption, with which we are concerned, the Hindus of the School of Benares have accepted, and submitted to, the rule of Nanda Pandita, and have adopted the usages, which it is said, on the authority of a statement of a gentleman of Calcutta made in some private correspondence which has taken place in reference to this case, but which neither the parties, their legal advisers, nor the Judges of this Bench who are of majority on this question of adoption have seen, prevail amongst certain classes of Hindus of the Daya Bhaga School of Lower Bengal. I merely point out that if the gentleman in question had been desirous of influencing this Court by a statement as to a fact he should, as he must well have known, have appeared in the witness box to give his evidence. It is hardly necessary to say that the laws and usages of the School of the Daya Bhaga are, as judicial decisions have shown, essentially different on many subjects to the laws and usages of the school of Benares. Mr. Colebrooke, referring to some critic, said, in a note printed at page 320 of the first Volume of Sir Thomas Strange's Hindu Law, edition of 1830, "Can he be ignorant, too, that the Hindu name comprises various nations differing in language and in manners, as much as the various nations of Christian Europe? It is no more to be wondered, that the law should be different in Bengal and Benares, than that it is so in Germany and Spain." See also on this subject of races, Sir John Strachey's "India," and Sir Alfred Lyall's "Asiatic Studies."

[363] In an earlier part of the Preface Mr. Sutherland said :—"The Dattaka Mimansa, as its name denotes, is an argumentative treatise, or disquisition, on the subject of adoption ; and though, from the author's extravagant affectation of logic the work is always tedious, and his arguments often weak and superfluous, and though the style is frequently obscure, and not unrarely inaccurate, it is, on the whole, compiled with ability and minute attention to the subject, and seems not unworthy of the celebrity which it has attained."

It appears to me that a valuable means of testing the authority allowed to the Dattaka Mimansa of Nanda Pandita before it had been translated in 1819 by Mr. Sutherland and of testing the accuracy of Mr. Sutherland's views and of those who followed his lead as to the importance in the Hindu community of that commentary may be afforded by ascertaining how far its precepts were recognised and followed by Courts in the Provinces of the Presidency of Fort William in Bengal before it was translated in 1819 and after it had been in existence for nearly two centuries. The materials for such a test are few, but some exist. It has never been suggested that Sudras were at any time prohibited from adopting a sister's son or a daughter's son. On the contrary, it has by some writers been maintained, I think erroneously, that amongst Sudras the first object of adoption was the sister's or the daughter's son in preference to all others. Similarly it was maintained, but erroneously, by some writers, including Nanda Pandita, that amongst Brahmans when there was a brother's son eligible for adoption the adoption of any one else would be invalid. Bearing in mind that no text and no author had ever suggested that it was not lawful for a Sudra to adopt a sister's son, or a daughter's son, it may reasonably be assumed that in the case to which I shall now refer the parties belonged to one of the three regenerate classes, for otherwise the reference to the Pandits of the question of adoption was unnecessary.

In case XII at pages 185, 186 and 187 of Volume II of Macnaghten's Principles and Precedents of Hindu Law one of the questions asked of the Pandits was whether E having adopted his daughter's son and having died, the adopted son was entitled to succeed to E's property? [364] The answer was:—"If, of the separated brothers, the youngest, having taken his daughter's son in adoption, died, such adopted son is alone entitled to the property to which the deceased was entitled." That case arose in 1808 in zilla Mirzapur in which the Banares School of Hindu Law is supreme. It appears, from cases numbered 58 and 59 at page 18 of Volume I of Morley's Digest of cases reported in the Supreme Courts of Judicature in India, that in 1810 an adoption by a Brahman of his sister's son was held to be valid, whilst in 1815 it was held that a Brahman could not adopt his sister's son as it imported incest. As in case number 61 at page 19 of the same Digest it is stated that the form of adoption in that case was the Kritrima form, I think it may be safely inferred that the form of adoption in cases numbers 58 and 59 on page 18 was the Dattaka form. I mention the above cases here as showing that prior to the translation in 1819 by Mr. Sutherland of the Dattaka Mimansa the prohibition of the Dattaka Mimansa of Nanda Pandita was not acted upon by the Courts in Bengal in two out of the three cases of which any report has survived, and in which the adoptions would necessarily have been held to have been invalid if at that time the Dattaka Mimansa was adhered to in Bengal.

It will be remembered that Mr. Sutherland when writing in Bengal his Preface to his translations of the Dattaka Mimansa and of the Dattaka Chandrika in 1819 had made inquiries as to who the authors were, and that obviously the only information which he had been able to obtain in Bengal on that point was that the authors were writers of Southern India, the fair inference being that in the opinion of his informants those commentaries were of more authority in Southern India than in Bengal or in Benares. Sir Thomas Strange in a note on a case of 1806 from the zilla of Cuddapah, having referred to the Dattaka Mimansa of Nanda Pandita and to two local commentaries of apparently not much authority, said:—"In practice the adoption of a sister's son by persons of all castes is not uncommon, the authority above quoted resting as it does on a single text, and that not pointedly prohibitory, cannot be considered sufficient to vitiate such adoptions," [365] see Sir Thomas Strange's Hindu Law, edition of 1830, Volume II, pages 100, 101. It was stated by Holloway, J., in *Narasammal v. Balaramachariu* (1), that the note to which I have just referred was by Mr. Ellis. Sir Thomas Strange in his Preface to the first edition of his Hindu Law stated that he had distinguished the Remarks in the Appendix by the letters C., E. and S. as denoting respectively the names of Mr. Colebrooke, Mr. Ellis and Mr. Sutherland. As in the only edition of Sir Thomas Strange's Hindu Law, viz., that of 1830, which contains the Appendix and to which I have access, no initial C., E. or S. is appended to the note to which I have referred, I have assumed that the note was by Sir Thomas Strange himself.

I am aware that some Pandits have cited the Dattaka Mimansa of Nanda Pandita in some cases relating to adoptions amongst Hindus of the Benares School, and it has been contended that from that fact I should infer that the Dattaka Mimansa was received in the School of Benares as an authority to be followed on all questions of adoption,

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including that which is before us. As a Judge, I am unable to adopt that argument. I do not know and have no information as to the school of Hindu law to which those Pandits belonged. In the Eastern Districts such as Gorakhpur it is as likely as not that such Pandits belonged to, or were influenced by, the School of Hindu law of Lower Bengal, which follows the Daya Bhaga. I am, however, aware that the Pandits in those cases did not agree. I cannot overlook the fact that in Sir William Macnaghten's opinion the venality of Pandits has done more than the speculations of commentators to create confusion in the Hindu law, and that according to his experience Pandits may cite authorities which are genuine and applicable to the particular subject, "but which are of no weight in the particular province whose doctrine should have been adopted." An instance of the truth of that warning was afforded by the Court Pandit of the Provincial Court of Bareilly, in a case to which I shall refer later on, who stated that the Vyavahara Mayukha was in force in the district of Etawah; [366] that statement can only be explained on the ground of the gross ignorance or the shameless mendacity of the Pandit who made it. For all I know other Pandits equally ignorant or equally regardless of the truth may have followed him; if they did, and their statements can be unearthed, we may expect some day to hear it vigorously argued in this Court that the Vyavahara Mayukha is the authority to be followed in deciding disputed questions between Hindus of the Benares School. Referring to the Court Pandits of Madras of the latter part of the last and the early part of the present century, Sir Thomas Strange, at pages xxi and xxii of the preface to the first edition of his Hindu Law, said:—"For, with regard to the Pandits, considering the infancy of the Judicial establishment provided for the dependencies on the Madras Government at the time when the collection was made, the authority of many cannot be looked upon as very great. The most competent (it may be presumed) were appointed. But in that part of India, and at the time in question, little if any encouragement having been begun to be given to the cultivation of learning among the natives, the field for selection could not be ample. Allowance is also to be made for the possibility of corruption in particular instances, remembering always the declaration of Sir William Jones, 'that he could not, with an easy conscience, concur in a decision merely on the written opinion of native lawyers in any case in which they could have the remotest interest in misleading the Court.'" I shall now quote two of the passages relating to Pandits to be found in Sir Francis Macnaghten's Preface to his Considerations on the Hindu Law. At page x Sir Francis Macnaghten said:—"A majority of the Pandits who have delivered their rescripts declare that the adopted son shall succeed to the estate of his adopting father's father; and they are apparently supported by the most rational construction; yet from the zilla of Saharanpur it is answered that the adopted son is excluded from inheritance by the Mitakshara and all other authorities." The following passage from page xii of Sir Francis Macnaghten's Preface, carefully read, is probably more condemnatory of Pandits than is anything else which he wrote. He said:—"I disclaim all intention of casting a reflection upon our present Supreme [367] Court Pandits. I have had much conversation with them both, and I believe them to be in all respects better qualified than such men usually are for their offices. Yet it has often been observed that opinions delivered in a particular cause varied from those which had been obtained upon former occasions; and I persuaded myself that it would be more satis-

factory at least to ascertain their sentiments at a time when they could not be biased by favour or by any feelings connected with the parties to an existing litigation." None of us on this Bench, so far as I am aware, either know or have the means of ascertaining what were the characters of the Pandits who, in cases relating to Hindus of the Benares School, cited the Dattaka Mimansa of Nanda Pandita as an authority. Of course, it is possible, but hardly probable, that local Pandits in outlying districts of these provinces like Gorakhpur were more learned and more honest than the Pandits of the Provincial Court of Bareilly, than the Pandits of Saharanpur and the other Pandits to whom Sir Francis Macnaghten referred, or than the Pandits who were condemned by Sir William Macnaghten, Sir Thomas Strange, and Sir William Jones. I feel that in a case of this importance to the Hindus of the Benares School, in which, if we make assumptions, which are not justified, as to the authority of Nanda Pandita in that school, there is grave risk of our imposing upon the Hindus of the Benares School a custom which may or may not exist amongst the Hindus of Lower Bengal who follow the Daya Bhaga, and which may never have existed in these provinces. I cannot, as a Judge, draw from the fact that in some few cases relating to the Benares School some Pandits, of whose characters I know nothing, cited the Dattaka Mimansa of Nanda Pandita, the conclusion that Nanda Pandita had been received as an authority by the School of Benares.

If we were, from the fact that Pandits in former years cited in Courts in these provinces certain commentaries in support of their statements, to conclude that the commentaries so cited had been accepted by the School of Benares as authoritative interpretations of the law, confusion would be worse confounded and we should be deciding questions between Hindus of the Benares School, not by the [368] Hindu law of that school, but by what commentators of another school said, erroneously or otherwise, was the law.

It is said that the following eight commentaries support the opinions on this subject of Nanda Pandita, namely, the Samskarakaustubha, the Dharmasindhu, the Dattaka Nirnaya, the Dattaka Kaumudi, the Dattaka Darpana, the Dattaka Didhiti, the Dattaka Manjari, and the Dattaka Ciromaui. Some of those commentaries are by writers of the School of the Daya Bhaga of Lower Bengal, some by writers of the Mahratha School of the Bombay Presidency, one was, I believe, by a writer of the Mithila School; as to the remainder I do not know of what part of India the writers were, but they were not of these Provinces, or of the School of Benares. All of them were, so far as I can ascertain, subsequent in date to the Dattaka Mimansa of Nanda Pandita. Not one of them was referred to by any one during the hearing of this case. The learned vakil who argued this case on behalf of the defendant had no opportunity of addressing us on any of those commentaries, or as to the authority, if any, which may be allowed to them in the Schools of Hindu law to which their authors belonged. My attention was first drawn to them by a member of this Bench more than a week after the arguments had been concluded and after the case had stood over for judgment. Only three of those commentaries have, in the nine years during which I have been on this Bench, been cited before me in any case, so far as I remember or can ascertain, and then they were not cited as authorities of the Benares School. They were cited as showing the interpretation put upon an ancient text by writers of another school of Hindu law. Of those eight commentaries

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the following were in one case—*Tulsi Ram v. Behari Lal* (1)—cited before me, the *Samskarakaustubha*, the *Dattaka Darpana*, and the *Dattaka Nirnaya*. I am not aware that any other Judge on this Bench is in a position to say that any one of those eight commentaries has ever been cited before him as of any authority in the School of Benares, or has, in fact, ever been cited before him in this Court for any purpose. I am not aware if the text [369] verified or unverified, of any of those eight commentaries is to be found within these provinces. There is not one Judge upon this Bench who is a Sanskrit scholar capable of translating those texts, or of ascertaining the context, or what those texts, in fact, say, except my brother Knox. No one on behalf of the defendant, whose interests are at stake here, has had an opportunity of having the texts of those commentaries examined. Under such circumstances, I would not venture to allude to them if I did not understand that, in the opinion of one, or possibly two, of the Judges of this Bench, the fact that on the question of adoption before us those eight commentaries of authors of other schools of Hindu law are more or less in harmony with the views of Nanda Pandita, affords a convincing argument that the *Dattaka Mimansa* of Nanda Pandita is on this question before us the law and the doctrine of the School of Benares. Under such circumstances I must deal with those commentaries as best I can on such scanty materials as are afforded to us by references to them on this subject which I find in the writings of Mr. Mandlik, Golap Chandra Sarkar and Dr. Jolly. The *Samskarakaustubha* gives a different version of the text of Saunaka to that given in the *Dattaka Mimansa* of Nanda Pandita; it omits that portion of the text which has been translated by Mr. Sutherland thus:—“For the three superior tribes, a sister’s son is nowhere [mentioned as] a son.” (See Mr. Mandlik’s *Vyavahara Mayukha* at page 489). The *Dharmasindhu* cites the text of Saunaka without referring it to any author. (Mr. Mandlik’s *Vyavahara Mayukha*, page 489). The *Dattaka Niranya* cites the text of Saunaka as a text of Narada (Mr. Mandlik’s *Vyavahara Mayukha*, page 489). It appears that the authors of those three commentaries consider that the text of Saunaka, to which I shall refer at length later on, prohibits the adoption of a daughter’s son and of a sister’s son, and that by those authors “the prohibition is placed on a par with the prohibition as to the giving of the eldest son, and the rule laying down the order of eligible adoptees, both of which have been on all hands admitted to be directory.” (Mr. Mandlik’s *Vyavahara Mayukha*, pages 488 and 489). Their Lordships of [370] the Privy Council in *Srimati Uma Deyi v. Gokulanand Das Mahapatra* (2), held that according the Hindu law as it obtains in Benares, the adoption of a very distant relation, not included within the sapindas of the adoptive father, made in violation of the preferential right of the son of a brother of the whole blood, was valid, and that the texts which prescribe the preferential adoption of such a son have not the force of law. The texts and the principal authority which were relied upon in that case as prohibiting the adoption of the distant relation were texts of the *Dattaka Chandrika*, texts of the *Dattaka Mimansa* of Nanda Pandita, and Mr. Sutherland’s Synopsis. In *Jinokee Debea v. Gopaul Acharjee* (3), it was held that the adoption of the first-born son though blameable was valid in law. The *Dattaka Kaumudi* appears to be merely an echo of the *Dattaka Mimansa* of Nanda Pandita. The *Dattaka Darpana*

(1) 12 A. 328.

(2) 5 I. A. 40.

(3) 2 C. 365.

excludes the sister's son and the daughter's son from the category of objects of adoption, but apparently says nothing about the son of a mother's sister. The Dattaka Didhiti reads the text of Saunaka differently to Nanda Pandita; it says that a daughter's son and a sister's son should be adopted by Sudras, but it does not say anything about their affiliation by the three regenerate classes, and apparently does not refer at all to the son of a mother's sister. The Dattaka Manjari says:—"Amongst Brahmans the daughter's and the sister's son are excepted, since they are unfit for being looked upon as sons; and for the same reason the paternal uncle and the like are excluded." I have gathered what I have stated as to the Dattaka Kaumudi, the Dattaka Darpana, the Dattaka Didhiti, and the Dattaka Manjari from page 327 of Golap Chandra Sarkar's Hindu Law of Adoption. According to Dr. Jolly in the Appendix to his Outlines of an History of the Hindu Law the Dattaka Ciromani is an epitome of seven treatises on adoption. Dr. Jolly gives translations of the portions epitomised as they appear in the Dattaka Ciromani, but does not give translations of the passages quoted from the Dattaka Mimansa of Nanda Pandita and the Dattaka Chandrika, as those works were accessible in an English form. The value of [371] the treatises epitomised on any question relating to the Hindu law of the School of Benares may be gathered from the following facts, assuming that the treatises were correctly epitomised in the Dattaka Ciromani, which may be doubted from the short epitomes on this particular question of adoption given by Golap Chandra Sarkar at page 327 of his Hindu Law of Adoption. According to the epitomes of the Dattaka Ciromani, the Dattaka Darpana allows the widow of a separated Hindu to adopt a son to her husband without having authority from her husband to adopt; the Dattaka Kaumudi permits the adoption of a son whilst another son is living from a desire to have many sons; the Dattaka Didhiti apparently expressed the same opinion and further stated that several men together could adopt the same son; the Dattaka Tiloka says that many sons may be adopted by the same man provided they are all adopted at the same time, and even a married man is fit to be adopted. Much more might be written on the same point. The treatises epitomised may, so far as I am concerned in this case, correctly state the law of adoption of the School of the Daya Bhaga, and I assume from nearly all those commentaries being relied upon by one of my Brother Judges that he considers that they are authorities accepted by some School of Hindu law, but they certainly could not be, nor are they, accepted as authorities in the School of Benares, and it may be assumed that some of them would be repudiated as authorities by the Hindus of Mithila. The result is that in six out of those eight commentaries no mention is made of the adoption of a mother's sister's son, and in one of them there is no prohibition against the adoption amongst the three regenerate classes of a sister's son, of a daughter's son or of the son of a mother's sister. The texts of the Dattaka Chandrika and of the Dattaka Mimansa of Nanda Pandita which were adopted as prohibitory in three of those eight commentaries have on one subject been held not to have the force of law in the School of Benares by their Lordships of the Privy Council, and on another subject have been held by the High Court at Calcutta not to be prohibitive. Neither separately nor collectively do those eight commentaries of authors of other Schools of Hindu law furnish in my opinion the slightest [372] ground for assuming that on the question before us the Dattaka Mimansa of Nanda Pandita has ever been accepted as, or ever

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was, the law of the School of Benares, nor do they suggest to my mind that the interpretation put by Nanda Pandita on the text on this subject cited in his Dattaka Mimansa was correct. That some eight or more commentators, of whose authority, reputation and accuracy of thought we know nothing, followed the lead, more or less closely, of the Dattaka Chandrika or of the Dattaka Mimansa of Nanda Pandita does not prove that Nanda Pandita correctly interpreted the text of Saunaka. It does not appear from the information before us whether any of these commentators accepted the text cited as a text of Sakalya. One solitary native commentator, who I believe was subject to the School of Benares, has followed the lead of the Dattaka Mimansa of Nanda Pandita. That commentator was the parda-nashin lady who resided in Benares and wrote under the name of Balambhatta. I say, without fear of contradiction in this Court, that she is not received as an authority by the School of Benares. *Prima facie* it would be improbable that the School of Benares, which has produced celebrated scholars and expounders of the Hindu law, should accept as an authority a lady of quite modern times, whose knowledge of the law and of the usages of Hindus in these provinces was confined to such knowledge as she was in a position to acquire when sitting behind the parda in her husband's house.

The three regenerate classes of Hindus of the School of Benares have not hitherto acknowledged that they are bound to accept the usages, or to follow the interpretation of the Hindu law, of those who belong to the School which follows the Daya Bhaga. We, as Judges of this Court, sit here in this case to apply the Hindu law and usages of the School of Benares and not the Hindu law and usages of the School of Lower Bengal or of elsewhere. Under such circumstances it appears to me to be our duty to be particularly careful that we do not impose by our decision upon the three regenerate classes of Hindus in these provinces a prohibition and a religious dogma not to be found in the Hindu law of the School [373] to which they are subject, a prohibition which may have originated in an erroneous view of the law taken by two commentators of quite modern times, which may have been followed, more or less closely, by writers who did not belong to the School of Benares, and which was supposed to apply in the Benares School of Hindu law by those who, without sufficient enquiry, accepted as correct the views of those two commentators and the views of their translator.

The result of much careful enquiry into the authority to be allowed to the Dattaka Mimansa of Nanda Pandita has led me to agree with that eminent Sanskrit scholar, Professor Jolly, that : "It is simply a misfortune that so much authority should have been attributed in the Courts all over India to such a treatise as Nanda Pandita's Mimansa, which abounds more in fanciful distinctions than, perhaps, any other work on adoption, and it is high time that the numerous other Treatises on Adoption should be thoroughly examined and given their due weight. Even hitherto, in spite of the pressure exercised by the authority of Nanda Pandita, the prevailing tendency of decisions has been in favour of divesting adoption of arbitrary restrictions, which have no foundation in equity or justice," (Professor Jolly's Outlines of an History of the Hindu Law, page 166). I am convinced that down to 1830 the Dattaka Mimansa of Nanda Pandita had not been accepted as an authority in the School of Benares. Since 1830 that Mimansa has occasionally been referred to in the Sudder Dewani Adalat of these Provinces and in this Court on various questions of adoption, but has not been followed when its rules were in conflict with the Mitakshara or

with other authoritative works of the Benares School, except in three cases, to which I shall refer at length later on, in none of which did the Judges enquire whether or not its rules had been accepted by the School of Benares. In the first of those cases a native Muunsif found the adoption proved and valid; the District Judge expressed no opinion about the adoption and decided the case on another point; the Judges of the Sudder Dewani Adalat decided, on the sole authority of Mr. Sutherland's statement, that the adoption was invalid, notwithstanding-[374]ing that the evidence which the Judges accepted as correct, showed that in the opinion of the caste the adoption was valid. In the second case all three Courts held that the adoption was invalid, applying Nanda Pandita's prohibition against the adoption of a sister's son: the curious points about that case are that the question was irrelevant, as the widow had not received authority from her husband to adopt as was found, and the prohibition of Nanda Pandita, although applied, was in fact misapplied, as the boy who was adopted by the widow to her husband was her brother's son and was not a son of a sister of the widow's late husband, and the adoption if it had been with authority would have been valid. In the third case the question of adoption was irrelevant; the curious point in connection with that case is that the parties to that case were parties to subsequent litigation in which it was by evidence proved beyond doubt that the particular adoption of a sister's son by a Brahman was valid, and was in accordance with usage amongst that division of the Brahman tribe.

It must never be overlooked for one moment that Nanda Pandita's sole position in the Hindu law is that simply of a commentator and that he had no power to impose of his own accord burdens and restrictions on the Hindus in the exercise of the right of adoption. His Dattaka Mimansa must be judged as any other commentary would be. I think I succeeded in showing in my judgment in *Beni Prasad v. Hardai Bibi* (1) that Nanda Pandita in construing a material text of Vasishtha ignored the principles of the construction of texts of the Hindu sacred law as prescribed in the Mimansa of Jaimini, and by violating those principles of construction put a construction upon that text which had not been adopted by the much more celebrated author of the Mitakshara.

Nanda Pandita in the Dattaka Mimansa asserts that amongst the three regenerate classes an adoption of a daughter's son, of a sister's son, and of a son of a sister of the mother of the adopter is prohibited. He draws that conclusion from two passages which he quotes from a text of Saunaka, and from a [375] passage which he gives as a text of Sakalya; one passage from Saunaka (Caunaka) is given partly in paragraph 2 of section II, page 547 of Mr. Sutherland's translation of the Dattaka Mimansa in Stokes' Hindu Law Books and partly in paragraph 74 of the same section at pages 563 and 564. It may be mentioned that the Dattaka Mimansa was written in prose and was not in the original divided into sections or paragraphs and was not punctuated. The system adopted in the Dattaka Mimansa was that a portion of a text was given and on it followed Nanda Pandita's comments, and then a further portion of the text was given followed by comments upon it. The text of Saunaka as given in paragraphs 2 and 74 of section II of the translation is as follows:—"The adoption of a son, by any Brahmana, must be made from amongst 'sapindas' or kinsmen connected by an oblation of food; or, on failure of these an 'asapinda,' or one not so connected, may be adopted:

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otherwise let him not adopt. Of Kshatriyas, in their own class positively; and [on default of a sapinda kinsman] even in the general family, following in the same primitive spiritual guide (Guru): of Vaicyas, from amongst those of the Vaicya class (Vaicyajateshu); of Cudras, from amongst those of the Cudra class. Of all, and the tribes likewise, [in their own] classes only; and not otherwise. But a daughter's son and a sister's son are affiliated by Cudras. For the three superior tribes, a sister's son is nowhere [mentioned as] a son." One version of this part of the text of Saunaka is thus translated by Golap Chandra Sarkar at page 309 of his Hindu Law of Adoption: "Amongst Brahmanas, the affiliation of a son *should be made* (Kartaryah) from amongst *sapindas*; or on failure of them a non-sapinda (may be affiliated); but any other should not be affiliated; amongst Kshatriyas, one from their own tribe, or one whose *Gotra* is the same as that of the adopter's *guru* or preceptor (may be affiliated); amongst Vaisyas from amongst those of the Vaisya tribe; amongst Sudras from amongst those of the Sudra tribe; amongst all classes, from their respective classes, not from others. A daughter's son or a sister's son is, however, affiliated by Sudras; amongst the three (tribes) beginning with the Brahmana, a [376] sister's son is not affiliated somewhere (or anywhere)." A translation of a version of this part of the text of Saunaka is given by Mr. Mandlik at page 53 of his Vyavahara Mayukha thus:—"Amongst Brahmanas, the adoption of a son should be made from amongst the *sapindas*, or in their absence, an *asapinda* [one not a sapinda] may be adopted, otherwise one should not be adopted; amongst Kshatriyas, one from their own class, or one whose *Gotra* is the same as that of the (adopter's) preceptor may be adopted; amongst Vaisyas, from amongst those of the Vaisya class; amongst Sudras, from amongst the Sudra class; amongst all classes, from amongst their respective classes only, not from others. But a daughter's son and sister's son are affiliated even by Sudras." I infer from a passage at pages 489 and 490 of his Vyavahara Mayukha that Mr. Mandlik obtained the text, his translation of which I have quoted, from the text as given in the Vyavahara Mayukha. Mr. Mandlik, commenting at page 494 of his Vyavahara Mayukha on the latter part of the text of Saunaka as given in the Dattaka Mimansa of Nanda Pandita gives what he vouches as his own and as a correct translation of that part of the text, as it appears in the Dattaka Mimansa, thus:—"Sudras (should) adopt a daughter's son or a sister's son. A sister's son is in some places (not adopted as) a son among the three (classes beginning) with a Brahmana." It would appear from Dr. Bühler's article on the Caunaka Smriti in the Journal of the Asiatic Society of Bengal for 1866, at page 159, that there were known to him at least five different Sanskrit versions of that part of the text of Saunaka which, as given in the Dattaka Mimansa of Nanda Pandita, Mr. Sutherland has translated as "But a daughter's, and a sister's son, are affiliated by Sudras," and that Dr. Bühler was not aware of any version of Saunaka's text, except that given by Nanda Pandita in his Dattaka Mimansa, in which the words which Mr. Sutherland has translated as "For the three superior tribes a sister's son is nowhere [mentioned as] a son" appear.

Mr. Mandlik, at pages 489 and 490 of the Vyavahara Mayukha, says in reference to this latter subject:—"This verse, although [377] found in the manuscript copy of Saunaka Karikas in my library, does not occur in that copy of Karikas which was available to Dr. Bühler. Nor does it

occur in the extract of the adoption chapter of the Karikas made in the Samskarakaustubha, and in the Vyavahara Mayukha. These extracts correspond with the manuscript of Dr. Bühler. On the other hand, the Dattaka Mimansa, the Dattaka Chandrika, and my own manuscript of Saunaka Karikas do give the said text. I am, therefore, inclined to hold with Dr. Bühler that there were two versions of the chapter of Saunaka, the one Maharastra as he calls it, and the other the Gauda or Eastern." Those facts, if there was nothing else, ought to make a Judge cautious in accepting blindly, and without careful judicial consideration, the texts given by Nanda Pandita in his Dattaka Mimansa and his comments upon them. Dr. Bühler was of opinion that it was from the Saunaka Karikas that Nanda Pandita quoted in his Dattaka Mimansa (see Journal of the Asiatic Society for 1866 at page 150). Commenting on the latter part of that text of Saunaka as given by him Nanda Pandita, according to the translation given by Mr. Sutherland of paragraphs 91, 92, 93, and 94 of section II of the Dattaka Mimansa. (Stokes' Hindu Law Books, page 567) said:—

"91. This part of the text, 'but a daughter's son, &c.' propounds an exception, as to those of the three first tribes, with respect to the daughter's son, and sister's son, inferred from the mention of propinquity in the general.

"92. Since (the particle 'but' having an exclusive import) a restriction 'by Cudras only,' is conveyed; those of the three first tribes are excluded. On this point the author subjoins a reason: 'For the three superior tribes, &c., &c.'

"93. Since the filial relation of a sister's son to one of the three first tribes, is not exhibited in any authority whatever, the passage is relative only to Cudras. This is the meaning of the whole.

"94. The expression, 'a sister's son' is of indefinite import, in the (part subjoined as a) reason; for, (otherwise) it would follow, that it were therein an unmeaning term: or, were it of definite [378] import, one portion (of the preceding sentence, viz., 'a daughter's son') would be void of sense."

I confess I find it difficult to make sense out of those paragraphs and the paragraphs which follow them. It appears to me that what Nanda Pandita was trying to demonstrate was that the sentence in Saunaka's text which Mr. Sutherland has translated as;—"For the three superior tribes, a sister's son, is nowhere (mentioned as) a son" was a reason given for the immediately preceding sentence of the text;—"But a daughter's son, and a sister's son, are affiliated by Sudras." and that reading the two sentences together Saunaka had, in the opinion of Nanda Pandita, expressly prohibited the adoption amongst the three regenerate classes of a daughter's son and a sister's son. Assuming for the moment that Nanda Pandita was correct in construing the sentence;—"For the three superior tribes, a sister's son, is nowhere (mentioned as) a son" as the reason for the statement contained in the immediately preceding sentence of Saunaka's text, and applying the rule of construction of the Mimansa of Jaimini, which is to be applied to the ancient Sanskrit text of the sacred Hindu law, the two sentences together must be deemed to contain an admonition only, and not a positive prohibition, against the adoption amongst the three regenerate classes of a sister's son and of a daughter's son. The rule of the Mimansa of Jaimini is thus stated by Mr. Mandlik at page 499 of the Vyavahara Mayukha:—"It is a rule of the Purva Mimansa that all texts supported by the assigning of a

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reason are to be deemed not as *Vidhi* but simply as *Artha-vada* (recommendatory). When a text is treated as an *Artha-vada*, it follows that it has no obligatory force whatever." I have shown in my judgment in *Beni Prasad v. Hardai Bibi*, (1) that the rules of the Mimansa of Jaimini, although they may sometimes have been overlooked or not attended to by Hindu as well as English commentators and text writers, and by English translators, are no new rules of construction but are authoritative rules for the construction of texts of the sacred law of the Hindus. The Mimansa of Jaimini is older by many centuries than the Dattaka Mimansa of Nanda Pandita. Its authority is undoubted. It has been applied by, amongst others, Jagannatha Tercapanchanana, who compiled Colebrooke's Digest, and is referred to in the notes in that digest. This is what was stated by Mr. Colebrooke as to the Mimansa of Jaimini:—"The written law, whether it be *Sruti* or *Smriti*, direct revelation or tradition, is subject to the same rules of interpretation. Those rules are collected in the *Mimansa*, which is a disquisition on proof and authority of precepts. It is considered as a branch of philosophy: and is properly the logic of the law. In the eastern part of India, viz., Bengal and Behar, where the Vedas are less read, and the Mimansa less studied than in the south, the dialectic philosophy, or *Nyaya*, is more consulted, and is there relied on for rules of reasoning and interpretation upon questions of law, as well as upon metaphysical topics." See Account by H. T. Colebrooke, Esq., of the Hindu Schools of Law in Sir Thomas Strange's Hindu Law, Volume I, page 315, edition of 1830. See also Mr. Colebrooke on the Mimansa of Jaimini, in the transactions of the Asiatic Society, Volume I, page 457. That Mr. Colebrooke in the above extract was when referring to "Bengal" applying that term, not loosely, but strictly according to its true and original meaning of the country stretching south-east from Bhagalpur to the sea, and was not including in that term Behar or the province of Benares is obvious from the reference in that extract to "Bengal and Behar" and from the following passage, relating to authorities in the different Schools of Hindu Law, in the same Account:—"To these are added, in Bengal, the works of *Jimuta Vahana* and those of *Raghunandana*, and several others, constituting a distinct school of law, which deviates on many questions from that of *Mithila*, and still more from those of Benares, and the *Dekhin*, or southern peninsula." I have shown in my judgment in *Beni Prasad v. Hardai Bibi* (1), that the author of the *Mitakshara* had construed a text of *Vasishta* in accordance with the rules of the Mimansa of Jaimini, and that the construction of that same text in the Dattaka Mimansa of Nanda Pandita was in violation of those rules. The [380] truth is, Nanda Pandita followed no rule of construction, but construed ancient texts as it suited his fancy, or his argument.

The reference to a daughter's son and a sister's son in the text of Saunaka if that text is correctly given by Nanda Pandita, appears to me to be simply a statement of what Saunaka considered to be a fact, namely, that in his time amongst Sudras a sister's son and a daughter's son were sons who were adopted by Sudras and that in the ancient texts of the Hindu law it had not been mentioned that a sister's son might be adopted amongst the three regenerate classes, a very different thing from saying that the adoption of a sister's son was prohibited. It appears to

(1) 14 A. 67 (70, 71, 72, 73).

me that Saunaka did not intend to represent that the adoption amongst the three regenerate classes of a sister's son or of a daughter's son was positively prohibited. Some writers have taken a third and a different view of the meaning of that text of Saunaka, and have contended that it means that amongst Sudras a sister's son and a daughter's son must be adopted in preference to others. Saunaka's statement may have been intended to represent that in his days, and in some part of India, so far as he knew, it was not the custom amongst the three regenerate classes to adopt a sister's son or a daughter's son, but it did not in my opinion imply a prohibition. I am led to that conclusion by each of the translations of the text which I have quoted. I also come to the same conclusion from the fact that no such prohibition against the adoption of a daughter's son or of a sister's son is even suggested in the laws of Manu, Vasishtha or in the Mitakshara, whilst Yama, who undoubtedly was a Rishi of great importance in the Hindu sacred law, distinctly recognised without any limitation or qualification the right of a Hindu to adopt a daughter's son. We shall see later on that Nanda Pandita was probably led to misconstrue the text of Saunaka, as it was given by him, by erroneously mixing up the ancient and obsolete practice of Niyoga with the law of adoption, and that Mr. Sutherland in the Synopsis went a step further and confused Niyoga with marriage.

In paragraph 107 of section II of Mr. Sutherland's translation of the Dattaka Mimansa at page 570 of Stokes' Hindu Law [381] Books a text is given as from Sakalya. Nanda Pandita referred to the text given by him as a text of Sakalya in continuation and in support of his argument on that portion of the text of Saunaka to which I have already referred, and I shall deal with it here, and before considering Nanda Pandita's comments on the other part of the text of Saunaka. The paragraph is as follows; "107. Cakala has clearly laid down the above points: "Let one of a regenerate tribe destitute of male issue, on that account, adopted (*sic*) as a son the offspring of a sapinda relation particularly: or also, next to him one born in the same general family: if such exist not, let him adopt one born in another family: except a daughter's son, a sister's son and the son of the mother's sisters." The following paragraph gives Nanda Pandita's comment on that text; "108. By this it is clearly established, that the expression 'sister's son' (in the last sentence of Caunaka's text, section 74) is illustrative of the daughter's son and mother's sister's son, and this is proper: for prohibited connection is common to all three. To enlarge would be useless."

It appears to me that if we have before us in paragraph 107 of section II of Mr. Sutherland's translation of the Dattaka Mimansa the complete text of Sakalya as translated, the words "except a daughter's son, a sister's son, and the son of a mother's sister" are equivalent to "let one of a regenerate tribe not adopt a daughter's son, a sister's son or the son of a mother's sister," and as no reason is given in the text (assuming it to be complete), we must, applying the rules of the Mimansa of Jaimini, construe the text as positively prohibiting such an adoption. Before, however, coming to the conclusion that a sacred text of the Hindu law has prohibited such an adoption, we must be satisfied that the text as given in the Dattaka Mimansa is not only a genuine text of the Hindu sacred law, but that it is the complete text, that is, that the original text contained nothing more and gave no reason for the exclusion of a sister's son, a daughter's son, and the son of a mother's sister from the category of persons eligible for adoption; for if the original text contained a

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reason for the exclusion of the sister's son, the daughter's son, and [382] the son of a mother's sister, the original text was admonitory only, and not prohibitory.

Even a casual reader of the text of Saunaka, as interpreted by Nanda Pandita, and of that given as a text of Sakalya on comparing them would notice that whilst the text of Saunaka refers only to a sister's son and a daughter's son, the text given as that of Sakalya refers not only to a sister's son and to a daughter's son, but also to the son of a mother's sister, and the natural enquiry would suggest itself why was no mention made of the son of a mother's sister in the text of Saunaka, who, beyond all dispute was an authority of great importance in the Hindu sacred law ? Only two possible answers could be given to that enquiry, one being that when Saunaka wrote he was not aware that any objection existed to the adoption of the son of a mother's sister, which would be improbable if such an objection did in fact exist, particularly on the ground of incest, in Saunaka's time, and the other answer being that in fact no objection to the adoption of the son of a mother's sister did in fact exist in the time of Saunaka. Another matter which on a comparison of those two texts, and bearing in mind the rules of construction of the Mimansa of Jaimini suggests itself is, that whilst the text of Saunaka gives, according to the opinion of Nanda Pandita, a reason, and consequently, if his opinion on that point is correct and the text is anything more than a mere statement of the fact that Sudras adopted a sister's son and a daughter's son, that text must be construed at the utmost as admonitory and not prohibitory, the text given as a text of Sakalya gives no reason, and if the text as given by Nanda Pandita be complete the text of Sakalya must be construed as a positive prohibition of the adoption of a sister's son, a daughter's son, and the son of a mother's sister. Why should an undoubted authority such as Saunaka merely give an admonition not to adopt a sister's son or a daughter's son, and why should Sakalya, if in fact he did, positively prohibit the adoption of a sister's son, of a daughter's son, and of the son of a mother's sister ? From what source did Nanda Pandita obtain the text said by him to be a text of Sakalya ? That text does not appear in any Veda, Sruti, Smriti, Sutra or Code of the Hindu law which is extant. It [383] does not appear in any early commentary on the Hindu law, such as the Mitakshara, and appears for the first time, so far as is known, in the Dattaka Chandrika, which apparently preceded at no long interval the Dattaka Mimansa of Nanda Pandita. Where did the author of the Dattaka Chandrika find that text ? Neither the author of the Dattaka Chandrika, whoever he may have been, nor Nanda Pandita, nor any one else has ever told us where the author of the Dattaka Chandrika found that text given as a text of Sakalya. The author of the Dattaka Chandrika found neither that text, nor the prohibition which it implies against the adoption of a sister's son, of a daughter's son, and of the son of a mother's sister, in any sacred book, code or commentary of the Hindu law which is now known to Hindus or to Sanskrit scholars. I find it impossible to believe that no allusion to that text or to the prohibition which it implies against the adoption of a sister's son, a daughter's son, and the son of a mother's sister should have been made in any sacred book, code or commentary of the Hindu law if the existence of that text or of that prohibition had been known before the author of the Dattaka Chandrika first produced it in his commentary. I cannot resist the conclusion either that no such text existed, or, if it did exist, that it was not considered of

any authority. It makes illegal the adoption of a daughter's son, whom Yama without any limitation recognises as a person as equally eligible as a brother's son for adoption.

With such absence of all information as to how or where the author of the Dattaka Chandrika found the text, if it had in fact existed, how can we assume that we have before us a complete transcript of an original text of Sakalya? Was this alleged most ancient text generally acted upon as an authoritative text by Hindus? In this connection it should be borne in mind that the Full Bench of the Madras High Court in *Eranjoli Illath Vishnu Nambudri v. Eranjoli Illath Krishnan Nambudri* (1) held that a custom amongst Nambudri Brahmans to adopt a sister's son was established, and in *Vayidinada v. Appu* (2), that [384] in Southern India a custom exists amongst Brahmans to adopt a sister's son and a daughter's son, and that such custom is valid. In the Panjab, according to a note at page 1028 of West and Buhler's Digest of the Hindu Law, 3rd edition, which is founded on Tupper's Customary Law of the Panjab, a sister's son and a daughter's son may be adopted with the consent of the male relations, the objection in the Panjab to the adoption of a sister's son or a daughter's son arising from their taking the property into another Gotr. The late Mr. Mandlik positively stated that in the Bombay Presidency such adoptions are common, and so far as I am aware that statement publicly made in his Vyavahara Mayukha has not been publicly contradicted. Golap Chandra Sarkar states that such adoptions are not uncommon in Lower Bengal, but what his authority for that statement was he does not mention, and I give the statement for what it is worth. Those two Full Bench cases in Madras and the fact that such adoptions are permitted in the Panjab coupled with the statement by Sir Thomas Strange which I have already quoted and with case XII and the cases in Morley's Digest to which I have referred and with the late Mr. Mandlik's statement as to the Bombay Presidency show either that the views as to the law of adoption expressed in the Dattaka Mimansa of Nanda Pandita were not generally accepted as correct, or that in many different parts of India they were unknown to many large bodies of Hindus, or were repudiated as not binding on their consciences. Neither the alleged text of Sakalya nor Nanda Pandita's prohibition is referred to in Colebrooke's Digest. Golap Chandra Sarkar at page 335 of his Hindu Law of Adoption asks a very pertinent question, which might apply in many parts of India, "Has any Brahmana been ever out-casted by adopting his daughter's or sister's son, though instances of such adoption are not rare?" I think it probable that Nanda Pandita took the text from the Dattaka Chandrika. Mr. Sutherland in his Preface of 1819 to his translations of the Dattaka Mimansa and the Dattaka Chandrika (Stokes' Hindu Law Books, page 527) says that the Dattaka Chandrika was supposed to have been the groundwork of the Dattaka Mimansa. The [385] same text is cited in each as the text of Sakalya. It is cited in paragraph 11 of s. 1 of Mr. Sutherland's translation of the Dattaka Chandrika at page 631 of Stokes' Hindu Law Books. Many of the observations which I have made on Nanda Pandita's comments on the text of Saunaka apply equally to his comments on the text quoted by him as a text of Sakalya.

I shall now refer to the other passage in the text of Saunaka upon which Nanda Pandita also relied as justifying his conclusions. It

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would appear from Mr. Mandlik's Vyavahara Mayukha at pages 481, 482 and 483, from Golap Chandra Sarkar's Hindu Law of Adoption, particularly at pages 319, 320, 321, 328 and 329 and from Professor Jolly's Outlines of an History of the Hindu Law, at pages 162, 163 and 164, that Nanda Pandita in the Dattaka Mimansa was influenced by thinking erroneously that the principles, upon which the practice of Niyoga was in remote ages governed, controlled the Hindu law of adoption, and that the application of those principles or of a misconception of those principles led Nanda Pandita to the view that the adoption amongst the three regenerate classes of a daughter's son, a sister's son and the son of a mother's sister was positively prohibited and illegal. That Nanda Pandita mixed up Niyoga with adoption appears plainly from his comments on the passage to which I am now referring, which appears in an earlier part of the text of Saunaka. A full translation of the text of Saunaka on adoption is given by Mr. Mandlik at pages 52 and 53 of his Vyavahara Mayukha and by Golap Chandra Sarkar at pages 308 and 309 of his Hindu Law of Adoption. The particular sentence occurs in the middle of a long description of the rights and ceremonies to be followed in an adoption and after the most important of those rights and ceremonies have been described, and before the description of ceremonies in adoption, the omission of which has been held by Courts in India not to invalidate an adoption. The particular sentence as it appears in paragraph 15 of s. V of the Dattaka Mimansa of Nanda Pandita was translated by Mr. Sutherland (Stokes' Hindu Law Books, page 590) thus ;—" having adorned with clothes, and so forth, the boy, bear-[386] ing the reflection of a son." The translation of the particular sentence has been given by Mr. Mandlik at page 52 of his Vyavahara Mayukha as follows :—" having with clothes and the like adorned the boy bearing the reflection of a son, &c.," and by Golap Chandra Sarkar at page 308 of his Hindu Law of Adoption thus :—" having adorned the boy bearing the reflection of a son with clothes and the like, &c." Dr. Buhler has translated the original text thus :—" He then should adorn the child which (now) resembles a son of the receiver's body, &c." (Journal of the Asiatic Society of Bengal, 1866, article *Caunaka Smriti*). Nanda Pandita apparently construed the passage in question as descriptive of the son prior to the adoption and not as descriptive of the adopted son after all the important rites and ceremonies, including the request for the gift, the gift, and the acceptance of the gift of the son in adoption, had been performed. It is highly improbable that in the middle of a passage describing the ceremonial of adoption Saunaka should have introduced, out of its place, a sentence having the effect of prohibiting the adoption of a son of a daughter, of a sister or of a mother's sister. It appears to me that the sense of the sentence, having regard to the place where that sentence appears, is given in Dr. Buhler's translation, and that the sentence means that, all the important rites and ceremonies of adoption having been performed, the adopted son then and for the first time bore the reflection of a son to the man who had adopted him. The comments of Nanda Pandita are to be found in the 16th and following paragraphs of s. V of Mr. Sutherland's translation of the Dattaka's Mimansa at pages 590 and 591 of Stokes' Hindu Law Books. Paragraphs 16 and 17 are as follows :—"16 ('The reflection of a son.') The resemblance of a son,—and that is, the capability to have sprung from [the adopter] himself, through an appointment (to raise issue on another's wife), and so forth ; as (is the case) of the son of a brother, a near or distant kinsman, and so forth. Nor is such

appointment of one unconnected impossible; for, the invitation of such (to raise issue) may take place under this text: 'For the sake of seed, let some Brahmana be invited by wealth, &c.' "

[387] "17. Accordingly, the brother, paternal and maternal uncles, the daughter's son and that of the sister, are excluded: for they bear not resemblance to a son."

If Mr. Sutherland's translation is correct, Nanda Pandita must have been applying in paragraphs 16 and 18 of s. V the principles of the *Niyoga* to Saunaka's text describing the ceremonies of an adoption in the *Dattaka* form. Except that by *Niyoga* a son was born it was in every particular the reverse of marriage. In marriage a husband obtained from his wife a son of his own getting, and he did not cease to be to his wife as a husband when she bore a son to him. In *Niyoga* apparently, to judge from texts and comments in Colebrooke's Digest, an impotent man might authorize his wife to conceive by another man who was a brother or a kinsman or a Brahman, and the son so begotten might inherit the property of his mother's husband like a son of the body of that husband begotten on his own wife; also a sonless widow might lawfully bear a son provided she had received her husband's authority in his lifetime, or was authorized by her spiritual parents; further, a man who had no male issue might, after due authority given to him, beget a son from his own body on the wife of another, and in that case the son so begotten on the wife of another was considered as the son of his mother's husband and as the son of the man who had begotten him. The brother or kinsman who was invited to raise issue in the case of the impotent husband was bound to abstain from the woman as soon as she conceived and could not lawfully beget a second son on the woman. There were several directions as to the conduct of the man who was invited to raise issue, to which it is not necessary to refer; it is sufficient to say that there was no analogy between *Niyoga* and Marriage. In the latter part of paragraph 16 of s. V, it is quite certain that Nanda Pandita was referring to that particular form of *Niyoga* in which a brother or a kinsman or a Brahman was appointed or invited to beget a son for an impotent husband on that husband's wife, and, if Mr. Sutherland's interpolations (in brackets) were discarded, it is probable that the earlier part of that paragraph referred also [388] to that particular form of *Niyoga*. In paragraphs 19 and 20 of s. V, if Mr. Sutherland's translation be correct, Nanda Pandita apparently wandered off into illustrations from marriage. In paragraphs ccxxxvi, ccxlv and ccxlv, at pages 362 and 366 of Colebrooke's Digest, Vol. II, will also be found curious illustrations to explain the result of *Niyoga*. The paragraphs of Nanda Pandita, to which I am referring, have puzzled Sanskrit scholars. The Madras High Court in *Minakshi v. Ramnanda* (1) held that Mr. Sutherland's translation of paragraph 20 of s. V was incorrect; that the Sanskrit of Nanda Pandita in that paragraph which Mr. Sutherland had translated as "with the mother of whom the adopter might have carnal knowledge" were correctly translated by Mr. Mandlik thus: "with the mother with whom *Niyoga* is possible."

It is generally hazardous work to attempt to give an explanation of the source of many of the opinions of such a writer as Nanda Pandita. In some cases no doubt they were evolved from his inner consciousness, in others they resulted from a simple misapprehension of an ancient text,

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and in others they were the result of confusing two or three totally different matters, and of construing the ancient text in the light of such confusion. The following explanation of the source of Nanda Pandita's opinions as explained in paragraphs 16 to 20 of s. V of the Dattaka Mimamsa appears to me to be reasonable. Manu mentioned twelve kinds of sons. They are thus given in Slokes 159 and 160 of Chapter IX of the Laws of Manu (Sacred Books of The East, Vol. XXV):—
"159. The legitimate son of the body, the son begotten on a wife, the son adopted, the son made, the son secretly born, and the son cast off, (are) the six heirs and kinsmen. 160. The son of an unmarried damsel, the son received with the wife, the son bought, the son begotten on a remarried woman, the son self-given, and the son of a Sudra female (are) the six (who are) not heirs (but) kinsmen." Sloke 165 is as follows:—"165. The legitimate son and the son of the wife (thus) share the father's estate; but the other ten become members of the [389] family, and inherit according to their order (each latter named on failure of those named earlier)." In Slokes 166 to 179 the twelve kinds of sons are more fully described. The 166, 167 and 168 Slokes are translated by Dr. Buhler (Sacred Books of The East, Vol. XXV), thus:—
"166. Him whom a man begets on his own wedded wife, let him know to be a legitimate son of the body (Aurasa) the first in rank. 167. He who was begotten according to the peculiar law (of the Niyoga) on the appointed wife of a dead man, of a eunuch, or of one diseased is called a son begotten on a wife (Kshetraja). 168. That (boy) equal (by caste) whom his mother or his father affectionately give, (confirming the gift) with (a libation of) water, in times of distress (to a man) as his son, must be considered as an adopted son (Datrima)." Then follow the descriptions of the Kritrima and the others of the secondary sons or substitutes for sons all except the legitimate son being referred to in Sloke 180 as "substitutes for a son (taken) in order (to prevent) a failure of the (funeral) ceremonies." In Chapter X of that part of Devanda Bhatta's Smriti Chandrika which relates to the Law of Succession and Inheritance he refers to Manu's list of twelve sons. After referring to the legitimate son (Aurasa) Devanda Bhatta says (Chapter X of the translation by Kristnasawmy Iyer of the Smriti Chandrika of Devanda Bhatta on the Law of Inheritance):—"The sons of the description of Kshetraja and the like inherit the property of their respective fathers [namely, the husband of the woman on whom the Kshetraja was procreated and the like,] and not the brothers, &c., of such fathers. 4. The same author [Manu] defines Kshetraja and the other classes of secondary sons:—I. He who was begotten, according to law, on the wife of a man deceased, impotent, or degraded, after due authority given to her, is called 'Kshetraja' or the lawful son of the wife. II. He whom his father or mother affectionately gives as a son, being alike [by a class] and in a time of distress; confirming the gift with water, is called 'Datrima' or a son given." Then follow the definitions of the other kinds of sons. Amongst the twelve sons mentioned by Manu and referred to by Devanda Bhatta, there is no mention of, or allusion to, a son begotten by [390] a sonless man upon the wife of another man; and, indeed, it would further appear from those Slokes of Chapter IX of the Laws of Manu (Sacred Books of the East, Vol. XXV), beginning with Sloke 31, concerning male offspring that the form of Niyoga by which in ancient times a sonless man might with the authority of the husband beget a son on another man's wife was not allowed by Manu. In Slokes 41—42 Manu says:—"41. Never, therefore, must a prudent well-trained man, who

knows the Veda and its Angas and desires long life, cohabit with another's wife. 42. With respect to this matter those acquainted with the past recite some stanzas, sung by Vayu (the Wind, to show): that seed must not be sown by (any) man on that which belongs to another." Then follow several illustrations from the growing of crops, &c. This is the illustration given in Sloke 53:—"53. But if by special contract (a field) is made over (to another) for sowing, then the owner of the seed and the owner of the soil are both considered in this world as sharers of the crop." One who did not read Sloke 53 with the Slokes preceding it and with those succeeding it might possibly infer that in Sloke 53 Manu recognized that form of Niyoga by which a sonless man begot a son upon another man's wife, even if such inference might properly be drawn from Sloke 53, yet the son so begotten would not be one of the twelve sons mentioned by Manu, who could inherit and also perform the funeral ceremonies. According to section X of Chapter II of Mr. Colebrooke's translation of the Mitakshara, which treats of the rights of the dwyamushyayana or son of two fathers, Niyoga to have effect in producing a son who could offer funeral oblations must have been performed on the wife of a childless man, and Manu had apparently prohibited the practice, and also, apparently, it was permissible only when the woman had been betrothed, but the marriage had not been consummated, and the man to whom she had been betrothed had died childless. According to Manu and Devanda Bhatta the Kshetraraja was the only son begotten in Niyoga who could inherit and perform the funeral ceremonies. The Kshetraraja was begotten in Niyoga pure and simple, and was not treated by Manu or Devanda Bhatta as in any sense a son [391] adopted (datrima) in the dattaka form, to which form alone the text of Saunaka related. Some commentators have referred to the secondary or substitute sons mentioned by Manu as adopted sons; but it is clear that the only son who could be said to have been adopted in the dattaka form was the datrima mentioned in the 168th Sloke of Chapter X of the Laws of Manu. We have seen that the latter part of paragraph 16 of Section V of Nanda Pandita's Dattaka Mimamsa refers to that form of Niyoga in which alone the Kshetraraja could be begotten, and that reading that portion of the paragraph with the earlier part, as Nanda Pandita apparently intended it to be read, and omitting Mr. Sutherland's interpolations, the whole paragraph related to that one form of Niyoga by which the Kshetraraja could be begotten, that is by another man upon the impotent husband's wife. Paragraph 18 of section V of the Dattaka Mimamsa of Nanda Pandita obviously referred to Niyoga; but owing to the doubts which have been entertained as to Mr. Sutherland's translation being correct, I am unable to say to which form of Niyoga Nanda Pandita was referring in that paragraph. Now my explanation is that Nanda Pandita looking about for any explanation, except the obvious one, of the text of Saunaka relating to the resemblance of a son, and finding the datrima following immediately after the Kshetraraja in the list of sons who could inherit given in Devanda Bhatta's Smriti Chandrika and in the laws of Manu, confusedly considered that there was some connection between the datrima and the Kshetraraja, or in other words between adoption in the dattaka form and Niyoga, and with a little wandering off into fanciful illustrations from marriage, the result was paragraphs 16, 17, 18, 19 and 20 of section V of the Dattaka Mimamsa. What Nanda Pandita overlooked was that if adoption in the dattaka form was controlled by the principles of the only form of Niyoga, in which according to Manu and Devanda Bhatta a son could

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be born who could inherit and perform the funeral ceremonies, there never could be born a boy who could be an object of adoption in the dattaka form; for the son begotten by another man on the wife of the impotent husband with his authority was in the Hindu Law of those ancient times the son of the latter, and [392] a man cannot adopt his son. If, as the Madras High Court held, Mr. Mandlik's translation of the concluding words of paragraph 20 of section V of Nanda Pandita's Dattaka Mimansa be correct, and Mr. Sutherland's translation of those words be incorrect, it is plain that Nanda Pandita when he wrote them was referring to Niyoga and not to marriage. Nanda Pandita was no more justified in confusing the Datrima (adopted son) with the Kshetrāja than he would have been if he had confounded the Datrima with other secondary sons, and had illustrated the text of Saunaka by references to them. Dr. Jolly, at pages 163 and 164 of his Outlines of an History of the Hindu Law, and Mr. Mandlik, at pages 482 and 483 of his Vyavahara Mayukha, give forcible illustrations of the result of applying the principles of Niyoga to adoption, and show that if Nanda Pandita was correct in applying the principles of Niyoga to adoption other rules propounded by him in his Dattaka Mimansa must be wrong.

The opinion, that in adoption amongst the three regenerate classes the person to be adopted must be one who by a legal marriage with his mother might have been the legitimate son of the adopter which influenced Sir William Macnaghten and others who wrote on the subject of adoption, and which led to many of the decisions of the Courts in India as to a daughter's son, a sister's son, and the son of a mother's sister being inadmissible for adoption amongst the three regenerate classes, appears to me to have been adopted from a passage in Mr. Sutherland's Synopsis which accompanied his translation of the Dattaka Mimansa and the Dattaka Chandrika. The passage in the Synopsis is to be found at page 664 of Stokes' Hindu Law Books, and is as follows :—
"The first and fundamental principle is that the person proposed to be adopted, be one who by a legal marriage with his mother might have been the legitimate son of the adopter. By the operation of this rule, a sister's son and offspring of other female, whom the adopter could not have espoused, and one of a different class are excluded from adoption. In the present age, marriage with one unequal in class is prohibited." Whether or not that statement in the Synopsis [393] was a reasonable deduction from the comments of Nanda Pandita in paragraphs 16 to 20 of section V of his Dattaka Mimansa, I think it is obvious that it was upon the supposed authority of those comments that Mr. Sutherland made the statement. If the comments of Nanda Pandita in paragraphs 16 to 20 of section V of his Dattaka Mimansa were not justified by the text relating to the resemblance of a son, it follows that the statement of Mr. Sutherland, which I have quoted from his Synopsis, was without foundation in the Hindu law, as in my opinion that statement was.

Professor Jolly at page 163 of his Outlines of an History of the Hindu law referring to what he describes as "a somewhat obscure passage in Nanda Pandita's Dattaka Mimansa" says :—"Supposing even the reading translated by Sutherland to be correct, which is doubtful, it was apparently not connection by marriage, but connection by Niyoga, which Nanda Pandita had primarily in view." Mr. Mandlik at pages 480 and 481 of his Vyavahara Mayukha referring to Mr. Sutherland's rule in his Synopsis says :—"Mr. Sutherland's rule in his Synopsis goes far beyond what he cites as his authorities. He seems to have confounded

Niyoga with what he calls 'legal marriage' *Niyoga* is not a marriage at all of any kind whatever, and further, *Niyoga* presupposes at the least a former betrothal of the woman with whom the said *Niyoga* is presupposed. *Niyoga*, strictly speaking, means the raising up of issue on the widow of a deceased by some one on appointment. As a practice, it has been reprobated by Manu. At no time in India's History was *Niyoga* ever exalted to the rank of marriage; and it is now a mere fossilized relic of the past. Marriage is one of the principal Sanskaras amongst the Hindus; whereas *Niyoga* is neither a Sanskara nor even a mere inferior popular observance sanctioned by custom. At the best, it was according to Manu a beastly practice, reprobated by the learned, and expressly prohibited in the Kali age. How Mr. Sutherland should have made the mistake of confusing *Niyoga* with 'legal' marriage is to me inexplicable."

[394] Shortly expressed the conclusions at which I have arrived with regard to Nanda Pandita's views on this question of adoption are that the texts from Saunaka, even as given by Nanda Pandita, do not bear the construction which he has put upon them, and that there is too much uncertainty as to the genuineness, completeness, and authority of the text cited by him as a text from Sakalya to warrant his conclusion that the adoption of a son of a sister, the son of a daughter and the son of a mother's sister amongst the three regenerate classes was prohibited by the Hindu text law as it existed at or prior to the time when he wrote his Dattaka Mimansa. That no such prohibition existed in the law as understood at that time by the School of Benares I am satisfied.

The next question is, have the opinions of Nanda Pandita as to the adoption of a son of a sister, of a son of a daughter, or of the son of a mother's sister amongst the three regenerate classes been within the last 270 years generally accepted and acted upon by Hindus who are subject to the Benares School of Hindu law; in other words is there any proof, clear or otherwise, upon which a Judge would be justified in acting, that any general usage based upon or in conformity with that opinion of Nanda Pandita has sprung up amongst and been followed by Hindus subject to the Benares School of Hindu law? What may or may not have taken place amongst Hindus subject to other schools of Hindu law may be instructive to students of, and writers on, Hindu law, but the existence or non-existence in other schools of Hindu law of a usage cannot be accepted in proof or in disproof of the existence of the same usage in the Benares School of Hindu law, with which alone we are concerned. We know from what I have already stated that in Madras, probably in Bombay and possibly in Lower Bengal, the prohibition against such adoptions has not been universally accepted, and we know that no such restriction of the right of adoption, based on the ground of incest, has been accepted in the Punjab. From that we cannot infer that there is amongst Hindus in these provinces, who are subject to the Benares School, any usage or sacred text which prohibits the adop-[395]tion of a sister's son, of a daughter's son, or of the son of a mother's sister.

Can we draw an inference that any such usage existed generally or at all in these provinces or elsewhere from the writings of Mr. Sutherland, of Sir Francis Macnaghten, of Sir William Macnaghten, or of Sir Thomas Strange? Mr. Strange's Manual of Hindu Law is not in this Court's Library, and consequently I am unable to express any opinion as to his views.

We know upon what basis or rather lack of basis Mr. Sutherland founded his opinion that:—"The first and fundamental principle (of the

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Hindu Law of Adoption) is that the person proposed to be adopted, be one who by a legal marriage with his mother might have been the legitimate son of the adopter." We know that Mr. Sutherland's opinion was founded upon the Dattaka Mimansa of Nanda Pandita and upon Mr. Sutherland's confusion of marriage with Niyoga.

The statement in Macnaghten's Principles and Precedents of Hindu Law (Sir William Macnaghten's) at page 67 of Volume I of the 3rd edition that the party adopted should not be the son of one whom the adopter could not have married, such as a sister's son or a daughter's son is obviously a mere paraphrase of the passage in Mr. Sutherland's Synopsis which I have already quoted, although Narada is apparently the only authority cited by Sir William Macnaghten for that particular proposition. We know from Professor Jolly, who translated the Narada Smriti, that no such rule is to be found in either of the two versions of the Narada Smriti. In the note at page 185 of Volume II of the 3rd edition of Macnaghten's Principles and Precedents of Hindu Law to case XII in which the Pandits in a case from zilla Mirzapur had stated in effect that the adoption of a daughter's son was valid, it is suggested that the parties were Sudras. I have already pointed out that if the parties were Sudras the question so far as the legality of the adoption of a daughter's son was concerned was unnecessary and meaningless, as no one had ever suggested that such an adoption by a Sudra would not be valid. So far as I have been [396] able to ascertain there was, with the exception of the case to which I have last referred, no report until long after the publication of Macnaghten's Principles and Precedents of Hindu Law of any case, in which the question of the right of a member of one of the three regenerate classes to adopt a sister's son or a daughter's son, or a son of a mother's sister arose, which clearly came from any district in which the Hindus were subject to the Benares School of Hindu law. If I am in error in assuming that in case XII to which I have just referred, the parties were not Sudras, (Sir William Macnaghten considers that the parties were Sudras), then so far as I have been able to ascertain there was not, until more than thirty years after Macnaghten's Principles and Precedents of Hindu Law were written and until many years after the death of Sir William Macnaghten, any report of any decided case in which this question arose and was decided, and in which it is clear that the parties were members of one of the three regenerate classes and were Hindus subject to the School of Benares, or were even residents within the district in which the law of that School prevails. Consequently, notwithstanding the reputation of the Principles and Precedents of Hindu Law, I cannot infer from it that at or before the time it was written there was any usage amongst the Hindus subject to the Benares School by which the adoption of a sister's son, or a daughter's son, or of the son of a mother's sister was prohibited amongst any classes of Hindus. The same remarks would apply to the works of Sir Francis Macnaghten and Sir Thomas Strange, who wrote respectively in 1824 and 1825.

The statement at page 150 of Sir Francis Macnaghten's Considerations on the Hindu Law as it is current in Bengal, published in 1824, that:—"The son of a sister, or of a daughter may be adopted by a Sudra. As to three superior classes, the rule is, that they cannot adopt a son whom it would be incest to have begotten," is evidently taken from the comments of Nanda Pandita in the Dattaka Mimansa and from the statement of Mr. Sutherland in his Synopsis to which I have already referred. Later in page 150 Sir Francis Macnaghten said:—"The Reverend

Saunaka Muni, [397] (as he is called by *Goverdhana*) says
But in no case a sister's son, or a daughter's son, or those whom common-
sense prohibits the adoption of, such as a brother, a paternal uncle, or a
maternal uncle . . . The italics are Sir Francis Macnaghten's.

Sir Thomas Strange at page 83 of his *Hindu Law*, Volume I, treating of the relation of the person to be adopted to the adopter, says: "The general principle, as laid down in a recent work of great weight upon the whole of this subject, is, *that one, with whose mother the adopter could not legally have married, must not be adopted*; * * * Though the adopted be not the actual son of the adopter, he is to resemble, and come as near to him as possible. He is to be at the least such as that he might have been his son. But the adopter could not have married his own mother; it is a prohibited connexion. Consequently his brother cannot be adopted by him. The same consideration excludes the paternal and maternal uncles; the daughter's and the sister's son. It must be noticed, however, that these two latter are eligible to adoption among Sudras; if not also in the three superior classes, notwithstanding positions to the contrary, no other being procurable." We know from note (3) at page 83 that the "recent work of great authority" was Mr. Sutherland's *Synopsis*. We also know from the notes to pages 83 and 84 that the *Dattaka Mimansa* and the *Dattaka Chandrika* were the other authorities upon which Sir Thomas Strange relied in part for the propositions which I have quoted. It is obvious from the concluding portion of the quotation that Sir Thomas Strange did not accept as universally applicable the rule of Mr. Sutherland's *Synopsis* or the rule of the *Dattaka Mimansa* of Nanda Pandita. If the incest theory of Nanda Pandita and Mr. Sutherland were the true theory, and if Nanda Pandita's construction of the text of *Saunaka* were correct, it is difficult to understand how the difficulty as to incest could be removed where no other than a daughter's son or a sister's son happened to be procurable for adoption. I have already referred to the note at page 101 of the 2nd volume of Sir [398] Thomas Strange's *Hindu Law*. The whole note is valuable, as it apparently was written after considerable research and with knowledge of the *Dattaka Mimansa* of Nanda Pandita and before the mind of Sir Thomas Strange, if he was the writer, had been influenced by the sweeping proposition of Mr. Sutherland in his *Synopsis*.

Mr. Arthur Steele, who wrote in 1826, as I infer from the date of his Preface, at page 44, paragraph XXXVIII, edition of 1868, of his *Law and Custom of Hindoo Castes within the Dekhun Provinces subject to the Presidency of Bombay*, after giving a list of five classes of boys who may be adopted, says:—"6. A boy of a different Gotr, but of the same caste (*Purgotr*). Such are the sister's son and daughter's son, who are adoptible in default of the preceding, P. C. (*Koustoobh* and *Nirunesindhoo*). A paternal uncle cannot be adopted being in place of his father. Nor a maternal uncle for 'an elder relation' (without regard to the relative age of the parties) 'cannot be adopted.' " It may be inferred from the passage which I have quoted that the incest theory was not responsible for the exclusion of a paternal uncle and a maternal uncle from the list of those capable of being taken in adoption. It will also be noticed that Mr. Steele and Sir Thomas Strange agree that in default of other objects of adoption a sister's son and a daughter's son may be taken in adoption. That statement of Mr. Steele was founded on the authority of the opinion of the Poona College, although it appears from a note that some of the Poona Sastris held a different opinion.

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An examination of the English Commentaries on Hindu law which were written between 1819 and 1830, in my opinion shows that Mr. Sutherland was responsible for the theory that the person to be adopted must be one who, by a legal marriage with his mother, might have been the legitimate son of the adopter; that that proposition was without sufficient enquiry adopted by Sir Francis Macnaghten and by Sir William Macnaghten, and that, with an important modification, which was destructive of the basis of the theory, it was adopted by Sir Thomas Strange, although Sir Thomas [399] Strange was well aware that in Southern India "in practice, the adoption of a sister's son by persons of all castes was not uncommon." The text-books of authors who have followed Mr. Sutherland and Sir William Macnaghten do not, with the knowledge of the authority which was relied upon by those authors, lead me to the inference that prior to 1830 there was any generally recognised prohibition, in the texts of the Hindu law or by general usage, amongst Hindus of any of the three regenerate classes against the adoption of a sister's son, of a daughter's son, or of a mother's sister's son; on the contrary, they lead me to the conclusion that the only prohibitions against such adoptions then known were the prohibitions of Mr. Sutherland, of Nanda Pandita, and of the author of the Dattaka Chandrika.

There had not, so far as I have been able to ascertain, been any case decided prior to 1815 in which it was held anywhere that the adoption of a sister's son, of a daughter's son, or of a son of a mother's sister was prohibited amongst any one of the three regenerate classes, except possibly the case of 1809 from Masulipatam, which I have not seen. In the case No. 59 in Morley's Digest it was held in 1815 that a Brahman could not adopt his sister's son. On the other hand, we have the fact that the Dattaka Mimansa of Nanda Pandita, the Dattaka Chandrika, the text of Saunaka, and the text given as a text from Sakalya relied upon in those commentaries are not even referred to in Mr. Colebrooke's Digest. We have also the note, but when made does not appear, of Sir Thomas Strange to the case of 1806 from the zilla of Cuddapah in which, having noticed the Dattaka Mimansa of Nanda Pandita and two local works, he stated that in practice the adoption of a sister's son amongst all classes in Southern India was not uncommon. We have also the fact that in the case of 1808 from the zilla Mirzapur (case XII at page 185 of Macnaghten's Hindu Law, Volume II) and in the case of 1810 numbered 58 in Morley's Digest, the prohibition of Nanda Pandita was not applied. We have also the positive assurance of the late Mr. Mandlik (Introduction to the Vyavahara Mayukha, page 73) that in the Bombay Presidency the Dattaka Mimansa of [400] Nanda Pandita "was not even known to the people in original for many years after the publication of its translation under the auspices of Government." The abovementioned facts lead me irresistibly to the conclusion that the surmise of Mr. Mayne, in paragraph 30 of his Hindu Law and Usage, that the authority which the Dattaka Mimansa of Nanda Pandita and the Dattaka Chandrika possess over other works on the subject of adoption is attributable to the fact that they became easily accessible to English lawyers and Judges from being translated by Mr. Sutherland, is well founded and is correct. Mr. Sutherland's translation of those two works was published in 1821. He had, as would appear from his Preface, been at work on the translation for some considerable time. I have come to the conclusion that the Dattaka Mimansa of Nanda Pandita and the Dattaka Chandrika were not treated even by the learned in Lower Bengal as works of any authority until after 1810 at the earliest. When

they or their prohibitions became known, if at all, to the people it is impossible to say; most probably not even in any part of Lower Bengal until after 1815. It is easy to understand how Sir William Macnaghten may in 1829 have been misled as to their importance. To English Judges and to English Counsel a translation into English of a commentary on the law of adoption would be more intelligible than would be texts and commentaries in Sanskrit, and amongst English Judges and English Counsel in India the translations of Mr. Sutherland would at once attract attention, and would give to the Dattaka Mimansa of Nanda Pandita and to the Dattaka Chandrika an importance in the eyes of English Judges which I believe they did not possess amongst the people.

That the prohibition of Nanda Pandita and of Mr. Sutherland may have been adopted by the English Judges in Bengal between 1815 and 1824 is probable.

That the prohibition of Mr. Sutherland and the opinions of the English Judges of Lower Bengal may, in the course of years as they became known, have influenced the Brahminical order in Calcutta and the adjacent districts is not improbable, but it must be remembered that those were not the days of railways and of a widely circulating native press. Whether or not a usage sprang up in Lower Bengal, prohibiting the adoption of a sister's son, of a daughter's son, and of the son of a mother's sister, is not the question which we have to decide. Except for the purposes of testing the accuracy of the statements of Sir William Macnaghten as to the authority of the Dattaka Mimansa of Nanda Pandita, and of testing the accuracy of the statements of Mr. Sutherland and of those who followed him, the enquiry as to whether or not the usage amongst the followers of the Daya Bhaga in Lower Bengal was in or prior to 1830 in accordance with that prohibition is beside the question. I think I may reasonably assume that no Hindu lawyer of position would now-a-days suggest that the existence or non-existence of a particular usage as to adoption amongst the Hindus who belong to the school of the Daya Bhaga would be evidence that the particular usage existed or did not exist amongst the Hindus who are subject to the School of Benares.

I may, however, point out that there is before this Bench absolutely nothing which a Judge could for one moment look at as evidence of the existence or non-existence at the present day of any usage amongst Hindus of Lower Bengal allowing or prohibiting the adoption amongst the three regenerate classes of a daughter's son, of a sister's son, or of the son of a mother's sister. The statement of Golap Chandra Sarkar in his Hindu Law of Adoption that such adoptions are not uncommon in Lower Bengal does not show that such a usage does exist or does not exist; that statement if well founded merely shows that the prohibition of Nanda Pandita has not been universally accepted and acted upon in Lower Bengal. As that statement was publicly made in the course of delivering his Tagore Law Lectures, and has, so far as I am aware, never been publicly contradicted, it may be taken for what it is worth. But before accepting as evidence in a suit the statement in the book of a living author that a custom or usage does or does not exist generally or in any particular locality, I should, as a Judge who is bound to administer the law, require that the author of the statement should be placed in the witness-box before me in [402] order that the litigant whom that statement might affect should have an opportunity of testing its accuracy and of ascertaining the sources of knowledge upon which it was founded. Even a

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Judge upon the Bench cannot lawfully act upon his own knowledge of a particular fact, but must act upon the evidence before him, as was pointed out many years ago by Mr. Field, who was a distinguished Judge of the High Court at Calcutta, in his Introduction to his Law of Evidence in British India.

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To the question whether any such prohibition was in or prior to 1830 understood and adopted by the Hindus of these provinces who are subject to the School of Benares, the only answer which, in my opinion, a Judge can give is that there is, so far, no evidence that it was, and as no text of the Hindu law of the School of Benares imposes such a prohibition, or limits in that respect the right of adoption, the presumption is that no such prohibition had been imposed by any usage amongst the Hindus of that School.

I shall now refer to those of the reported cases which related to Hindus resident within the districts, which have always been subject to the Hindu law of the Benares School, in order to ascertain, if possible, whether or not they afford any evidence as to the existence, either before or after 1830, amongst the three regenerate classes of Hindus who are subject to the School of Benares of any usage by which a sister's son or a daughter's son or the son of a mother's sister could not be validly adopted. The earliest case of which I have been able to discover any trace is case XII in Macnaghten's Principles and Precedents of Hindu Law, Volume II, pages 185, 186, and 187; it was as I have already said a case from zilla Mirzapur in 1808. Assuming that the reason which I have already given for concluding that the parties belonged to one of the three regenerate classes is correct, it shows that in 1808 in the Benares School the opinion of the Pandits was that an adoption of a daughter's son was valid and that Nanda Pandita's doctrine as to incest was not entertained in the Benares School.

In 1810 a suit was instituted in the Provincial Court of Bareilly, which ultimately came on appeal in 1834 before their Lordships of the [403] Privy Council from the Sudder Dewani Adalat of Bengal. It was the case of *Raja Haimun Chull Sing v. Koomer Gunshear Sing* (1). It involved the questions as to whether a widow who had not been given authority by her husband to adopt and had not the authority of her deceased husband's relatives to adopt could adopt a son to him, and whether an only son could be given in adoption. Its only interest in the present case consists in the statements made by certain Pandits who were consulted in the course of the suit. On the 12th of April 1813 the Provincial Court dismissed the suit. The plaintiff appealed to the Sudder Dewani Adalat at Calcutta, which Court, after having taken the opinion of certain Pandits, dismissed the appeal on the 14th of July 1817. These dates are material, as they indicate the period within which the Pandits who were consulted by the Sudder Dewani Adalat gave their opinion. The Pandits who were consulted by the Sudder Dewani Adalat were the Pandit of the Provincial Court of Bareilly and certain Pandits in Calcutta of the Sudder Dewani Adalat. The Pandit of the Provincial Court of Bareilly in his reply made the monstrously untrue statement that the Vyavahara Mayukha was in force in the zilla Etawah. The Vyavahara Mayukha has never been in force in any of the districts of the North-Western Provinces of the Presidency of Fort William in Bengal. It would of course be appli-

(1) 2 Knapp 203.

cable to Hindus who had come from the Bombay Presidency and had carried with them and retained their laws. It is obvious that the parties to the suit were natives of these provinces, and were not Mahrathas. The Pandits of the Sudder Dewani Adalat at Calcutta in their reply stated that the Dattaka Mimansa was in force in the zilla Etawah. The probability is that the latter statement had no more foundation in fact than had the statement as to the Vyavahara Mayukha. The Pandits in Calcutta in making this statement as to the Dattaka Mimansa were most probably influenced by the fact that the prohibition of the Dattaka Mimansa of Nanda Pandita must have been applied in 1815 in case No. 59 of Morley's Digest, although it does not appear to what part of the country the parties in that case belonged. [404] How the Pandits of Calcutta should have known what were the works of authority received by the Hindus of the Etawah district does not appear. The Etawah district is nearly 800 miles distant from Calcutta, and, in those days of bullock-garis, it must have taken from four to five weeks to make the journey from Calcutta to Etawah. Further, the Hindus of Lower Bengal and the Hindus of these provinces were as little of the same race as Italians and Germans are, and the languages spoken by the people of the respective districts were essentially different. The Pandit of Etawah who was consulted by the Provincial Court, and the Pandit of Benares, the latter of whom had given an opinion in another case, the record of which had been forwarded to the Sudder Dewani Adalat, had apparently not referred either to the Dattaka Mimansa of Nanda Pandita or to the Vyavahara Mayukha.

The next case was that of *Luchmeenath Rao Naik Kaleya v. Mussumat Bhina Baee* (1). That case came from Benares and raised amongst other questions the question whether the adoption of a sister's son during the lifetime of a brother's son was illegal. The Court Pandits advised that the adoption of a sister's son during the lifetime of a brother's son was illegal. It is specially to be noticed that neither the plaintiff's case nor the answer of the Court Pandits suggests that the adoption of a sister's son would, if the brother's son had not been alive at the date of the adoption, have been prohibited and illegal. We know that for years there was a fierce controversy on the question whether any one other than a brother's son could be adopted, if a brother's son was alive and eligible. The Principal Sudder Amin and the Sudder Dewani Adalat of these Provinces on appeal declined to decide the question of adoption and decided the case on another point. In page 1028 of West and Bühler's Digest of the Hindu Law, 3rd edition, that case is cited as an authority for the proposition that in the North-Western Provinces, "the adoption of a sister's son is invalid, according to the decisions, as it imports incest not only among Brahmans, but generally in the three regenerate classes, except perhaps the [405] Vaisyas." The fact is that the case decided nothing of the kind, the only inference to be drawn from it is that in the School of Benares in 1852 the prohibition of Nanda Pandita and Mr. Sutherland and their doctrine of incest had not been accepted. The authors of West and Bühler's valuable Digest of Hindu Law were possibly misled by Sir Michael Westropp, C.J., as to what had been decided in these provinces in *Luchmeenath Rao Naik Kaleya v. Mussumat Bhina Baee*. Sir Michael Westropp cited that case in his judgment in *Gopal Narhar Safray v. Hanmant Ganesh Safray* (2) for the following proposition:—

(1) 7 S.D.A. N.W.P. 441.

(2) 3 B. 273 (292).

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In January 1866, the case of *Shib Lall and Shitab Rae v. Bishumber* (1), was decided in appeal by the Sudder Dewani Adalat of these Provinces. The suit was for cancellation of a deed of gift on the ground that the gift was contrary to the administration papers of the village in which the subject of the gift was. The defendants pleaded that the administration papers did not invalidate the gift, that the village had been divided and the administration papers had ceased to be of force, and further that the gift having been made to an adopted son was good in law. The parties were Brahmans. The adoption was of a sister's son. The donor stated that he had taken the child, Deena Nath, into his house when the child was five years old, had adopted the child two years later, had feasted the members of the brotherhood in acknowledgment of the adoption and had managed and defrayed the expenses of the marriage of Deena Nath who had continued until his death as a member of the donor's family. The Munsif dismissed the suit finding the issues, including that as to the adoption, in favour of the defendants. The District Judge in appeal, without expressing any opinion as to the validity of the adoption, reversed the decree of the Munsif and gave the plaintiff a decree cancelling the gift on the ground that as the division of the village had not been completed the gift was contrary to the administration papers. The [406] defendants appealed to the Sudder Dewani Adalat of these Provinces, and that Court agreed with the District Judge as to the gift having been invalid by reason of the administration papers, and accepting, for the purposes of its judgment, the statement of the donor as to the adoption of Deena Nath applied the prohibition of Mr. Sutherland in the very words of its author in the Synopsis, using inverted commas and giving the reference, and found that the adoption was illegal. It is obvious that the Sudder Dewani Adalat of these provinces did not find against the adoption on any evidence of a usage. The evidence as accepted by that Court for the purposes of its judgment strongly negatived any usage forbidding such an adoption, it showed that on the occasion of the adoption the members of the brotherhood had assembled and had been feasted in acknowledgment of the adoption. If, in the opinion of the members of the caste the adoption of a sister's son was illegal according to Hindu Law, the members of the brotherhood would not have attended the adoption feast, and thereby rendered themselves liable to be outcasted. It will be remembered that the Native Munsif had found the adoption valid. Without any evidence that Mr. Sutherland's prohibition against the adoption of a sister's son had been accepted by usage in these Provinces, and with evidence before them strongly indicating that the adoption by a Brahman subject to the School of Benares of his sister's son was not contrary to usage in these Provinces, the two learned Judges of the Sudder Dewani Adalat applied Mr. Sutherland's prohibition. It was not until 1868 that their Lordships of the Privy Council in *The Collector of Madura v. Moottoo Ramalinga Sathupathy* (2) laid down what were the duties of an English Judge in such cases.

The next case in these Provinces was that of *Musummat Battas Kuar v. Lachman Singh* (3). In that case a widow without authority from her deceased husband had adopted to her deceased husband her brother's son.

(1) S.D.A. N.W.P. (1866) 25.

(2) 12 M.I.A. 397 (436).

(3) 7 N.W.P. H.C.R. 117.

The first Court held on the authority of the Dattaka Mimansa of Nanda Pandita that a brother's son must not be [407] adopted by a sister. The Judge of Cawnpore decided in appeal against the adoption on the ground that according to the Dattaka Mimansa, as referred to in Macnaghten's Hindu Law, the party adopted . . . should not be the son of one whom the adopter could not have married, such as his sister's son or daughter's son. This Court without considering whether any such rule of law was deducible from the texts of the law or was accepted by the School of Benares held that the adoption was "liable to be avoided on the ground that the adopted person was not legally eligible for adoption by the widow on her husband's behalf, and also on the ground that she had not been authorized by him to adopt a son on his behalf." In that case Mr. Justice Pearson and Mr. Justice Spankie apparently without any consideration of the subject and certainly without any proof of a usage in these provinces adopted the dicta of Nanda Pandita and Sir William Macnaghten, as they found them. That case was decided by this Court in 1875. As an authority on the particular question before us that decision is worthless, if in fact, as it would appear, the widow had adopted her own brother's son to her husband. The prohibition of Nanda Pandita and of Mr. Sutherland does not apply to the adoption of the son of a wife's sister or of the son of a wife's brother, and consequently even according to Nanda Pandita and Mr. Sutherland, the adopted person was not in fact legally ineligible for adoption by the widow on her husband's behalf. That adoption would have been good if the widow had received authority from her husband to adopt to him. An adoption of a son by a widow to her husband with his authority, and an adoption of a son to herself are, as every student of the Hindu law knows, two totally different questions, and are not to be confounded; in adopting a son to her husband with his authority, the wife or widow, as the case may be, acts as her husband's agent. The authorities which show that a wife's brother or his son, or the son of a wife's sister may be adopted are given in the notes to paragraph 118 of Mr. Mayne's Hindu Law and Usage.

The next case, in which the legality of the adoption of a sister's son by a member of one of the three regenerate classes was questioned which came before this Court was that of *Parbati v. [408] Sundar* (1). That case was before this Court in 1885, and the two learned Judges before whom it came considering themselves bound by authority declined to consider the question of the legality of the adoption. The fact was that question was in that case irrelevant. So far as I am aware, there had been no decision of this Court or of the Sudder Dewani Adalat of these provinces which in any way precluded them from considering the question as to the legality of the adoption. There was no case, so far as I have been able to ascertain, in which any usage amongst Hindus subject to the School of Benares prohibiting such an adoption had been found, or had been even attempted to be proved. If the attention of those learned Judges had been drawn to the passage which I have quoted from the judgment of their Lordships of the Privy Council, in *The Collector of Madura v. Mootoo Ramalinga Sathupathy* (2), and if they had considered the question to be relevant, they would doubtless have attempted to ascertain whether the prohibition of Nanda Pandita and Mr. Sutherland had been received by the Benares School of Hindu Law which governed the district with which they had to deal, and whether that

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(2) 12 M.I.A. 397 (436).

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prohibition had in that district been sanctioned by usage. That decision in I. L. R., 8 All., 1, has been cited as an authority that the rule of Mr. Sutherland, as limited to the three regenerate classes, had been affirmed by this Court. In my opinion, as an authority for the proposition that any such rule either in 1885 or at any time was of force in these provinces, it is useless. That case went on appeal to Her Majesty in Council. Their Lordships, L. R. 16 I. A., 186, reversed the decree of this Court on another point, and as to the question of adoption merely said:—"If it were necessary to determine the point, their Lordships would probably have little difficulty in accepting the opinion of the High Court that a Hindu Brahman cannot lawfully adopt his own sister's son." I do not think that their Lordships would hold that that observation precludes this Court from considering the matter.

The next case in this Court on the subject of the adoption of a sister's son by a Brahman was that of *Chain Sukh Ram v. Parbati* [409] (1). In that case two appeals were heard together. In one of those appeals Musammat Parbati, who was the appellant in the case reported in I. L. R., 8 All., 1, was a respondent, and in the other of those cases Musammat Sundar, who was the respondent in the case in I. L. R., 8 All., 1, was a respondent. The original suits in which those two appeals arose had been tried in the Court of first instance after the Judges of this Court had in *Parbati v. Sundar* (2) declined to consider the question of the legality of the adoption of a sister's son considering themselves bound by authority to hold that such an adoption was invalid. Consequently in the two later suits evidence was called from Muzaffarnagar, Meerut, Bulandshahr, Aligarh, Delhi, Saharanpur, Muttra, Etawah and Cawnpore, to prove that there was a custom amongst Bohra Brahmans by which the adoption of a sister's son was valid. When those suits came in appeal before this Court, it was strongly contended that the question as to whether such a custom could be valid was concluded adversely to the custom by their Lordships of the Privy Council in *Sundar v. Parbati* (3) in the passage which I have already quoted. Mr. Justice Tyrrell and I held that we were not precluded from considering the question of custom, and after pointing out that the alleged rule of Hindu law which prohibits amongst the regenerate classes, the adoption of a sister's son, or a daughter's son, had in many parts of India been varied by custom or had possibly never been followed, and that grave doubts had been raised as to the authenticity of the principle that the person to be adopted must be one who by a legal marriage with his mother might have been the legitimate son of the adopter, assumed for the purposes of the appeal before us, but did not decide, that Mr. Sutherland's view on the subject was correct, and proceeded to try the issue as to the alleged custom amongst Bohra Brahmans in these provinces. We found as a fact on the evidence that the custom amongst Bohra Brahmans of these provinces to adopt a sister's son was proved, and we held that the custom was valid and good in law. That Bohra Brahmans belong to one of the many divisions of Brahmans and [410] consequently belong to one of the three regenerate classes of Hindus cannot be doubted. That case proves that when put to the test of evidence as to the usage of at least one important branch of the Hindu community in the northern parts of these provinces the prohibitions of Nanda Pandita and of Mr. Sutherland have been entirely disregarded as binding by that branch of Brahmans; it proves no more, but it suggests

(1) 14 A. 53.

(2) 8 A. 1.

(3) 16 I.A. 186.

that it would be judicially rash to hold, except upon clear evidence, that the prohibitions of Nanda Pandita and Mr. Sutherland have been accepted as binding by any of the three regenerate classes of Hindus of these provinces.

There are three cases bearing on this question of adoption mentioned at pages 18 and 19 of Morley's Digest. They are cases numbered 58, 59, and 60, and were respectively decided in 1810, 1815, and 1819. I have been unable to ascertain whether or not the parties in these cases respectively were subject to the School of Benares. In case No. 58 it was decided in 1810, that an adoption by a Brahman of his sister's son was valid. In case No. 59 it was decided in 1815 that a Brahman could not adopt his sister's son, as such an adoption imports incest. In case No. 60, it was decided in 1818 that among Brahmans, a widow cannot adopt her uncle's son, as she could not be his mother on the ground of incest.

As the cases to which we were referred which were decided in Madras and Bombay, and in which it was held that amongst the three regenerate classes an adoption of a sister's son, or of a daughter's son or of the son of a mother's sister was invalid, related not to Hindus of the Benares School or of these provinces, but to schools of Hindu law in districts with which we in this Court in this case are not concerned, and as it appeared to me from a consideration of those cases that it was, not by the people of those schools and districts, but by the High Court Judges on behalf of the people and contrary to the wishes and usages of the people, that the prohibitions and interpretations of the Dattaka Mimansa of Nanda Pandita, of the Dattaka Chandrika, and of Mr. Sutherland had been accepted and adopted, I thought it unnecessary to refer to those decisions. However, as it appears that one, if not both, of the Judges [411] of this Bench who are in the minority, appears to consider that the questions as to the authority to be allowed to those commentaries, the questions as to the true construction of the text of Saunaka, and the question as to the *onus* of proof in this case are practically concluded by the decisions in those cases in Madras and Bombay, it is necessary for me to refer to them, and I shall do so as briefly as I can. To prevent the establishment of a precedent in this Court I think it advisable to point out that the decision of a High Court in India is not binding upon any other of those High Courts, except in cases to which the principle of *res judicata* applies, and that when that principle does not apply a High Court, although it should give due consideration to the reasons stated by another High Court for its decision, is not bound to follow that decision unless it agrees with it.

The earliest decided case in Madras of which we have a report in the Library of this Court is *Narasammal v. Balaramacharlu* (1). That case was from the Andhra country, and I infer from the judgment that the Madras High Court considered that, although an adoption of a sister's son by a Brahman might be valid in the Dravida country, such an adoption in the Andhra country could not be supported even by proof of a custom. The learned Judges said :—"This is a case, then, in which it is sought to set up a supposed custom, which has never received the sanction of judicial authority, against the express language of the greatest authorities. We are strongly of opinion that such customs cannot, even if proved to exist, operate in a Court of justice bound to administer the

(1) M.H.C.R. 1862-3, 420 (1 M.H.C.R. 420).

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law." The first observation to be made on that passage is that if no custom could be received as valid until it had received the sanction of a Court of law, it is impossible that any custom could ever have been established as valid ; and as the learned Judges stated that the case before them was one of first impression, they, apparently holding that view as to the proof of a custom, consequently scouted the idea that there could be a valid custom for such an adoption and decided the case on [412] "the express language of the greatest authorities" who were according to them—Mr. Sutherland in his Synopsis, Nanda Pandita in his Dattaka Mimansa and the author of the Dattaka Chandrika, and paid no attention to what Mr. Ellis had written, or to what Mr. Justice Strange had, according to them, laid down in the second edition of his manual—"That usage has sanctioned the departure from the rule to the extent that there (the Madras Presidency) a daughter's son or a sister's son may be adopted." The rule referred to was the prohibition of Nanda Pandita and Mr. Sutherland. It is to be observed that the Full Benches of the Madras High Court did not take the same view as to how a valid custom might be established when they held that the Brahmans in *Eranjoli Illath Vishnu Nambubri v. Eranjoli Illath Krishnan Nambudri* (1), had established a valid custom amongst Nambudri Brahmans to adopt a sister's son, and in *Vayidinada v. Appu* (2), where they held that a valid custom exists amongst Brahmans in Southern India to adopt a sister's son and a daughter's son. The learned Judges in *Narasammal v. Balaramacharlu* may, for all I know, have been correct in assuming that in Madras the Dattaka Mimansa of Nanda Pandita and the Dattaka Chandrika were of the number of "the greatest authorities."

The next case in Madras was *Jivani Bhai v. Jivu Bhai* (3). That case was decided upon another point, but this is what the learned Judges said on the question of adoption :—"On the point of the validity of the adoption of the son of a person with whom the adopter could not have intermarried, there will be found great conflict of authority amongst the Pandits, but none whatever upon the authorities. They are all perfectly consistent in declaring such adoptions invalid. It will perhaps be found that the allegation of custom in this case will be found to amount simply to an allegation that people do that which the law has forbidden." That was a sweeping assertion. We are not told what were the authorities which "are all perfectly consistent in declaring such adoptions invalid." Possibly Manu, the Mitakshara and several other [413] authorities of the School of Benares, none of which suggest any such prohibition, were in 1865 not considered by those learned Judges to be authorities in Madras or Southern India.

The next case in Madras was *Gopalayyan v. Raghupatiayyan* (4). That is a case which should be carefully studied by any one who is anxious to ascertain how far High Courts in India have, in setting up the Dattaka Mimansa of Nanda Pandita and the Dattaka Chandrika as the sole law to be followed by Hindus on this question of adoption, disregarded and trampled upon the usages of the people. It was a case of the adoption of a sister's son by a Brahman. The Civil Judge found on evidence that a custom to make such adoptions was valid. He said in his judgment—"If it were now attempted to be declared that such adoptions were illegal in Southern India, there would be only one course to pursue, viz., a similar one

(1) 7 M. 3.

(2) 9 M. 44.

(3) M.H.C.R. 1864—5. 462 (2 M.H.C.R. 462).

(4) M.H.C.R. 1871—2. 250 (7 M.H.C.R. 250).

to that some years ago acted upon in England in the matter of marriage with deceased wife's sisters, that is, to pass an Act declaring all such adoptions already made to be legal, but to prohibit them in future. Otherwise the most frightful confusion would be imported into very many families in this district alone." According to the Madras High Court the particular Civil Judge was a Judge of "great experience," but as the High Court considered that according to "the writers of all schools," the adoption by a Brahman of his sister's son was not valid (who those writers were we are not told), they remanded an issue as to the existence of a customary law, and in doing so gave two directions, of which the following is the most important:—"The evidence should be such as to prove the uniformity and continuity of the usage and the conviction of those *following it that they were acting in accordance with law*, and this conviction must be inferred from the evidence." "In return to this issue the Civil Judge (E. F. Webster) found (on a consideration of oral evidence alone) that the custom has been shown to be uniform because uninterrupted. That the existence of the custom goes back as far as 134 years, and that the publicity of the acts, the general acquiescence of the people in those acts and the opinions of those amongst [414] the people who are acquainted with the Shastras that such adoptions are valid, all go distinctly to shew a conviction among the people that they were acting in accordance with law, and I therefore find the issue sent down in the affirmative." One would have thought that in Madras, at any rate, upon that evidence and that finding this fetish of the Dattaka Mimansa of Nanda Pandita would have been laid for ever. But it was not so; the High Court found that "there was no evidence justifying the setting up of a rule of law opposed to all authorities, and specifically to the one declared by almost the only skilled witness examined in favour of the custom to be binding in the very district in which it was sought to enforce it." What were the authorities which prevented the High Court from acting on that evidence?

The next two cases in Madras were the Full Bench cases of *Eranjoli Illath Vishnu Nambudri v. Eranjoli Illath Krishnan Nambudri* (1) and *Vayidinada v. Appu* (2) in which, respectively, the custom amongst Nambudri Brahmans to adopt a sister's son, and the custom in Southern India amongst Brahmans to adopt a sister's son and a daughter's son, was held valid notwithstanding the previous decisions of that Court and notwithstanding Mr. Sutherland, the Dattaka Mimansa of Nanda Pandita and the Dattaka Chandrika. Neither of these commentaries are referred to in the judgment in the former of those two cases, and in the latter of those two cases, although the text of Saunaka as given in the Dattaka Mimansa of Nanda Pandita is discussed and compared with the text of Saunaka as given by another commentator, not one word is said in the judgment about the text said by Nanda Pandita to be a text of Sakalya. The Full Bench evidently placed no reliance upon the latter text.

The next reported case in Madras is *Minakshi v. Ramnada* (3). That case was decided on that part of the Dattaka Mimansa of Nanda Pandita which was a commentary on the text of Saunaka; and again no reference is made in support of the opinion of the [415] Court to the alleged text of Sakalya. In that case one important matter was that the Court held that Mr. Sutherland had mistranslated the concluding words of paragraph 20 of section II of the Dattaka Mimansa of Nanda Pandita. In that case the Court did not refer to the Dattaka Chandrika.

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(2) 9 M. 44.

(3) 11 M. 49.

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The result of a consideration of the reported cases from Madras appears to me to be that whenever the Madras High Court permitted the parties to call evidence to contradict the Dattaka Chandrika and the Dattaka Mimansa of Nanda Pandita, the result was that the prohibitions of those two commentaries were discredited and were proved not to have been accepted by the people.

I shall now briefly refer to the three cases decided in Bombay of which the reports are accessible to me, and in which the factum of the adoption was found. There was one case in Bombay, and there may have been more, in which the factum of the adoption was not proved.

The first case in Bombay of which I have a report is *Ganpatra Vireshvar v. Vithoba Khandappa* (1). Notwithstanding the attempts which have been made to explain away the decision in that case on the statement, which appears to be well founded, that the parties were in fact Sudras, yet the references in the judgment to the case in the Privy Council which had been relied upon in support of the reality of the adoption of a sister's son, which in fact had taken place, leads me to the conclusion that Sir Richard Couch, C.J., and Newton and Warden, JJ., considered that the parties were Vaishyas, one of the three regenerate classes of Hindus, when they held that the adoption of a sister's son having taken place could not be set aside. The arguments of the vakils on each side depended according to the report on the supposed fact that the parties belonged to one of the three regenerate classes and no one had at any time suggested that the adoption of sister's son by a Sudra would not be valid.

The next case in Bombay is *Gopal Narhar Safray v. Hanmant Ganesh Safray* and *Ganesh Ramchandra Safray* (2). In that case [416] the Bombay High Court, disregarding the previous ruling of its own Court in *Ganpatra Vireshvar v. Vithoba Khandappa* (1), held that the members of the three regenerate classes were absolutely prohibited from, and incapable of, adopting a sister's son or a daughter's son or the son of any other woman whom they could not marry by reason of propinquity, and that the burden of proving a special custom to the contrary lay upon him who alleged the custom. The Court accepted the text said by Nanda Pandita to be a text of Sakalya without any enquiry as to its authenticity. One of the authorities relied upon in that case was the Dattaka Chandrika which the Court supposed to have been the work of Devanda Bhatta; another of the authorities relied upon was *Luchmeenauth Rao Naik Kaliya v. Musammatt Bhina Bae* (3) which had not decided, as it was assumed by the Bombay High Court that it had, that the adoption of a sister's son by a Brahman in these provinces was invalid; two of the other cases relied upon were *Narasammal v. Balaramcharlu* (4) and *Gopalayyan v. Raghupatiayyan* (5) upon which I have already commented.

In *Bhagirthibai v. Radhabai* (6), the Court followed the decision to which I have last referred.

I have now referred to all the cases of which I am aware and to the reports of which I have access in which the prohibitions of Nanda Pandita and Mr. Sutherland were adopted. It appears to me that the Courts on the authority of Mr. Sutherland or of Sir William Macnaghten and of those who echoed their statements accepted the prohibition of Nanda Pandita and his glosses and interpretations of texts and applied them to the Hindus in most of those cases without any enquiry at all, and in some

(1) 4 B.H.C. R.A.C. J. 130.

(2) 3 B. 273.

(3) 7 S.D.A. N.W.P. 441.

(4) M.H.C.R. 1862-3, 420. (1 M.H.C.R. 420)-

(5) M.H.C.R. 1871-2, 250. (7 M.H.C.R. 250). (6) 3 B. 298.

of them without any adequate enquiry, as to whether those prohibitions, those glosses and interpretations, and those texts were justified or had ever been accepted by the Hindus of the schools to which the cases related. Further, it appears to me that in the remainder of those cases the Judges acted on the assumption that on questions [417] of adoption the usages of the people were to be completely disregarded and to be treated as not worthy of consideration, if, unfortunately for the people, their usages conflicted with the prohibitions of Nanda Pandita and of Mr. Sutherland.

So much confusion has been imported into this case by the unwarranted assumption that the Hindus of these provinces who are subject to the School of Benares have moulded their usages so as to bring them into accordance with the rulings of High Court Judges of Madras and Bombay, that I must point out that a dispassionate consideration of the reported cases from Madras shows that those rulings have not had the effect, even in Madras, which we are asked to assume that they have had in these provinces. No matter what may have been the effect of those rulings upon the usages of the people in Madras and Bombay, what we have to act upon in this case is the law of the School of Benares.

So far as this point before us is concerned, I consider that the question as to whether amongst the three regenerate classes in these provinces which are subject to the Benares School of Hindu Law, an adoption of a sister's son, of a daughter's son, and of the son of a sister of the mother of an adopter is, according to the texts of the Hindu law, permissible or is prohibited is not concluded by authority, and we are entitled to express our opinion upon it in this case. There is in my opinion absolutely no proof, clear or otherwise, that the prohibitions of Nanda Pandita and Mr. Sutherland against such adoptions have ever been received by the Benares School of Hindu Law and sanctioned by usage in these provinces; indeed Case XII in the Second Volume of Macnaghten's Hindu Law and the case in 7 S. D. A., N -W. P., 441, suggests to my mind that no such prohibition had down to 1852 been recognised or adopted in these provinces. Further, in my opinion, it has not been shown that any text of the Hindu law of the Benares School contains any such prohibition.

In my opinion, it has not been shown that the adoption in this case, if it in fact took place, by Madho Singh of his mother's sister's son was prohibited or illegal by the law of the Benares School which [418] applies in these provinces and to the parties. If it were necessary, I would be prepared to go further and to hold that the adoption of a son of a mother's sister amongst the three regenerate classes of Hindus subject to the School of Benares is not only not prohibited, but is valid. I would set aside the decree under appeal on this preliminary point and remand the case under section 562 of the Code of Civil Procedure.

KNOX, J.—I have had full opportunity for carefully studying the very able and exhaustive judgment of the learned Chief Justice. It would be waste of time to go over the same ground. I concur fully in holding that what the respondents ask us to accept as an undisputed doctrine of Hindu law cannot be accepted as such; that it was for the respondents to establish that the so-called undisputed doctrine of Hindu law under which they impeach the adoption of Bhagwan Singh had been accepted in and sanctioned by the usage of the Benares School, and that as they have not done this the case must be remanded under s. 562 of the Code of Civil Procedure.

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The texts pressed upon us by the respondents for acceptance are texts from the Smriti of Saunaka and a text said to be a text of Sakalya.

On the texts from the Smriti of Saunaka, Nanda Pandita in his Dattaka Mimansa bases all the several reasons he puts forward for pronouncing that the adoption of a daughter's son, a sister's son and a mother's sister's son is invalid. The fragment said to be from Sakalya is added as a text corroborating his teaching upon the subject.

Dr. Bühler in a very interesting paper re-produced in the Journal of the Asiatic Society, 1866, p. 149, gives the text and translation of a manuscript known to Sastris as the Brihat Saunaka Smriti. It is termed Saunakya Karika, and is the work which Nanda Pandita and other writers on adoption quote. Dr. Bühler collated his manuscript with the text as re-produced in the Dattaka Mimansa, the Dattaka Chandrika, the Vyavahara Mayukha and the Sanskara Kaustubha with this result. The first of the two [419] passages on which Nanda Pandita relies as quoted by Nanda Pandita, differs materially from the text as quoted by other commentators, and it also differs from the manuscript in the possession of Dr. Bühler. The passage as quoted by all the commentators consists of two ordinary slokas, and of the text of those slokas there are no less than five different readings. The Dattaka Chandrika alone agrees with the Dattaka Mimansa as to the language of the original text. As Nilkantha in the Vyavahara Mayukha quotes the original text, the inference is that this form of adoption is valid amongst all classes, Sudras included. The text of Dr. Bühler's manuscript favours the readings given by Nilkantha, though differing from it. By substituting a "but" (तु) for an "and" (चापि) the Dattaka Mimansa and the Dattaka Chandrika bring out a prohibition. But the Dattaka Mimansa alone goes further and inserts half a sloka which runs as follows:—

ब्राह्मणादिचये नास्ति भागिनेयः सुतः क्वचित् which means that "amongst the three castes beginning with the Brahmans a sister's son is nowhere adopted."

This half sloka is not to be found in the text as re-produced by any of the other commentators, and, coming in as a half sloka by itself, it raises the suspicion that it is a passage interpolated into the original text in order to strengthen the reading of the preceding text where it differs from the text as given by the other commentators.

In the second of the texts on which Nanda Pandita relies there is a reading which, if the true one, would most seriously affect the value of the comments made by Nanda Pandita. It is the text which was quoted so often at the hearing and which contains the word पुच्छयावहं. The latter half of this word is exactly re-produced in the Greek *σκιόσπορος*, and its literal meaning is "bearing the shadow." Nanda Pandita translates it as "bearing the resemblance of a son," and on this one word he builds up the whole of his theory that the boy must be one who was capable of having sprung from the adopter through *Niyog*. If the original text does [420] not contain the word पुच्छयावहं the ground work for all this doctrine fails, and the fabric built upon it melts into thin air. The author of the Sanskara Kaustubha also quotes the same text from the Smriti of Saunaka, but, according to him, the text runs:—ब्रह्मादिभिरलंकृत्य छच्छयावहं

सुतं, a reading which at first blush seems more natural and suitable. It means "the boy having been adorned with clothes and ornaments and having come under the shadow of an umbrella." If this reading be the true reading of Saunaka's text, not even the ingenuity of Nanda Pandita could have evolved out of उचछायागतं the idea of "Niyoga."

Even if the reading given by Nanda Pandita is the accurate one, I still cannot and do not accept the strained interpretation which he brings out of पुचछायावहं. The natural meaning is that the boy, who before adoption was no son of his adoptive father, now bears the representation of a son. I am not prepared to abandon this natural meaning and to accept the confused array of errors which Nanda Pandita has evolved. This subject has been so fully treated by the learned Chief Justice that I will say no more than that I fully concur with what he has said on Nanda Pandita's comments on his texts.

Is it strange that I should view with some distrust the meaning given in the Dattaka Mimansa when I find such material differences in the reading of both the texts quoted by Nanda Pandita as the authority for his law? I am not ignorant of the fact that the Vyavahara Mayukha and the Sanskara Kaustubha are not authorities in the Benares School, but all profess to re-produce a genuine and identical text of a Dharmasastrī. Some one must have read or remembered wrongly the original text, and, in the absence of evidence, how am I to decide which was the true version of the text as it stood in the original?

It is impossible to examine critically the small fragment said to be quoted from Sakalya. It stands without beginning, without end, and with no reference as to the work from which it is taken. It may not be Sakalya's at all. Nanda Pandita is known to have [421] erred in references before. It may be a text of Sakalya, but without the context, I decline to draw any inference of any kind from it.

These criticisms would be totally uncalled for and out of place if there were before me evidence that the Benares School had taken Nanda Pandita's reading of Saunaka as the correct one, or given to his interpretation of it the sanction of usage. But it is otherwise when I am asked to accept them as genuine and undoubted texts of Hindu law accurately quoted and accurately interpreted.

I would answer the reference in the manner proposed by the learned Chief Justice.

BLAIR, J.—I concur in the order proposed by the Chief Justice and in the reasoning by which he has arrived at his conclusion. I am not satisfied that Nanda Pandita has been accepted in the provinces governed by the Mitakshara as an undoubted authority upon the law of the Benares School. I think the texts cited by him are by no means certain to be accurate and complete, or to have been correctly construed by him and later commentators. In the absence therefore of evidence of usage having the force of law, I must decline to impose upon the Hindu community restrictions which are not proved to have obtained their general and continued sanction.

BURKITT, J.—I fully concur in the very elaborate and exhaustive judgment which has just been pronounced by the learned Chief Justice, and in the terms of reasoning on which it is founded. I will only add that that judgment does not impose any restriction on any class of Hindus in the matter of adoption. It does not make it compulsory on any Hindu

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to adopt his daughter's son, or his sister's son, or the son of his mother's sister. It does no more than lay down that such an adoption, if made, is not invalid according to the law of the Benares School. I quite fail to see how such an exposition of the law of that school can have the effect of "shaking settled titles," as my brother Banerji appears to apprehend.

I would set aside the decree under appeal, and would remand the case under the provisions of s. 562 of the Code of Civil Procedure to the Court against whose decree this appeal is made, with directions to proceed to determine the suit on the merits.

17 A. 422 = 15 A.W.N. (1895), 112.

[422] REVISIONAL CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

SARMAN LAL (*Plaintiff*) v. KHUBAN AND OTHERS (*Defendants*).^{*}
[6th December, 1894.]

Revision—Act No. IX of 1887 (Provincial Small Cause Courts Act), s. 25—Civil Procedure Code, s. 622—Grounds upon which an application for revision under s. 25 of Act No. IX of 1887 will be entertained.

It is no ground for revision under s. 25 of Act No. IX of 1887 that the Court whose order it is sought to revise may have come to an erroneous decision on a point of limitation. *Amir Hasan Khan v. Sheo Baksh Singh* (1) referred to.

[F., 20 A. 78 (79) = 17 A.W.N. 168; 21 A. 89 (91); 18 A.W.N. 74; R., 29 A. 509 (526) = 23 A.W.N. 104; 21 B. 250 (255); 6 A.L.J. 944 = 3 Ind. Cas. 817; 11 A.L.J. 295 (296); 19 Ind. Cas. 782.]

[N.B.—See also 16 A. 476 = 14 A.W.N. (1894), 183 for a report of the reference to the Full Bench.—Ed.]

THIS was an application to revise a judgment and decree of a Court of Small Causes, the sole ground being that the Court had dismissed the suit on an erroneous finding as to a question of limitation. The case was referred to the Full Bench for decision as to the principles upon which s. 25 of Act No. IX of 1887 ought to be applied. (See I.L.R., 16 All. 476). After the decision of the Full Bench the case was returned to a Division Bench for disposal.

Babu Jogindro Nath Chaudhri for the applicant.

The opposite parties were not represented.

JUDGMENT.

BLAIR and BURKITT, JJ.—This application for revision is based upon the allegation that the Small Cause Court, which is the Court of original jurisdiction, had tried and wrongly decided a question of limitation. We are asked now in this application under s. 25 of Act IX of 1887 to re-open that question in revision. Our attention has been called to the Full Bench judgment of this Court in this case in answer to a reference by one of our number. It was there argued that s. 25 of the Small Cause Court Act was not simply co-extensive with s. 622 of the Code of Civil Procedure. We all were of opinion that in the exercise of our discretion we ought to apply to cases brought before us under s. 25 of Act IX of 1887 the general principle embodied in s. 622 of the Code

^{*} Civil Revision No. 5 of 1894, from an order of the Judge of the Court of Small Causes at Agra, dated the 10th October 1893.

of Civil Procedure. The ruling of the Court was itself to this effect, that the considerations to be applied to such an application for revision as [423] this did not differ materially from those applicable under s. 622, and which were applied before the decision of the case *Amir Hassan Khan v. Sheo Baksh Singh* by their Lordships of the Privy Council. The case was reported in I. L. R., 11 Cal., 6. It appears to us that we have no clear and satisfactory guidance from the decided cases as to what was held by this Court to be the scope of s. 622 before the clear and definite ruling in that case. It seems quite certain that there was no consistent course of decision in this Court. Abundance of rulings can be found, some entertaining wider and some entertaining narrower views of the limitations imposed by that section. We consider the closer and stricter interpretation to be most in accord with the intention of the Legislature, and we therefore in our discretion refuse to try in revision, and to reopen the questions of law and fact which have in the exercise of its jurisdiction been decided upon evidence by a Court whose decision upon such a point has been made final by law. We reject the application.

Application rejected.

17 A. 423 = 15 A.W.N. (1895) 88.

APPELLATE CIVIL.

Before Mr. Justice Aikman.

MUHAMMAD HUSAIN (*Plaintiff*) v. BADRI PRASAD (*Defendant*).^{*}
[5th March, 1895.]

Act No. XII of 1881 (N.W.P. Rent Act), s. 93 (h)—Suit by recorded co-sharer for recorded share of profits—Adverse possession.

The mere circumstance that a co-sharer's name is recorded in the Revenue papers will not prevent a suit by him for his share of profits being barred by limitation if in fact he has received no profits for more than twelve years prior to such suit. *Maksood Ali Khan v. Ghazee-ood-deen* (1) and *Tulshi Singh v. Lachman Singh* (2) followed.

[R., 13 C.P.L.R. 99 (102).]

THE facts of this case sufficiently appear from the judgment of Aikman, J.

Munshi Madho Prasad, for the appellant.

Mr. A. H. S. Reid, for the respondent.

JUDGMENT.

[424] AIKMAN, J.—This was a suit under clause (h) of s. 93 of Act No. XII of 1881 to recover profits for the years 1293, 1294 and 1295 F. The defence was that, although the plaintiff had purchased this property about 21 years ago, he had never got possession of it, and that for upwards of 12 years the defendant had been in adverse possession. The Court of first instance, the Assistant Collector of Aligarh, decreed plaintiff's claim in part. On appeal this decree was reversed by the learned District Judge, who dismissed the plaintiff's claim. The plaintiff comes here in second

^{*} Second Appeal No. 707 of 1894, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 28th March 1894, reversing a decree of Babu Dalthamban Singh, Assistant Collector, 1st class, dated the 27th September 1889.

(1) N.W.P.H.C.R. (1868) 158 = 3 Agra 158.

(2) 1 A.W.N. (1881) 20.

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appeal. The plaintiff relies on the fact that he is a recorded co-sharer. He does not assert that he ever received profits of the shares of which he is recorded as being in possession. It appears that he brought a suit to recover the profits for 1283 Fasli which would fall due on the 1st of August 1876. There is nothing on the record to show when this suit was brought; but it appears from a copy of the Assistant Collector's judgment that it was decided on the 26th of August 1879. From that judgment it appears that the defendants to that suit raised a plea similar to that which is now put forward, namely, that the plaintiff had never received any portion of the profits. The Assistant Collector in 1879 gave the plaintiff a decree, but this decree was set aside in appeal, for what reasons does not appear, as no copy of the appellate judgment is produced. In appeal it is urged that the plaintiff's claim was not barred by any adverse title acquired by the defendant, inasmuch as the defendant for the first time in 1879 denied the plaintiff's title. With regard to that plea I would observe that it is not shown that it was in 1879 that the defendant first denied the plaintiff's title. From the defence in the former suit and from the fact that it is not shown that the plaintiff ever received any profits from this share, I infer that the defendant has all along denied the plaintiff's title. The rulings of this Court in *Maksood Ali Khan v. Ghazee-ood-deen* (1) and *Tulshi Singh v. Lachman Singh* (2) are clearly in the respondent's favour. In my opinion the decision of the lower appellate Court is right. I dismiss this appeal with costs.

Appeal dismissed.

17 A. 425 = 15 A.W.N. (1895) 82.

[425] APPELLATE CIVIL.

Before Mr. Justice Aikman.

LAKHMI CHAND (*Decree-holder*) v. BALLAM DAS (*Judgment-debtor*).^{*}
[6th March, 1895.]

Execution of decree—Limitation—Execution stayed by reason of an injunction for more than three years—Revival of previous application for execution.

A decree-holder in execution of his decree attached a decree held by his judgment-debtor. On the 3rd of July 1888 the decree-holder applied for execution of his decree by enforcement of the second decree, and in pursuance of this application obtained attachment of certain property as belonging to the judgment-debtor under the second decree. Subsequently a suit was filed by the son of such judgment-debtor claiming the property as his own, and in that suit an injunction was granted staying execution under the application of the 3rd of July 1888 until the suit was decided. The application for execution was thereupon struck off, but the attachment was maintained. On the 19th of March 1892 the suit was dismissed and the injunction came to an end. On the 29th of October 1892 a fresh application was made for execution.

Held that this second application was not barred by limitation, but was to be regarded as an application to renew the proceedings commenced by the former application, which had been suspended by the act of the Court and not by anything for which the decree-holder was responsible. *Peary Mohan Chowdhry*

* Second Appeal No. 693 of 1894, from an order of J. Denman, Esq., District Judge of Benares, dated the 25th April 1894, confirming an order of Babu Nil Madhub Roy, Subordinate Judge of Benares, dated the 24th June 1893.

(1) N.W.P.H.C.R. (1868) 158 = 3 Agra 158.

(2) 1 A.W.N. (1881) 20.

v. *Romesh Chunder Nundy* (1); *Kalyanbhai Dipchand v. Ghinashamlal Jadunathji* (2) and *Paras Ram v. Gardner* (3) referred to.

[R., 14 C.L.J. 610 (612) = 11 Ind. Cas. 48.]

THE facts of this case are fully stated in the judgment of Aikman, J. Mr. *Abdul Majid*, for the appellant.

Maulvi *Muhammad Ishaq*, for the respondent.

JUDGMENT.

AIKMAN, J.—On the 18th of May 1887 Lakhmi Chand, the appellant in the case, got a decree against certain persons, amongst whom were two men named Sham Chand and Shiam Sundar Lal. These two judgment-debtors had, on the 24th of December 1884, got a decree against one Ballam Das, the respondent in this appeal. On Babu Lakhmi Chand's application that decree of the 24th of December 1884 was attached on the 15th of June 1887, under the provisions of s. 273 of the Code of Civil Procedure, in execution of his decree. Both decrees were passed by the same Court. The law [426] is not quite clear as to what should be done by an attaching decree-holder in such a case, but it has been held in *Peary Mohun Chowdhry v. Romesh Chunder Nundy* (1) that a person attaching a decree is a representative of the decree-holder within the meaning of s. 244, cl. (c) of the Code of Civil Procedure, and is entitled to have execution of the attached decree enforced on his application, and with this opinion I entirely concur.

On the 3rd of July 1888, Lakhmi Chand applied for the execution of his own decree by enforcement of the decree of 1884 against the property of Ballam Das and by crediting the sale-proceeds to the applicant's decree. Notice was issued to Ballam Das under the provisions of s. 248 of the Code. He showed no cause against the execution, and accordingly certain property belonging to him was attached on the 31st of July 1888, and ordered to be sold on the 17th of January 1889. In the meanwhile Manni Lal, the son of Ballam Das, brought a regular suit to have it declared that the property attached as belonging to Ballam Das was in reality his (that is, Manni Lal's) property. An injunction was issued by the Court in which this suit was filed staying the execution against Ballam Das which was then in progress. On the 30th of January 1889, on the motion of the decree-holder's pleader, the execution case was filed with liberty to him to proceed with it when the injunction was taken off, the attachment of Ballam Das' property being maintained. On the 19th of March 1892 Manni Lal's suit was dismissed, and with the dismissal of this suit the injunction came to an end after having been in force for upwards of three years. On the 29th of October 1892 the present application was made asking that the decree of 1884 should be executed and the money realized by its execution should be applied in satisfaction of the decree of the attaching creditor. The judgment-debtor, Ballam Das, objected that the attached decree had become barred by limitation. Both the Subordinate Judge and the District Judge have sustained the plea and dismissed the appellant's application. Hence the appeal to this Court.

[427] In my opinion the lower Courts were clearly wrong in refusing the application. At the time when the application of the 3rd of July 1888 was made the decree against the respondent was alive. It is true that upwards of three years had elapsed between the date of that and the

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17 A. 425 =
15 A.W.N.
(1895) 82.

(1) 15 C. 371.

(2) 5 B. 29.

(3) 1 A. 355.

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date of the present application ; but this is due to no fault or laches of the attaching creditor, but to this fact that the proceedings in execution were stayed by an order of Court. Section 15 of the Indian Limitation Act provides for the exclusion from the period of limitation of the time during which an injunction has continued in force, but this provision applies only to suits and does not extend to applications. I think it is unfortunate that the Legislature did not make clear provision in the Limitation Act for a case like the present. In a case somewhat similar to the present case—*Kalyanbhai Dipchand v. Ghunashamlal Jadunathji* (1)—Melville, J., commented on the "monstrous injustice" that would ensue if art. 179 of Act No. XV of 1877, which governs the execution of decrees, were applied strictly to cases like the present. Courts in this country have frequently been struck by the difficulty caused by the defect in the Limitation Act adverted to above. Sometimes the difficulty has been got over by holding that art. 178 of the Act applies. That article allows a period of three years' limitation for "applications for which no period of limitation is provided elsewhere in the schedule or by the Code of Civil Procedure, s. 230." This period runs from the time when the right to apply accrues. Other Courts, and amongst them a Full Bench of this Court in *Paras Ram v. Gardner* (2), have held that a renewed application for execution is not a fresh application, but a continuance or revival of the previous application which had been interrupted owing to a cause for which the appellant was not responsible. Looking to the terms of the order of the 30th of January 1889, which was passed in this case, I prefer to regard the present application as an application to renew the previous proceeding which was in abeyance owing to the injunction. In this view the decree-holder's application was not in any way barred. I am unable to follow the lower Courts in [428] their opinion that no application was ever made to execute the attached decree of the attaching creditor. Not only was the application of the 3rd of July 1888 an application to execute the attached decree, but the application was granted. It was objected by the learned vakil for the respondent that the application of the 3rd of July 1888 was defective, inasmuch as it did not give all the particulars required by s. 235 of the Code of Civil Procedure in regard to the attached decree. In my opinion the particulars which the application gives were sufficient, and in any case the judgment-debtor, by neglecting to show any cause against the execution when opportunity was given him, has, I hold, lost his right to rely on any objection of this nature. For the above reasons I decree the appeal with costs in all Courts, and, setting aside the orders of the lower Courts, remand the case under the provisions of s. 562 of the Code of Civil Procedure with directions to re-admit the application under its original number in the register and proceed to dispose of it according to law.

Appeal decreed and cause remanded.

(1) 5 B. 29.

(2) 1 A. 955.

17 A. 428 = 15 A.W.N. (1895) 93.

APPELLATE CIVIL.

*Before Mr. Justice Knox and Mr. Justice Burkitt.*MANOHAR SINGH (*Plaintiff*) v. SUMIRTA KUAR (*Defendant*).*

[6th March, 1895.]

Burden of proof—Mortgage deed—Recitals in instrument—Act No. III of 1877 (Indian Registration Act), ss. 59, 60—Evidence.

In a suit brought by a mortgagee upon a mortgage by conditional sale for payment of the mortgage-debt or in default for foreclosure, one of the defendants, not being one of the original mortgagees, but a purchaser at auction-sale under a Rent Court decree, resisted the suit and put the plaintiff to proof on the document under which he claimed. *Held* that the mere production of the deed of mortgage which had been thus questioned and the fact that that deed of mortgage contained an endorsement certificate by the Registrar in the usual manner under s. 59 of Act No. III of 1877, were not sufficient to shift the burden of proof on to the defendants.

Recitals in an instrument may be conclusive and are always evidence against the parties who make them, but they are not evidence against third parties. *Brajeshware Peshakar v. Budhanuddi* (1) referred to.

[*Not F.*, 11 A.L.J. 221 (222); 11 A.L.J. 371 (375); *R.*, 5 C.L.J. 653 (658); 6 C.L.J. 659 (661) = 3 M.L.T. 38; 15 C.L.J. 7 (9) = 17 C.W.N. 108 (110) = 13 Ind. Cas. 120; 13 C.P.L.R. 1; 3 Ind. Cas. 91 (92); 18 Ind. Cas. 744; 5 O.C. 18 (24).]

[429] ONE Manohar Singh brought a suit upon a deed of conditional sale, claiming either payment of the mortgage-debt or foreclosure of the mortgage, against the heirs of the mortgagor and against one Musammat Sumirta Kuar, who had purchased the property claimed at auction-sale under a decree of a Revenue Court, and, as the plaintiff alleged, with knowledge of his (the plaintiff's) mortgage over the property.

Of the defendants, heirs of the alleged mortgagor, one did not enter an appearance, and the rest confessed judgment. The defendant auction-purchaser, however, filed a written statement in which she pleaded that the plaintiff's deed was executed by the mortgagor, who was a near relation of his, fictitiously and collusively and without consideration. She also objected to the amount of interest claimed.

On these pleadings the Court of first instance (Subordinate Judge of Cawnpore) found that no consideration had passed under the deed sued upon and that the transaction was collusive, and accordingly dismissed the suit as against Musammat Sumirta Kuar.

On appeal the lower appellate Court (District Judge of Cawnpore) agreed with the findings of the Court of first instance as to collusion and absence of consideration and dismissed the appeal.

The plaintiff appealed to the High Court chiefly on the ground that the lower Courts had wrongly placed the burden of proving payment of consideration on the plaintiff.

Pandit *Moti Lal* and Babu *Durga Charan Banerji*, for the appellant.

Mr. *T. Conlan* and Pandit *Sundar Lal*, for the respondent.

* Second Appeal No. 915 of 1893, from a decree of J. J. McLean, Esq., District Judge of Cawnpore, dated the 15th May 1893, confirming a decree of Saiyid Akbar Husain, Subordinate Judge of Cawnpore, dated the 4th April 1892.

(1) 6 C. 268.

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JUDGMENT.

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1895) 93.

KNOX and BURKITT, JJ.—The sole point which arises for decision in this second appeal is whether the Courts below have erred in law in throwing the burden of proof of actual payment of the mortgage-money on appellant, who was plaintiff.

[430] There is no doubt that if the burden of proof was rightly laid, the findings of fact arrived at by the lower appellate Court are sufficient for the determination of the appeal and cannot be disputed. The respondent was in possession of the property in dispute, having purchased the same under a sale following a decree of a Rent Court dated the 16th of January 1888, the date of the sale being the 20th of August 1891. The appellant sought to recover possession of the same property on a registered deed of mortgage by conditional sale over the same property purporting to have been executed in his favour on the 19th of August 1886. The respondent virtually put the appellant to proof of the document under which he claimed, and what is contended before us is that, upon the mere production by the appellant of the deed of mortgage which had been thus questioned, and on the fact that that deed of mortgage contained an endorsement certificate by the Registrar in the usual manner under the Indian Registration Act, s. 59, the burden of proof had then and there shifted on to the shoulders of the respondent. Precisely the same question was considered in *Brajeshware Peshakar v. Budhanuddi* (1). We fully concur in the law laid down by the Chief Justice at pages 277 and 278, where he says that in his opinion in that case "the effect of the recital as well as the decision of the Privy Council in *Chowdry Deby Persad v. Chowdry Dowlut Singh* has been misunderstood. A recital in a deed or other instrument is no doubt in some cases conclusive, and in all cases evidence, *as against the parties who make it*, and it is of more or less weight or more or less conclusive against them according to circumstances. It is a statement deliberately made by those parties, which, like any other statement, is always evidence against the persons who make it. But it is no more evidence as against third persons than any other statement would be." To the same effect is s. 60 of Act No. III of 1877 which does not provide that a certificate signed by a Registering Officer shall be considered conclusive proof, but simply provides that it may be admissible for the purpose of proving that the facts mentioned in the endorsement referred to in s. 59 have [431] occurred as therein mentioned. It requires more than this, especially where, as in the present case, the surrounding circumstances were suspicious and not explained.

We dismiss the appeal with costs.

Appeal dismissed.

17 A. 431 = 15 A.W.N. (1895) 74.

APPELLATE CIVIL.

Before Mr. Justice Aikman.

SETH SHAPURJI NANA BHAI (*Decree-holder*) v. SHANKAR DAT DUBE
(*Objector*).^{*} [6th March, 1895.]

Execution of decree—Civil Procedure Code, s. 234—Application to execute decree against alleged representative of deceased judgment-debtor.

In the case of an application under s. 234 of the Code of Civil Procedure to execute a decree against a person alleged to be the representative of a deceased judgment-debtor it is for the Court which passed the decree to decide whether the person against whom execution is sought is or is not such representative, but it is for the Court executing the decree to decide to what extent such person is liable as such representative. *Srihary Mundul v. Murari Chowdhry* (1).

[*Appr.*, 28 M. 466 (471) = 15 M.L.J. 116.]

THE facts of this case sufficiently appear from the judgment of Aikman, J.

Munshi *Ram Prasad* and Maulvi *Ghulam Muftaba*, for the appellant.
Pandit *Sundar Lal* and Babu *Kalindi Prasad*, for the respondent.

JUDGMENT.

AIKMAN, J.—The appellant in this case got a money decree from the Court of the Subordinate Judge of Aligarh against one Raja Hari Har Dat Dube, a resident of the district of Jaunpur. The judgment-debtor died after the passing of the decree and before execution had been taken out. After his death the decree-holder applied to the Court which passed the decree to send it for execution to the Court of the Subordinate Judge of Jaunpur. In his application he inserted the name of the respondent Raja Shankar Dat Dube, brother, and Musammat Sahodra, widow of the deceased judgment-[432]debtor as his legal representatives. Notice was issued to these two persons to show cause why the decree should not be executed against them. No cause was shown by Musammat Sahodra, but Raja Shankar Dat Dube presented a petition of objection, contending that he was not the heir of the deceased judgment-debtor and that no property of the deceased had come to his hands. The Subordinate Judge of Aligarh found both these issues against him and ordered the transfer of the decree for execution to Jaunpur. Against this order Raja Shankar Dat Dube appealed to the District Judge of Aligarh, repeating in his appeal the same objections as he had raised before the Subordinate Judge. Neither before the Subordinate Judge nor in his appeal to the District Judge did he raise any question as to the jurisdiction of the former Court to decide as to whether or not he was the legal representative of the deceased judgment-debtor. The learned District Judge allowed the appeal, being of opinion that the decision of the Subordinate Judge as to whether the applicant was or was not the heir of the deceased judgment-debtor was *ultra vires*, inasmuch as the question was one to be decided by the Court executing the decree. In second appeal to this Court the decree-holder impugns the correctness of the learned Judge's opinion. I think the appeal must succeed. Although the decree-holder did not

* Second Appeal No. 694 of 1894, from an order of L. G. Evans, Esq., District Judge of Aligarh, dated the 4th April 1894, confirming an order of Babu Mohan Lal, Subordinate Judge of Aligarh, dated the 29th July 1892.

(1) 13 C. 257.

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refer in his petition to s. 234 of the Code, I think his application amounts to an application under the first paragraph of that section, and from the wording of that section it is in my opinion a question for the Court which passed the decree to decide whether a particular person is or is not the legal representative of a deceased judgment-debtor. But I think the Subordinate Judge was exceeding his powers when he went on to decide as to the amount of property which had come to the hands of the respondent. The Court which passed the decree having decided who is to be regarded as the legal representative, it is for the Court executing the decree to decide as to the extent of that legal representative's liability. I draw this inference from the use of the words "the Court which passed the decree" in the first paragraph, and "the Court executing the decree," in the second paragraph of s. 234 of the Code. So much [433] therefore of the Subordinate Judge's decision as referred to the property in the hands of the respondent was *ultra vires*, but in my opinion the Subordinate Judge had jurisdiction to decide as to whether or not the respondent was the legal representative. This was a question properly for the Court which passed the decree, and not for the Court to which the decree was transferred. The learned counsel for the respondent relies on s. 244, cl. (c). This gives the Court executing a decree jurisdiction to determine "questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof." But this does not give a Court executing a decree transferred to it jurisdiction to determine who are to be considered the representatives. Any order passed by a Court sending a decree for execution to another Court holding that the decree might be executed against a certain person as the legal representative of the deceased judgment-debtor might, I think, come within the provision of cl. (c) of s. 244 of the Code of Civil Procedure, and a copy of it should be sent to the Court to which the decree is transferred for execution. In this view I am supported by the remarks of Prinsep and Beverley, JJ., in *Srihary Mundul v. Murari Chowdhry* (1). The learned District Judge in his judgment says as follows :—"I agree with the Subordinate Judge that the application of the original applicant (now appellant) should have been dismissed, but the application should have been dismissed on the ground that the Court had no jurisdiction to entertain the application." The meaning of this is not quite clear, but I gather from it that the District Judge merely held that the lower Court ought to have dismissed the application as having no jurisdiction, and did not mean to hold that the application should have been dismissed on its merits. I therefore think that the case must be remanded under s. 562 of the Code of Civil Procedure. I allow this appeal, and, setting aside the order of the lower appellate Court, remand the case under s. 562 of the Code of Civil Procedure with directions to re-admit the appeal under its original [434] number on the register and proceed to determine it on the merits with reference to the above remarks. The costs will abide the result.

Appeal decreed ; cause remanded.

17 A. 434 = 15 A.W.N. (1895) 83.

APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.*BHIKHARI DAS AND ANOTHER (*Plaintiffs*) v. DALIP SINGH AND OTHERS
(*Defendants*).^{*} [8th March, 1895.]*Mortgage—Sale by mortgagor of part of the mortgaged property—Such sale not to affect the rights of the mortgagee under his mortgage—Act No. IV of 1882, (Transfer of Property Act), s. 88.*

The right of a mortgagee to bring any portion of the mortgaged property to sale is not curtailed by the mortgagor subsequently to the mortgage selling a portion of the mortgaged property to a third person. *Lala Dilawar Sahai v. Dewan Bolakiram* (1), *Inaukui Rama Raju v. Yerramilli Subbarayudu* (2) and *Banwari Das v. Muhammad Mashiat* (3) referred to.

[Appr., 31 M. 419 (F.B.) = 3 M.L.T. 287 = 18 M.L.J. 229 ; R., 29 M. 217 (222).]

THIS was a suit for sale upon a mortgage of shares in various villages, including a share in a village known as, "Fatehpur Shamshoi." The plaintiffs claimed as owners of the bond sued upon by virtue of a partition of the property of the joint family of which they and the original mortgagor had been members. The defendants were the widow and sons of the mortgagor, the original mortgagee, *pro forma*, a person whose name was alleged in the plaint to have been fictitiously entered in the Revenue papers in respect of a portion of the mortgaged property, and one Ram Kishen Das, who had purchased subsequently to the mortgage the mortgaged share in Fatehpur Shamshoi.

The representatives of the original mortgagor put in various defences which it is not necessary here to set forth. Ram Kishen Das pleaded that he had purchased the share in Fatehpur Shamshoi in good faith and for valuable consideration, and that under s. 56 of Act No. IV of 1882, the mortgagees should proceed first against the other properties included in the mortgage-deed in suit.

[435] The Court of first instance (Subordinate Judge of Shahjahanpur) gave effect to the contention of the defendant Ram Kishen Das, and ordered that the other hypothecated property should be sold first, but in respect of the other defendants gave the plaintiffs a decree for sale.

The plaintiffs appealed to the High Court as to the method adopted by the Court of first instance in assessing interest on the mortgage bond and they also objected to the postponement of the sale of the interest in mauza Shamshoi.

Pandit Bishambar Nath and Pandit Sundar Lal, for the appellants.
The respondents were not represented.

JUDGMENT.

EDGE, C. J., and BANERJI, J.—This appeal has arisen out of a suit for sale under s. 88 of Act No. IV of 1882. A portion of the property mortgaged was, subsequently to the mortgage, sold to one of the defendants. It was the property known as Fatehpur Shamshoi. The Subordinate Judge gave the plaintiff a decree, but he limited his decree by obliging the plaintiff to have recourse to other mortgaged

* First Appeal, No. 253 of 1893, from a decree of Rai Banwari Lal, Subordinate Judge of Shahjahanpur, dated the 30th August 1893.

(1) 11 C. 258.

(2) 5 M. 387.

(3) 9 A. 690.

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15 A.W.N.
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property before selling the property called Fatehpur Shamshoi. He apparently thought that s. 56 of Act No. IV of 1882 applied to this case. That section has no application here. That section merely applies as between the buyer and the seller and does not limit the rights of a prior mortgagee. This case is not one of those provided for by s. 81 of that Act. The right of a mortgagee to bring any portion of the mortgaged property to sale is not curtailed by the mortgagor, subsequently to the mortgage, selling a portion of the mortgaged property to a third person. We are fortified in this opinion by the decision in *Lala Dilawar Sahai v. Dewan Bolukiram* (1), *Indukuri Rama Raju v. Yerramilli Subbarayudu* (2) and *Banwari Das v. Muhammad Mashiat* (3).

The Subordinate Judge misunderstood the covenant as to interest. It was a covenant to pay interest at the rate of Rs. 1-12-0 per cent. per mensem and provided for yearly rests, in which case [436] the interest in arrears was to be added to the principal and the aforesaid rate of interest was to be charged on the consolidated sum.

We allow this appeal, and give the plaintiff a decree for sale under s. 88 of Act No. IV of 1882, by which the whole, or such portion of the property mortgaged as may be necessary, may be sold. The amount claimed in the plaint as due up to the commencement of the suit is Rs. 7,250. We give the defendants until the 7th of September next to redeem the mortgage of the plaintiff on payment of Rs 7,250, *plus* interest thereon at the rate of Rs. 1-12-0 per cent. per mensem from the date of the institution of the suit down to the date of payment within such period, *plus* the costs of this suit in the Court below and in this appeal in this Court; and if the payment be not made on or before the 7th of September 1895, such interest shall be allowed from the date of the commencement of the suit up to the 7th September 1895. A decree shall be prepared under s. 88 of Act No. IV of 1882.

Appeal decreed.

17 A. 436 = 15 A.W.N. (1895) 102.

APPELLATE CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

QUEEN-EMPRESS *v.* AJUDHIA PRASAD.* [16th March, 1895.]

Act No. XLV of 1860 (Indian Penal Code), s. 193—Fabricating false evidence—Report made by Amin executing a Civil Court's decree that he had been obstructed—Similar report to Police—Subsequent deposition in Court—Alternative charges.

Held that a report made by an Amin of a Civil Court deputed to give possession of certain property in execution of a decree, as to his having been obstructed in so doing, to the Court executing the decree, and a similar report made to the Police, would not, even if false, amount to the fabrication of false evidence within the meaning of s. 193 of the Indian Penal Code, and consequently, where such Amin was charged in the alternative with making the two reports as above and also a third and inconsistent statement in respect of which he might have been charged under s. 193, that he was wrongly charged, and that it was necessary to prove the falsity of the third statement.

THE facts of this case were as follows :—

The appellant, Ajudhia Prasad, a Court Amin, was deputed to make over possession of certain property in execution of a decree. [437] He

* Criminal Appeal No. 141 of 1895.

(1) 11 C. 258.

(2) 5 M. 387.

(3) 9 A. 690 (704).

made a report on the 24th of September 1894 to the Court in which the decree was that he had been obstructed in executing the decree by certain persons whom he named. He also made a similar report to the Police. Subsequently, on the 15th of December 1894, Ajudhia Prasad made a deposition with respect to the circumstances of his attempt to execute the decree in question, which appeared to be inconsistent with the two reports formerly made by him. He was accordingly put on his trial for the offence defined by s. 193 of the Indian Penal Code and charged in the alternative with the making of the two reports on the one side, and of the subsequent deposition on the other. He was also charged under s. 211 in respect of the report made to the Police. On these charges Ajudhia Prasad was convicted and sentenced to rigorous imprisonment for one year and one day. Ajudhia Prasad thereupon appealed to the High Court.

The Hon'ble Mr. Colvin, Pandit Moti Lal and Babu Durga Charan Banerji, for the appellant.

The Government Pleader (Munshi Ram Prasad) for the Crown.

JUDGMENT.

EDGE, C. J., and BANERJI, J.—It is very probable that Ajudhia Prasad's evidence given in December was false evidence, but it has not been shown to us that it has been proved to have been false evidence. The evidence given in December was inconsistent in material points with the statement made in the report submitted to the Court of Small Causes and made to the Police. But there is nothing to show whether it was the earlier statements which were false or the evidence given on the trial which was false. In our opinion he could not have been convicted under s. 193 of the Indian Penal Code in respect of the statement made to the Police, nor in respect of that made in the report in the Court of Small Causes. We do not think that on either occasion he was fabricating evidence, even assuming that the statements were false. Consequently it became necessary for the prosecution to prove that the evidence given in the trial in December was false. We allow the appeal, set aside the conviction and sentence, and acquit Ajudhia Prasad of the charge. The recognizances will be discharged.

17 A. 438 = 15 A.W.N. (1895) 89.

[438] APPELLATE CIVIL.

Before Mr. Justice Burkitt., and Mr. Justice Aikman.

R. WALL AND ANOTHER (*Petitioners*) v. J. E. HOWARD AND OTHERS
(*Opposite parties*).^{*} [18th March, 1895.]

Letters Patent, s. 10, Act No. VI of 1882 (Indian Companies Act), s. 169—Extension of time for serving notice of appeal—No appeal from order of High Court refusing extension—Discretionary order.

No appeal will lie under s. 10 of the Letters Patent of the High Court of Judicature for the North-Western Provinces from an order of a single Judge of the Court refusing an application under s. 169 of Act No. VI of 1882 (Indian Companies Act) for extension of time for serving notice of an appeal under that Act; such order not being a judgment within the meaning of s. 10 of the Letters

^{*} Appeal No. 31 of 1894, under s. 10 of the Letters Patent, from an order of the Hon'ble Mr. Justice Banerji, dated the 21st of May 1894.

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15 A.W.N.
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Patent. *Banno Bibi v. Mehdi Husain* (1), *Muhammad Naim-ullah Khan v. Ihsan-ullah Khan* (2), *Kishen Pershad Panday v. Tiluckdhari Lall* (3), *Lutf Ali Khan v. Asgur Raza* (4), *Hurrish Chunder Chowdry v. Kali Sundari Debia* (5), *Mohabir Prosad Singh v. Adhikari Kunwar* (6), *Lane v. Esdaile* (7), *Kay v. Briggs* (8), *The Amstil* (9) and *Ex-parte Stevenson* (10) referred to.

[R., 17 A. 475.]

THE facts of this case are as follows :—

In 1894 a limited company, the Agra Savings Bank, was being wound up under the supervision of the Court of the District Judge of Allahabad. On the 14th of March 1894 certain shareholders of the Bank, amongst whom were the present appellants, filed a petition in the Court of the District Judge purporting to be under ss. 162 and 214 of the Indian Companies Act, 1882, and having for its object the institution of an inquiry into the conduct of certain directors and auditors of the said Bank in relation to the affairs of the Bank and the ultimate compelling of the directors and auditors named therein to contribute to the assets of the Bank compensation for moneys alleged to have been lost to the Bank through their negligence or misfeasance.

This petition was accepted by the Court, which thereupon framed certain issues to form the subject of an inquiry. Shortly after the [439] framing of issues on this petition the then incumbent of the office of District Judge of Allahabad retired, and his successor, on the 30th of April, dismissed the petition, so far as it purported to be a petition under s. 214, on the ground that it was premature, and ordered the petitioners to pay costs. The hearing of the petition as a petition for an inquiry under s. 162 was continued for a short time, and then the Judge declined to grant further discovery and ordered the papers to be shelved.

The petitioners, before filing an appeal against the above orders of the District Judge dismissing their petition, applied to the High Court under s. 169 of the Indian Companies Act, 1882, for extension of time for filing their appeal and for giving notice of the appeal, having regard to the restricted period of limitation prescribed by that section; but they omitted to state the reasons which induced them to believe that it would be practically impossible to serve notice of their appeal within the time prescribed. On this application the following order was made :—

“Under s. 169 of Act VI of 1882, which has been referred to in this application, this Court has not in my judgment power to extend the time for filing an appeal from the order of the District Judge which is complained of by the applicants. The only time which the Court of appeal is empowered by that section to extend is the time within which notice of the appeal is required to be given by that section. I am therefore unable to grant the extension asked for as regards the period of limitation for appealing against the order of the Court below. As for the granting of an extension of the time for the service of notice, I am of opinion that such extension cannot be granted except for valid reasons. Such reasons have not been shown to exist in this case. The only reason given in the application is that a copy of the order complained of has not been obtained; but it has not been alleged or shown why the copy has not been obtained. I accordingly refuse this application.”

(1) 11 A. 375.

(2) 14 A. 226.

(3) 18 C. 182 (189).

(4) 17 C. 455.

(5) 10 I.A. 4.

(6) 21 C. 473.

(7) L.R. (1891) A. C. 210.

(8) 22 Q.B.D. 343.

(9) L.R. 2 P.D.N.S. 186.

(10) L.R. (1892) Q.B.D. Vol. I, 294.

The petitioners appealed against this order under s. 10 of the Letters Patent.

[440] Mr. *W.K. Porter*, for the appellants.

Messrs. *A. Strachey* and *W. Wallach*, for the respondents.

JUDGMENT.

BURKITT, J.—In this case an application was made to Mr. Justice Banerji under s. 169 of the Indian Companies Act (Act No. VI of 1882) to grant an extension of time for giving notice of an appeal against an order of the District Judge of Allahabad refusing an application under s. 214 of that Act. An extension of time for filing the appeal was also asked for. The learned Judge refused both applications being of opinion that no sufficient reason for granting them had been shown.

This is an appeal brought under s. 10 of the Letters Patent of this Court against that order of refusal.

Mr. *Strachey* for the respondent takes two preliminary objections against the hearing of the appeal. Firstly, he contends that no appeal lies, because, he says, the order under appeal is not a 'judgment' within the meaning of s. 10 of the Letters Patent, which gives a right of appeal from the judgment (not being a sentence or order passed or made in any criminal trial), of one Judge of the Court. Several cases were cited to us during the argument; but I do not think that they are all in point, as some of them turn on s. 591 of the Code of Civil Procedure. That section, however, is in my opinion not applicable to the present case. I think that section must be read with s. 588, and should be construed as if the words "under this Code" were inserted between the words "by any Court" and the words "in the exercise of." To hold otherwise would have the effect of abolishing many appeals given by Acts of the Legislature passed before Act No. XIV of 1882 came into force, *e.g.*, an appeal to the High Court from the District Judge in this very matter. I am therefore unable to say that the present appeal, which arises out of a right of appeal created by the Indian Companies Act (Act No. VI of 1882) in a matter entirely outside the Code of Civil Procedure, is forbidden by s. 591 of that Code.

In the case of *Banno Bibi v. Mehdi Husain* (1) it was held by this Court under ss. 588 and 591 of the Code of Civil Procedure, [441] following certain cases in the Madras High Court that no appeal lay from an order of a single Judge refusing leave to appeal *in forma pauperis*. For similar reasons in *Muhammad Naim-ullah v. Ihsan-ullah* (2) it was held that an order by a single Judge of the Court amending a decree passed in appeal by a Divisional Bench of which he was the only member remaining in the Court was an order from which an appeal was excluded by Chapter XLIII of the Code of Civil Procedure. And in that case the learned Chief Justice defined the "judgment" referred to in s. 10 of the Letters Patent to be "the express decision of a Judge of the Court which leads up to and originates an order or decree," and he pointed out that it was impossible to read together Chapters XLIII and XLV, the latter being the chapter which treats of appeals to Her Majesty in Council.

The next case to which I would refer is that of *Kishen Pershad Panday v. Tiluckdhari Lall* (3). There it was held that no appeal lay under

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15 A.W.N.
(1895) 89.

(1) 11 A. 375.

(2) 14 A. 226.

(3) 18 C. 182 (183).

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17 A. 438 =
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s. 15 of the Letters Patent of the Calcutta Court (corresponding with s. 10 of the Letters Patent of this Court) from an order of a single Judge refusing to extend the time for furnishing security for the costs of an appeal to Her Majesty in Council. The question before the High Court in that case was whether such an order is a "judgment" within the meaning of s. 15 of the Letters Patent. Like the order now under appeal before us the order in that case was one to which the provisions of ss. 588 and 591 of the Code of Civil Procedure did not apply. After citing and discussing several reported cases the learned Judges held that "where an order decides finally any question at issue in the case or the rights of any of the parties to the suit, it is appealable, otherwise not." Among the cases referred to in the judgment of the Court just cited was that of *Lutf Ali Khan v. Asgur Rezo* (1). In that case the question was whether an appeal lay against an order of a Judge granting a certificate that the case was a fit one for appeal to the Privy Council, and it was held, after an examination of the case of *Hurrish Chunder Chowdry v. Kali Sundari Debia* (2) that, as the order under appeal was not one deciding, finally or otherwise, any [442] question at issue in the case or the rights of any of the parties to the suit, it was not appealable. In *Hurrish Chunder Chowdry v. Kali Sundari Debia* it was held that an appeal did lie from the order of a Judge refusing to send down for execution a decree of Her Majesty in Council. In the recent case of *Mohabir Prosad Singh v. Adhikari Kunwar* (3), which was an appeal against an order of a single Judge refusing to stay execution under s. 608 of the Code of the Civil Procedure, it was held that "judgment in clause 15 of the Letters Patent means a decision which affects the merits of the question between the parties by determining some right or liability." In that view of the law the Court held that refusal to stay execution in the exercise of the discretion given by s. 608 to a Judge or Bench of the Court did not affect any "right or liability by determining any question which affects the merits of the dispute between the parties in any sense." In the already cited case of *Muhammad Naimullah Khan v. Ihsan-ullah Khan* (4) the meaning and effect of *Hurrish Chunder's* case are fully discussed, and I would add that, as the order of Mr. Justice Pontifex in that case decided that the decree of Her Majesty in Council could not be executed, it undoubtedly did decide a question at issue in the case and the right of the decree-holder to have execution of his decree. The order therefore would have been appealable under the rulings cited above.

In construing the word "judgment" in s. 10 of our Letters Patent, which were prepared in England and use the phraseology of the English Courts, it is impossible to give to it the restricted meaning of the word "Judgment" as defined in the Code of Civil Procedure. As used in England it is wide enough to embrace the definitions of decree, judgment and order in that Code. The use of the words "sentence or order" in the exception as to criminal matters is significant. Now the order under appeal here certainly is not a decree nor appealable as such. It is an order by which the learned Judge in the exercise of his judicial discretion refused to grant to the appellants an indulgence which they could not claim as a matter of right. It did not decide any question at issue in the case [443] nor the rights of any of the parties, nor did it lead up to or originate any order or decree. The order was complete in itself and did not require anything further to be done.

(1) 17 C. 455.

(2) 10 I.A. 4.

(3) 21 C. 473.

(4) 14 A. 226.

It is no doubt the case that the ultimate effect of the order may be to prevent the hearing of the appeal against the order of the District Judge passed under s. 214 of the Companies Act, the appellants not having complied with the requirements of s. 169 as to giving notice. That fact, however, does not in my opinion alter the position. On this matter some cases cited by the learned counsel for the respondents from the English Reports are most instructive. The Appellate Jurisdiction Act, 1876 (39 and 40 Vict., C. 59) by s. 3, provided that an appeal should lie to the House of Lords "from any order or judgment" of the Court of Appeal in England. Nevertheless it was held by the House of Lords in *Lane v. Esdaile* (1) that no appeal lay from an order of the Court of Appeal refusing to grant special leave to appeal to it from a judgment of the High Court after the time limited for appealing had expired. By Rule 15 of Order LVIII the Court of Appeal had power to grant special leave, and the result of the refusal was to put an end to the appellate proceedings. But the House of Lords held that the order of the Court of Appeal refusing special leave to appeal was not a "judgment or order" within the meaning of s. 3 of the Appellate Jurisdiction Act. Lord Herschell is reported to have said:—"The matter was intrusted and intended to be intrusted to their (the Court of Appeal) discretion, and the exercise of a discretion of that sort intrusted to them is not, within the true meaning of the Appellate Jurisdiction Act, an order or judgment from which there can be an appeal." In his judgment Lord Herschell cited with approval the (case of *Kay v. Briggs* (2) in the Court of Appeal. In that case the Court of Appeal held, with reference to ss. 19 and 45 of the Judicature Act of 1873, that they had no power to overrule the discretion given by s. 45 of the Act to the Divisional Court to refuse special leave to appeal, notwithstanding that by s. 19 the Court of Appeal had jurisdiction to hear an appeal "from [444] any judgment or order" of the High Court. It was held that the real meaning of s. 45 is to confine the power to give leave to appeal absolutely to the Divisional Bench, and that the Court of Appeal had no jurisdiction to entertain the application, inasmuch as, if they allowed it, the special leave would be given, not by the Divisional Bench, but by the Court of Appeal, which was not the contingency on which s. 45 provided that the decision of the Divisional Bench should not be final. The decision in that case refusing to interfere with the discretion of the High Court had the same effect as the order in the case under appeal before us may have. It put an end to the intended appeal. In the judgment of the Master of the Rolls in *Kay v. Briggs* the case of "*The Amstil*" (3) was cited as being decisive against the application. In that case the Judge of the Admiralty Division had refused leave to appeal from a judgment of a County Court, leave being necessary because the period (ten days) within which the appeal could be brought had expired. On an appeal founded upon s. 19 of the Judicature Act to the Court of Appeal, Lord Justice James, with the concurrence of the other members of the court, is reported to have said:—"The statute enacts that an appeal from a County Court in an admiralty cause shall not be allowed unless an appeal is lodged within a certain time, but provides that the Judge of the Admiralty Division may allow it to proceed on sufficient cause being shown to his satisfaction for the omission. Cause has not been shown to his satisfaction, and I am of opinion that we have no jurisdiction to interfere." The inference to be drawn from the words just cited is (as in *Lane v. Esdaile*) that, as the

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(1) L. R. (1891) A. C. 210.

(2) 22 Q. B. D. 343.

(3) L.R.2 P.D.N.S. 186.

1895 Judge of the Admiralty Division was intrusted with a discretion to grant
 MARCH 19. or to refuse leave to appeal, his order passed in the exercise of that discretion was not a judgment or order within the meaning of s. 19 of the
 APPEL- Judicature Act. In that case also the effect of the order was to put an
 LATE end to the appeal. That case is very much on all fours with the appeal
 CIVIL. before us. In the latter the learned Judge had a discretion to grant or
 — to refuse the extension of time asked for. In the exercise of that discretion he refused the application, as [445] he held that the applicant
 17 A. 438 = had not made out sufficient reason to warrant his allowing the extension
 15 A.W.N. of time asked for.
 (1895) 89.

I take it that the rule to be deduced from the above cases is that where a Court is invested with jurisdiction to do or to refuse to do a certain act the order passed in the exercise of its discretion in that matter is not a judgment or order within the meaning of s. 19 of the Judicature Act. Those cases no doubt all refer to the refusal of applications for special leave to appeal, but in *Lane v. Esdaile* and in the case of *The Amstil* the application practically asked for an extension of the time limited for appealing, as is the case here.

In the case of *Ex parte Stevenson* (1) it was pointed out by the Lord Chief Justice that the granting of leave to appeal to a jury under the provisions of the Statute 53 and 54 Vic., Cap. 70, was to be granted as the leave of the High Court, and not as the leave of the Judge at Chambers who granted it, and on appeal the Master of the Rolls (p. 611), relying on *Lane v. Esdaile*, laid down the proposition that "wherever power is given to a legal authority to grant or refuse leave to appeal, the decision of that authority is from the very nature of the thing final and conclusive, and without appeal unless an appeal from it is expressly given." These words mean of course that the decision of such "legal authority" is not a "judgment or order" within the meaning of s. 19 of the Judicature Act. Now in the present case this Court as the Court of Appeal under s. 169 of the Indian Companies Act is the "legal authority" to which is given the power of extending the time for giving notice of an appeal under that section. By paragraph XII of Rule I of the Rules of Court a single Judge has been intrusted with power to hear and dispose of such an application as that made by the present appellants, just as the Judge at Chambers was empowered in the case last cited. The order passed by such single Judge is therefore the order of the High Court and is not subject to appeal "unless an appeal from it is expressly" given. No express appeal is anywhere provided unless it be by s. 10 of the Letters Patent.

[446] On the whole, after carefully considering all the authorities set out above. I am of opinion that no appeal lies in the present case, firstly, because the order under appeal does not decide any question at issue in the case or any right of either party, and secondly, because the order, from which no appeal is expressly given, was passed in the exercise of his judicial discretion by the learned Judge in a matter in which, as representing the whole Court, he had power to decide whether the applicants had made out sufficient cause to his satisfaction for their omission to give notice of their appeal within the time limited by law. An order such as that passed in the present case is, I hold, not a "judgment" within the meaning of s. 10 of the Letters Patent.

(1) L.R. [1892] 1 Q.B. 294; A.C. 609.

The second preliminary objection taken by the learned counsel was that the hearing of this appeal was barred, because notice of it had not been given within three weeks from the date of the order appealed against.

But, as I have decided that no appeal lies from that order, I consider it to be quite unnecessary to discuss the question whether this appeal would or would not have been in time if an appeal were permitted by law.

I would refuse to hear this appeal and would dismiss it with costs.

AIKMAN, J.—Looking to the serious consequences which may result to a litigant from the rejection of an application under s. 169 of the Indian Companies Act for an extension of time, I should have been glad had I been able to hold that an appeal like the present was maintainable, but, as has been shown in the judgment just delivered by my brother Burkitt, the weight of authority both in this country and in England is entirely against so holding. I am therefore of opinion that no appeal lies, and I concur in the order proposed.

Appeal dismissed.

17 A. 447 = 15 A.W.N. (1895) 93.

[447] APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Aikman.

KALLIAN MAL (*Defendant*) v. MADAN MOHAN (*Plaintiff*).^{*}
[18th March, 1895.]

Pre-emption—Wajib-ul-arz—Construction of document—Co-sharer—Holder of resumed muafi—Act No. XIX of 1873 (N.W.P. Land Revenue Act), s. 62—Rules of the Board of Revenue, 1876, Department I, Rules 30 and 51.

The plaintiff, a co-sharer in the village of Deobarampur, sued for pre-emption of certain land, being 'resumed revenue-free land' in the village, which had been sold to a stranger. The clause of the *wajib-ul-arz* under which pre-emption was claimed was as follows:—"When any co-sharer (*hissadar*) is bent upon selling or mortgaging his right (*haqqiyat*), then first that co-sharer who is nearest to the sharer bent on transfer can take it; after that any other person who is interested (*sharik*) in the village rank by rank can take it. If no person interested in the village takes it then a stranger may take it."

Held that under the circumstances of the case the plaintiff had no right of pre-emption in respect of the land claimed by him, the vendor not being, within the meaning of the *wajib-ul-arz*, a co-sharer in the village by virtue of his possession of a portion of the resumed *muafi*.

[F., A.W.N. (1904) 118; R., 20 A. 419 (421); 5 A.L.J. 182 = A.W.N. (1908) 59; A.W.N. (1894) 19; D., 2 A.L.J. 345 = A.W.N. (1905) 92; 3 O.C. 110 (114).]

THE facts of this case sufficiently appear from the judgment of Knox, J.

Munshi Ram Prasad, for the appellant.

Pandit Sundar Lal, for the respondent.

JUDGMENT.

KNOX, J.—The ground taken in the memorandum of appeal is that the record of rights has been misconstrued by the lower appellate Court, and that on a true construction of the record the respondent has no right to pre-empt and his suit should have been dismissed. The respondent

^{*} First Appeal No. 142 of 1894 from an order of Maulvi Muhammad Anwar Husen, Subordinate Judge of Farakhabad, dated the 4th September 1894.

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1895 was plaintiff in the Court of first instance. The suit he brought was to
 MARCH 18. enforce a right of pre-emption under this same record of rights in respect
 — of a portion of land known and styled in the village papers as "*resumed*
 APPEL- *revenue-free land* of mauza Deobarampur." The respondent was one of
 LATE those persons commonly known as *co-sharers* in the village of Deobaram-
 CIVIL. pur. In this village, besides the ordinary co-sharers, there were persons
 — who were proprietors of land which had once been recorded as revenue-
 17 A. 447 = free, but had, before the present suit had been brought, been assessed to
 15 A.W.N. [448] Government revenue. There were in the village also other persons
 (1899) 93. who possessed proprietary interests of other kinds, but with them we are
 not concerned. The portion of land which forms the subject-matter of
 this suit was a portion of the land formerly rent-free, but now assessed to
 Government revenue. The respondent in his plaint distinctly bases his
 right of pre-emption upon the clause relating to pre-emption as recorded
 in the village record of rights. That clause runs as follows :—"When any
 co-sharer (*hissadar*) is bent on selling or mortgaging his right (*haqqiyat*),
 then first that co-sharer who is nearest to the sharer bent on transfer can
 take it : after that any other person who is interested (*shariq*) in the
 village, rank by rank, can take it. If no person interested in the village
 takes it then a stranger may take it." The lower appellate Court inclining
 to the view that the respondent and the vendor were sharers in one and
 the same *mahal* of the village and that respondent was entitled to pre-empt
 and had a preferential right of purchase as against the appellant, who
 is admittedly a stranger, remanded the case to the Court of first instance
 for trial of the remaining issues. The Court of first instance had held a
 contrary view, and without determining the other questions in issue had
 dismissed the suit on this preliminary point. Hence the question which
 we have to determine in the present appeal is, whether the clause above
 quoted from the village record of rights does or does not confer on the
 respondent the right of pre-emption over that portion of the revenue-free
 grant subsequently assessed to revenue which is the subject-matter of
 this litigation. The case for both the appellant and the respondent was
 argued with great ability, and it was contended with much force on behalf
 of the respondent that, although the vendor was proprietor of a plot only
 of the resumed revenue-free land, he was still one of those persons termed
 in the record of rights a sharer (*hissadar*). In support of this contention
 our notice was directed to s. 62 of Act No. XIX of 1873 ; to the rules
 of the Board of Revenue, edition 1876, Department I, page 10, and
 especially to rules 30 and 51. We were also referred to the precedent of
Inayat Husain v. Amin-ud-din Ahmad(1), *Safdar Ali v. Dost Muhammad*(2)
 and the Full [449] Bench ruling of *Niamat Ali v. Asmat Bibi*(3). The
 last of these rulings deals with the case of a person who was admittedly
 a co-sharer in the ordinary sense of the term. In *Safdar Ali v. Dost*
Muhammad the case again was that of a co-sharer in the *mahal*. In both
 cases the dispute did not turn, as in the present case, upon whether a
 person who is only a proprietor of a portion of land and not one of the
 general proprietary body of a *mahal* can be rightly termed a shareholder
 in the *mahal*. The case of *Inayat Husain v. Amin-ud-din Ahmad* turned
 upon the interpretation to be given to the word *sharik*. On the other side
 we were referred to a passage in the petition for partition which had been
 put in by the predecessor in interest of the present respondent. and to a
 second passage in the partition proceedings. In both of these the prede-

(1) 8 A.W.N. (1888) 182.

(2) 10 A.W.N. (1890) 117.

(3) 7 A. 626.

cessor in interest of the respondent distinctly sets out that neither she, styling herself *hissadar* (or sharer), nor any of the other sharers had any concern with the plot in which the subject-matter of this suit is situate. It was also pointed out to us that both in s. 62 of Act No. XIX of 1873 and in rule 51 of the rules of the Board of Revenue a separate place is assigned in the record of rights to the co-sharers distinct from that assigned to all persons occupying portions of the land in the village or in possession of any heritable or transferable interest in such land.

The particular portion of the record of rights which recites the custom regarding pre-emption finds place only in the chapter relating to the rights of sharers amongst themselves founded on custom or agreement. It is not to be found in that portion which relates to other persons. It is true that the rules contained in the circular of the Board of Revenue to which our notice was directed are rules for the guidance of Settlement Officers prescribed under Act No. XIX of 1873, and that the village record of rights with which we are concerned bears date 1870, but the exact similarity in the heading to Chapter II of the document with that contained in the circular of the Board of Revenue shows that there must have been in existence some similar circular upon which this record of rights [450] was framed. Looking therefore to the place in this record of rights in which the rule regarding pre-emption is to be found, I, with considerable hesitation, come to the conclusion that the persons only to whom it is intended to apply are those who are known and were known in the village as co-sharers in the ordinary language of the day, and that it was understood in the village that those who held any portion of the once revenue-free and subsequently assessed lands were in no way concerned with it, and that the rule or custom of pre-emption was not a rule or custom relating to them. The right of pre-emption not being an ordinary right, but one for which express provision must be found, I come to the conclusion that in this case and under the special circumstances the respondent has not made out his claim to pre-empt and that the Court of first instance was right in dismissing his suit.

AIKMAN, J.—I concur with my brother Knox in thinking that this appeal must succeed. The plaintiff came into Court asserting a right to pre-empt, based on a clause in the *wajib-ul-arz* of the village, and the only question we have to decide in this appeal is whether the *wajib-ul-arz* gives the plaintiff the right he claims or not. The *wajib-ul-arz* is drawn up in four chapters. We have only to consider the second and third of those chapters. The second deals with the rights of sharers among themselves; the third deals with the rights of subordinate holders. It is in Chapter II that the clause on which the plaintiff relies is to be found. The sale which gave rise to this suit was one by which a subordinate holder, who comes under Chapter III, conveyed his property to the respondent before us. I think it is clear that the meaning of the framers of the *wajib-ul-arz* was to distinguish subordinate holders from co-sharers proper. No right of pre-emption is expressly given when a sale is made by such subordinate holders. It is only in the case of a sale by a sharer that this right arises. In Chapter III, there is a clause by which the zamindars of the village (and by zamindars, I understand the co-sharers) expressly disavow any right of interference with property such as that which formed the subject of this sale. I think for the plaintiff to endeavour to assert a right of pre-emp- [451] tion in respect of such property is to go in the teeth of the arrangement which was come to at the time the *wajib-ul-arz* was framed, to which the co-sharers and the subordinate

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1895 holders had been signatories. Further, as has been pointed out by my
MARCH 18. brother Knox, the predecessor-in-title of the present plaintiff, when a
 — partition was being carried out in 1889,* repeated this disavowal of all
APPEL- concern with the resumed revenue-free land. For these reasons I think
LATE that the view taken by the Court of first instance was the correct one.
CIVIL. *Per Curiam.*
 — This appeal is decreed, the order of the lower appellate Court is set
17 A. 447= aside, and that of the Court of first instance restored with costs in all
15 A.W.N. Courts.
(1895) 93. *Appeal decreed.*

17 A. 451 = 15 A.W.N. (1895) 103.

APPELLATE CIVIL.

Before Mr. Justice Burkitt.

RAM DIN AND OTHERS (*Defendants*) v. RANG LAL SINGH (*Plaintiff*).†
 [15th March, 1895.]

Pre-emption—Limitation—Sale with subsequent agreement for re-purchase—Mortgage by conditional sale.

On the 6th of June, 1887, one R.K. sold a certain zamindari share to S. On the 18th of May 1888, B. brought a suit for pre-emption of that share. Pending the suit, on the 6th of July, 1888, the vendor, the vendee and the pre-emptor entered into an agreement by which the vendee, recognizing the pre-emptive right of the plaintiff, agreed to re-transfer the property to the vendor or the pre-emptor on payment by either of them on the full moon of Jeth in any year of the price paid by him. On the 20th of June, 1891, the vendor, affecting to treat the transaction of the 6th of June 1887, as a mortgage, made an application purporting to be under s. 83 of the Transfer of Property Act accompanied by payment of the price of the property into Court and prayed for redemption. The vendee refused to take out the money deposited by the vendor; and subsequently, on the 13th of November, 1891, R.K. applied for repayment to him of the said money, stating that he wished the vendee to remain in possession, and asking that the agreement of the 6th of July, 1888, might be considered null and void. On the 1st of September 1892, one R.S. filed a suit for pre-emption of the said property.

[452] *Held*, that the original transaction of the 6th of June, 1887, was an out-and-out-sale, and was not, and could not be, by the subsequent agreement between the parties, turned into a mortgage by conditional sale; and in consequence that the suit brought by R.S. was barred by limitation.

[R., 3 O.C. 260; 8 O.C. 275 (277).]

THE facts of this case are fully stated in the judgment of the Court.
 Babu Bishnu Chandar, for the appellants.
 Maulvi Muhammad Ishaq, for the respondents.

JUDGMENT.

BURKITT, J.—This is an appeal in a pre-emption suit. The vendor, one Ram Khilawan, by a registered sale-deed dated the 6th of June, 1887, sold certain property to one Sheoraj Ahir. Subsequently, in May, 1888, a suit was instituted by one Bharos to pre-empt that property on the ground that the vendee was not a co-sharer. The suit was brought under the provisions of the *wajib-ul-arz* as to pre-emption. Before that suit came to a

* [In 15 A.W.N. (1895) 93 for 1889 we find 1885—ED.]

† Second Appeal No. 793 of 1894, from a decree of Kunwar Jwala Prasad, District Judge of Azamgarh, dated the 26th June, 1894, reversing a decree of Munshi Kishan Lal, Additional Subordinate Judge of Azamgarh, dated the 20th of March, 1893.

hearing in Court an agreement was entered into by the vendor, the vendee and the pre-emptor and was registered on the 6th of July, 1888. The effect of that document is that the vendee, practically admitting the pre-emption right of Bharos, agreed to hand back the property on the Puran Mashi of Jeth of any year on being repaid by either the vendor or the pre-emptor the amount he had given for it. Nothing further appears to have been done in the matter till the year 1891, when, on the 20th of June of that year, the vendor, assuming to treat the sale of 1887 as a mortgage, and after referring to the stipulation contained in the agreement of July, 1888, applied to the Court under the provisions of s. 83 of the Transfer of Property Act to permit him to deposit the mortgage money in Court on the ground that Sheoraj had refused to accept it. This application appears to have been shelved on the 3rd of August, 1891. Subsequently in November, 1891, Ram Khilawan applied for leave to withdraw the money from Court and asked that the agreement of 6th July, 1888, should be considered null and void, and stated that he had no longer any desire to interfere with Sheoraj's possession. This application of the 13th of November 1891 is the foundation of the plaintiff's suit. In the sixth paragraph of the plaint plaintiff alleges that this [463] transaction of the 13th of November, 1891, amounted to a sale and that therefore he is entitled to pre-empt. In the first Court the Subordinate Judge very properly held that the suit was barred by limitation, being of opinion that the plaintiff's pre-emptive rights were, as I understand him, in no way affected by the agreement of July, 1888, or by the application of the 13th November, 1891. The lower appellate Court disagreed with the first Court, and held that, though the sale of June, 1887, was an absolute out-and-out sale, the agreement of the 6th of July, 1888, had the effect of turning that absolute sale into a mortgage by conditional sale. He further held that "the effect of the application of the 13th of November, 1891, is that the conditional vendor relinquished his equity of redemption and made the sale absolute." He further held that, as the sale thus became absolute on the 13th of November, 1891, the plaintiff's cause of action arose on that date, and that therefore his suit was in time. I am unable to concur in any one of the conclusions at which the learned Judge arrived, excepting so far as he finds that the sale of June, 1887, was an out-and-out absolute sale. In that matter he is quite right. But the agreement dated the 6th of July, 1888, did not have, could not have, and was not intended to have, the effect of turning the absolute sale of June, 1887, into a mortgage by conditional sale. From the beginning to the end of that instrument the word "mortgage" is nowhere mentioned, and the sale of June, 1887, is described in it as an absolute sale (*bainamah la kalami*). The matter to which the parties to that instrument agreed is no more than that if either the vendor or the pre-emptor repaid the purchase money on a fixed date to the vendee the latter would reconvey the property. In fact this document can be considered as neither more nor less than a promise by the vendee to re-sell the property on certain conditions. The sale as originally made remained untouched as an out-and-out absolute sale and the only right which the vendor or the pre-emptor acquired was a right of repurchase. The learned Judge in the Court below is quite wrong in holding that under the deed of July, 1888, the previous absolute sale became a conditional sale with power of redemption, and the vendor's statement in his petition of June, 1891, as to the sale [464] having become a mortgage, and, in his petition of November, 1891, as to his relinquishment of his supposed

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equity of redemption are simply absurd. I concur fully with the view of the law taken by the Court of first instance and dissent *in toto* from that laid down by the District Judge. I allow this appeal. I set aside the decree of the lower appellate Court, and I restore the decree of the Court of first instance dismissing the plaintiff's claim. Defendants are entitled to their costs in all three Courts.

Appeal decreed.

17 A. 454=15 A.W.N. (1895) 95.

APPELLATE CIVIL.

Before Mr. Justice Burkitt.

AMJAD ALI AND OTHERS (*Plaintiffs*) v. MUSHTAQ AHMAD
AND ANOTHER (*Defendants*).^{*} [19th March, 1895.]

Pre-emption—Wajib-ul-arz—"Stranger."

Under the terms of a *wajib-ul-arz* successive pre-emptive rights were given, first, to 'own brothers,' secondly, to 'near cousins,' thirdly, to 'shareholders.' Held, the parties being Muhammadans, that in regard to a sale of land to which this *wajib-ul-arz* applied a nephew (brother's son) of the vendee was a 'stranger' and his joinder as co-vendee would vitiate the sale and let in other persons having a right of pre-emption. *Bhurey Mal v. Nawal Singh* (1) distinguished.

[R., 10 O.C. 225 (234).]

THE facts of this case sufficiently appear from the judgment of Burkitt, J.

Mr. D. N. Banerji, for the appellants.

Mr. T. Conlan and Pandit Sundar Lal, for the respondents.

JUDGMENT.

BURKITT, J.—This is an appeal in a pre-emption suit. One Muhammad Saddiq, a co-sharer, sold a small property to Mushtaq Ahmad and Muhammad Israil. Mushtaq Ahmad is a co-sharer in the same *thok* with the vendor. Muhammad Israil is not a co-sharer, but is the nephew of Mushtaq Ahmad and the son of Mushtaq Ahmad's brother, who is a co-sharer. The plaintiffs-appellants have instituted this suit for the purpose of acquiring by pre-emption the property sold to the vendees. The allegation on which their plaint is founded is that Muhammad Israil is a 'stranger' and that Mush-[455]taq Ahmad by joining him as a co-vendee has vitiated the sale. Such undoubtedly would be the case if Muhammad Israil be a 'stranger.' Now it is admitted that he is not a co-sharer; but it is contended that as a son of one co-sharer and the nephew of another co-sharer he cannot be considered to be a 'stranger.' In support of this plea the case of *Bhurey Mal v. Nawal Singh* (1) was cited. With great respect for the learned Judges who decided that case I must say that I am unable to follow the reasons given for the decision at which the Court arrived. It was a case in which three plaintiffs jointly claimed pre-emption. The Court of first appeal held that two of those plaintiffs were not entitled, as they were not co-sharers in the *thok*. On second appeal to this Court it was held that the respondent, the first pre-emptor, by having

^{*} Second Appeal No. 744 of 1894 from a decree of H. G. Pearse, Esq., District Judge of Agra, dated the 26th July 1894, reversing a decree of Babu Prithi Nath, Munsif of Muttra, dated the 21st October 1893.

(1) 4 A. 259.

joined with himself "certain members of his family who were strangers *quoad* the estate" did not thereby defeat his pre-emptive right. It is not stated how the other two plaintiffs were related to the plaintiff Nawal, or how they were members of his family (they appear to have been distant cousins), and there is nothing to show that they were members of a joint undivided Hindu family to whom the ruling in *Gandharp Singh v. Sahib Singh* (1) would apply. Unless they were such, in my opinion, the judgment in *Bhurey Mal's* case could be supported only on the fact, which does not appear to have been present to the mind of the Court, that the second and the third pre-emptors were near cousins of the deceased co-sharer Sahuria, whose property was in dispute. Under the terms of the *wajib-ul-arz* near cousins had a pre-emptive right. I cannot consider this case from 4 Allahabad as any authority on the present question. Now in the present case the *wajib-ul-arz* gives successive pre-emptive rights, firstly, to 'own brothers,' secondly, to 'near cousins,' thirdly, to 'shareholders,' and there are some other categories I need not notice. As the vendee, Muhammad Israil, is not a co-sharer and is not related to the vendor, he is not a person who, under any of the categories of the *wajib-ul-arz* cited above, could claim pre-emption. He, as a Muhammadan, is in a very different position from the son of Hindu co-sharer, who [456] by the Hindu law acquires on his birth an equal right with his father. The son of a Muhammadan acquires no such vested right, and, even if he survive his father, the latter may during his life have made such a disposal of the estate as to bar the succession of the son. A person in such a position cannot but be considered to be 'a stranger,' inasmuch as he does not come within any of the categories provided in the *wajib-ul-arz*. I am therefore of opinion that by joining Muhammad Israil, who, though his nephew, was not a co-sharer nor a relative of the vendor, Mushtaq Ahmad vitiated the bargain, and that the plaintiffs are entitled to pre-empt. I must therefore allow this appeal. I set aside the judgment and the decree of the lower appellate Court, and, as the suit was decided by the Court below on a preliminary point, and as I have reversed its decision on that point, I remand the case to the lower appellate Court for decision on the merits. Costs to abide the result.

Appeal decreed : case remanded.

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17 A. 456 (P.C.) = 22 I.A. 139 = 6 Sar. P.C.J. 593.

PRIVY COUNCIL.

PRESENT :

*Lord Hobhouse, Lord Davey and Sir R. Couch.**[On appeal from the High Court at Allahabad.]*BEJAI BAHADUR SINGH (*Plaintiff*) v. BHUPINDAR BAHADUR
SINGH (*Defendant*).BEJAI BAHADUR SINGH (*Plaintiff*) v. KOUNSAL KISHORE
PRASAD MAL (*Defendant*).

[12th, 13th, 14th February and 30th March, 1895.]

Evidence proving title by inheritance to raj estates—Proof of pedigree—Act No. I of 1872 (Indian Evidence Act), s. 32—Estate held as separate under the Hindu Law—Widow's interest therein—Act No. XI of 1857 (Offences against the State)—Confiscation.

A raj estate was claimed by the appellant as the nearest agnatic kinsman of the last raja in possession, who had died without male issue, but leaving a widow, and a daughter by her, both of whom died before this suit.

The respondent, who had obtained possession under a gift from the widow, denied the claimant's relationship to the raja. He also alleged that no title could have descended to the claimant from father to son, as the father's property had been confiscated on his conviction of an offence against the State, and sentence under Act XI of 1857.

[457] *Held*, that as the widow had taken the estate as the result of her husband's having owned it as his separate property, the respondent, whose only title was through her, had not established that a right of survivorship had accrued to the plaintiff's father on the death of the raja in 1853; therefore, there was no right of that kind which could have been confiscated by the sentence which was passed in 1862. Nor had the father any right of inheritance that could be enforced during the life of the widow, who outlived him. The separation of the estate, as held by the late raja, negatived both the confiscation and limitation.

The claimant, to prove his title, relied upon a pedigree, not stated in any document produced that had existed in the family before this suit. The genealogy on which he claimed was, however, identical with one which his father had more than once asserted, alleging title to two mauzas of the raj estate. The raja, called upon to answer in proceedings at settlement, had not given a direct denial to the alleged relationship.

On the contention that there were steps in the pedigree, as to which the evidence adduced did not include proof of statements made by a deceased person who had means of knowledge, or proofs of other statements within s. 32 of the Indian Evidence Act, I of 1872, and as to which the evidence was insufficient.

Held, that the evidence taken altogether, oral and documentary, had been sufficient to prove that the appellant was related to the deceased raja, as he had claimed to be, and that the appellant was, as heir to him, entitled to inherit the raj estates, on the widow's death; this opinion being founded on the documentary evidence.

[R., 2 O.C. 149 (159).]

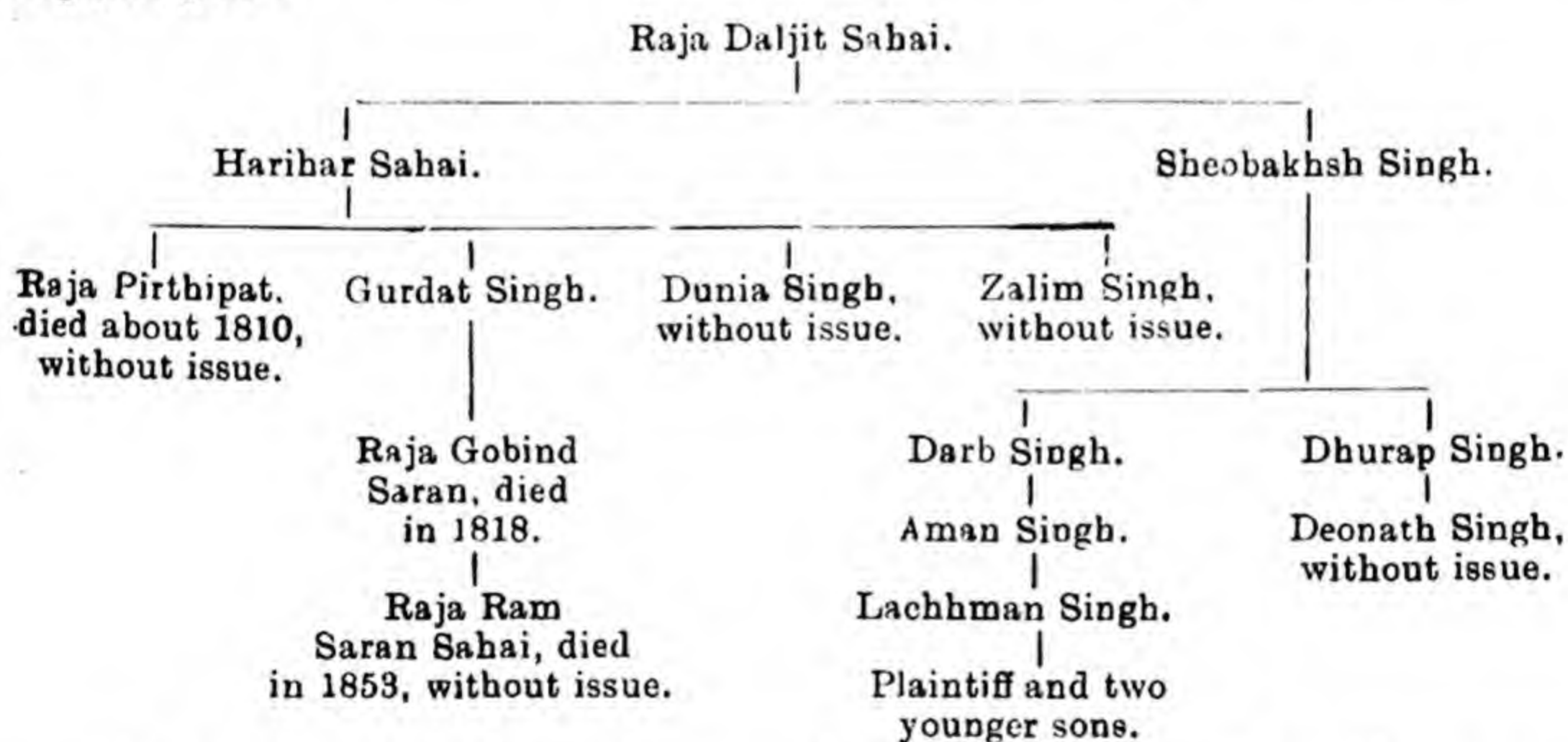
Two consolidated appeals from two decrees (19th July, 1889) of the High Court reversing a decree (12th November, 1887) of the District Judge of Mirzapur.

These were appeals from decrees passed on appeals separately preferred by two defendants in the same suit, which was brought on the 22nd September, 1886, by the plaintiff-appellant, a zamindar of mauza Ramgarh, pargana Bejaigarh, against the respondent, with other defendants, for possession of the estates of the Bejaigarh Raj, viz., villages in the districts of Mirzapur and Shahabad, valued at Rs. 1,25,755, with

moveables valued at over Rs. 75,000, and mesne profits amounting to Rs. 28,060. The last raja in possession was Ram Saran Sahai, who died on the 8th December, 1853, leaving one daughter, and a widow, but no son. The widow, Rani Pirthiraj Kuar, succeeded for her life, and died on the 19th April, 1886. On the 28th April, 1857, she made a deed of gift purporting to transfer the greater part of the raj estates to her daughter Radhe Prasad, [458] who died in April 1859, and on the daughter's death the estates came into the possession of her husband, Babu Brijendar Bahadur. He died on the 4th August, 1879, without issue, and his surviving widow and the Rani Pirthiraja Kuar executed deeds purporting to transfer all their rights in the raj estates to Bhupindar Bahadur Singh, Raja of Kantit, who was recorded as proprietor in the Collectorate books. This was the principal defendant in this suit, and with him was joined his sister's son, Kishore Prasad Mal, a minor, sued through his father. Other defendants were joined on Bhupindar's statement that they were in possession of part of the raj estates under grants from the widow.

As to some of these the plaintiff withdrew his claim, and the rest made no defence.

The plaint alleged that the plaintiff was heir to the raj estates as the nearest collateral relation of the last male owner, setting forth the following pedigree :—



Bhupindar Bahadur, whose nephew made substantially the same defence, defended the possession given to him by the Rani Pirthiraj Kuar. He denied that the plaintiff was descended from the same common ancestor with Raja Ram Saran Sahai. He stated the conviction of, and the sentence upon, Lachhman Singh, father of the plaintiff, by the Sessions Judge of Mirzapur on the 5th May, 1862, under Act XI of 1857 (*offences against the State*), in order to show [459] that the plaintiff could not inherit through his father and that he had no right to sue. The sentence was of imprisonment for five years, during which the prisoner died, with confiscation of all his property. Limitation under Act XIV of 1859, section 1, sub-section 12, was also alleged, the twelve years, if commencing in 1854, having expired in the widow's time.

But the principal question in the appeal was whether the plaintiff's relationship to the raja had been rightly held not to have been established. The High Court had decided the appeals upon no other point. All the three questions, raised by the defence, were, however, decided on the present appeal.

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The provisions of the Indian Evidence Act, I of 1872, referred to in the case, as to what statements of persons not present, may be proved by others, as relevant in proof of relationship, are given in section 32, to the following effect:—Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be called as a witness, are themselves relevant facts, when (cl. 5) the statement relates to the existence of any relationship between persons as to whose relationship he who is said to have made the statement had special means of knowledge, and when (cl. 6) the statement relates to relationship between persons deceased, and is made in a will or deed, about the affairs of the family, or in any family pedigree, or upon anything on which such statements are usually made. In all cases such statements must have been made before the question in dispute was raised. By section 50, the opinion expressed by the conduct of any person who has special means of knowledge is a relevant fact upon a question of relationship.

These sections and clauses were thus referred to in the judgment of the High Court:—"For the purposes of our Indian Courts this is the extent to which hearsay evidence with regard to relationship is admissible, and it may be summarized shortly under three heads—(1) statements made orally or in writing by persons deceased (&c.) having special knowledge *ante litem motam*; (2) statements in writing as to relationship between persons deceased, in wills or deeds [460] relating to the affairs of the family to which they belonged, or on a tombstone or other thing on which such statements are usually made *ante litem motam*; (3) opinion shown by conduct as to the existence of a relationship by a person who had special means of "knowledge."

The suit was heard by the District Judge, Mr. W. T. Martin. The first issue was whether the plaintiff belonged to the family of Raja Ram Saran Sahai, and was his heir, and whether he was entitled to sue for the inheritance. The District Judge referred to the history of the Bejaigarh Raj, as contained in the printed "Duncan Records," Vol. I, p. 173; Wynyard's Settlement Report, 1843; Roberts' Settlement Report, 31st July, 1847. Of these he took judicial notice under sec. 57 of the Evidence Act, I of 1872, as they were books, or documents, on matters of public history, and all of them had been compiled before the plaintiff's claim was first made. He considered that the plaintiff's chief support was the settlement proceeding and order of Mr. Roberts, dated the 9th May, 1851, with other petitions, and orders, forming part of the documentary evidence. These fully appear in their Lordships' judgment on this appeal. His translation of the raja's answer in the proceedings in 1851, when called upon to answer by the Settlement Officer, did not agree as to the words—"upar deorhi murisan hamare rahte the"—spoken of Babu Darb Singh, and Babu Dharap Singh by the raja, with that of the official translator in the High Court.

As to the alleged confiscation, the Judge found that, as Raja Ram Singh was in separate possession of the raj property, and his widow took a life-estate therein, according to the ordinary rules of the Hindu law, any rights, which the claimant's father had at the date of his conviction, being merely of an expectant, and not of an actual, character, were not affected by the forfeiture ordered under Act XI of 1857. On the question of limitation, proceeding upon the same view as to the right of Rani Pirthiraj to take an estate for life, the Judge held that neither she, as against her husband's collateral relations, nor Babu Brijendar Bahadur, as against her, had acquired any title by adverse possession.

[461] Making a summary of all the evidence, on the issue as to the proof of the claimant's relationship, the District Judge said :—

"To sum up the evidence, documentary and oral, on the first issue : defendant's counsel laid great stress on the ruling in *Kedarnauth Doss v. Protob Chunder Doss* (1), which lays down the rule that 'where the plaintiff claims as a collateral heir, he is bound to allege and prove his title through the common ancestor in all its stages, and one most important stage is of course the common ancestor himself.' Well, there is no question in this case that plaintiff has alleged his title as required by this ruling, for he sets forth his genealogy, step by step, from the common ancestor, Raja Daljit Singh. The proof consists in (1) the admission of plaintiff's relationship by the last raja in 1850 implied by—

- "(a) his not denying the relationship, but making baseless insinuations merely, in respect of it;
- "(b) his admitting that plaintiff's family received maintenance from the raj;
- "(c) his setting up a baseless plea to account for plaintiff's possession of certain villages.

"(2) In the oral evidence which proves that the Ramangon branch of the raja's family is the nearest relation to it, and plaintiff is the head of that branch, and that before her death the last raja's widow recognized plaintiff as heir to the raj.

"Accordingly, on the first issue, I find that plaintiff does belong to the family of Raja Ram Saran Singh and is his heir, and, as such, is entitled to sue."

The claim, with the exception of six mauzas, was decreed.

Each of the two present respondents filed a separate appeal to the High Court from this judgment. A Division Bench (Straight, J., and Brodhurst, J.) allowed the appeal, and dismissed the plaintiff's suit. They referred to the burden being on him to prove his pedigree. After a full examination of the evidence on which the [462] decree of the first Court was based, the conclusion at which they arrived was thus expressed :—

"The matter therefore stands thus, that the plaintiff has produced no evidence of the statements of deceased persons as to his relationship through Sheobakhsb Singh with Raja Daljit Singh, who had special means of knowledge of such relation and made them before the question now in controversy arose. He has brought forward no pedigree or other document relating to the affairs of the family showing the relationship he asserts between the deceased members of his branch and the deceased members of Raja Ram Saran Sahai's branch prepared before the question now in controversy arose. He has given some evidence of the opinion expressed by conduct as to the existence of the relationship alleged on the part of Raja Gobind Saran Sahai in making the allowances to the ancestors of the plaintiff, of Raja Ram Saran Sahai in his treatment of the plaintiff's father and of the Rani Pirthiraj, in her treatment of the plaintiff, which, for the reasons I have stated, appears to me of no substantial value, and the statements of the four witnesses, Deonath, Sheo Saran, Bhola and Indarjit as to the status of the plaintiff. I am unable to hold that upon these materials the plaintiff has satisfied the onus that is upon him or that he has forged the connecting link in the chain which divides Darb and Dhurap from Raja Daljit Singh. I have most anxiously and earnestly considered all the

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evidence as well as the able arguments of the learned pleader for the respondent as well as the judgment of the Court below, but I cannot say that there is enough to warrant me in holding that the plaintiff has made out his title by proof of which alone he can succeed. It is true that the pedigree on which he relies has been asserted since 1850 down to the present time by the father of the plaintiff first, and now by the plaintiff; but it has always in my opinion been as distinctly denied by Raja Ram Saran and his Rani after him, except in the case of the latter within a few months of her death, and possession was obtained and maintained over the whole riasat despite it. In 1850 Raja Ram Saran Sahai was a man in middle life with no child, except a daughter, and I cannot understand why, if Lachhman Singh were the next heir to the raj, and he had been, as he apparently was, till the proceedings in the Revenue Court, on good terms with him, the raja should have spoken of him and his ancestors as he did. It is also strange, if Lachhman Singh held the status he asserted, he should have been content with the very trifling allowance derivable from the income of the two villages Bamangaon and Souli, which produced a babuana relatively insignificant and out of all proportion to the income of the raja and his position as a cadet of the family. Again, taking the case of Lachhman Singh as he put it in 1850, 1854 and 1862, if it meant anything, it was that the raj property was ancestral and joint, but impartible; that only one person succeeded to the gaddi of the raj; that the younger brothers were called Babus and received a proportionate share of the ancestral raj in ilakas; and that these persons succeeded to the gaddi in the event of the raja dying without male issue; or, in other words, that Lachhman Singh on the death of Ram Saran Singh was entitled to the gaddi and the riasat then and there. It was not suggested that there was any right by custom of the family for females to succeed. What can be thought of his conduct in allowing the rani to obtain possession of the whole estate and to hold it for eleven years before he took any steps to assert his rights or made any effort to obtain an increased babuana? It certainly is a strong indication to my mind that, so far as Lachhman Singh was concerned, he knew he had no proof of the relationship he asserted, which would certainly, if it existed, have been more readily procurable nearly five and thirty years ago than now. So, again, from 1865 to the institution of the present suit, the plaintiff himself made no move, and it is only when financed for the purpose that he comes in with this litigation upon allegations that are altogether at variance with those formerly made, to which I have referred.

"Upon full consideration of all the circumstances, and in difference with the view of the learned Judge, I find that the plaintiff has not made out that he belongs to the family of Raja Ram Saran Sahai, the last owner, or that he is his heir and so entitled to maintain this suit. This finding disposes of the appeal and it is unnecessary to discuss the question of limitation or confiscation. I decree the appeal with costs, and, reversing the decree of the Court below, dismiss the plaintiff's suit with costs."

On the plaintiff's appeal from the judgment in favour of the two defendants—

Mr. J. D. Mayne and Mr. W. A. Raikes, for the appellant, argued that the decision of the first Court was right, and should have been upheld. The evidence on the record showed that the claimant was the nearest collateral relation of the late raja, and, therefore, heir to the raj estates. The respondent, Bhupindar Bahadur Singh, only claimed in virtue of a

gift from the Rani Pirthiraj Kuar, whose title was but that of a widow, ending with her life. The qualification of the widow's estate necessarily attached to it, and there was no reason why she should have obtained an absolute interest. She obtained no greater interest than any widow succeeding under the Hindu law. The ascertainment of heirs to take on the death of an owner was a question substantially depending on the status of that owner; *The Collector of Masulipatam v. Cavali Vencata Narrainapah* (1). Thus, the appellant's case was that by Hindu law the successor of the last raja, who died in 1853, was, upon the death of his widow, the nearest male descendant from the common ancestor of that descendant and the raja.

The alleged confiscation under Act XI of 1857 of the estate, as if it had been in the possession of the claimant's father, never took place, inasmuch as the father had no title to the estate now claimed, or any property on it, upon which the sentence could operate in 1862. But setting this and limitation aside, this question here was mainly one of fact, and was whether the claimant had been proved to have been a descendant from Raja Daljit Sahai. From the younger son of this man the plaintiff alleged his descent, and in this was supported by four witnesses, members of the family; with regard to the difficulty of getting witnesses who had heard statements made by those with means of knowledge of descents which [465] went back to the beginning of the century, this was the best evidence that could have been given. Two other witnesses, one of whom was a companion of the late raja, and the other a kanungo of the parganas in which the property was, gave evidence to the same effect. Others supported the testimony as to the treatment of Lachhman by the late raja. The documentary evidence was more important. In reference to the raja's answer having stated that the Babus, Darb Singh and Dhurap Singh, were "doorkeepers," in the sense of servants, the real meaning was that they were "upon the threshold," in the sense of being dependent on the raja's allowance, which was strictly the fact, or, as expressed by the first court, "just where poor relations would be." Had they been no relations at all, the raja would have said so.

The High Court appeared to have considered it necessary that each step in the plaintiff's pedigree should be proved in the manner described in the Evidence Act, I of 1872, section 32; but that definition of admissible hearsay evidence of pedigree did not apply to exclude the legitimate inferences that might be drawn from the documentary and general evidence in a case bearing on a pedigree. It would be plainly impossible to go far back if the proof of statements of persons who knew the progenitors and their relations when alive were required to prove every step.

Due effect had not been given to the repeated production of the same genealogy long before the controversy in the present suit, and to the absence of any direct denial by the raja of the relationship between him and Lachhman.

Mr. R. B. Finlay, Q. C., Mr. J. H. A. Branson and Mr. G. E. A. Ross, for the respondent, Bhupindar Bahadur Singh, contended that there was no sufficient evidence to establish the relationship of the plaintiff to the last raja, Ram Saran Sahai, the burden of proof being upon him to establish that before the title of the defendant in possession could be called in

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(1) 8 M. I. A. 500.

1895 question. The alleged relationship did not rest upon family documents
 MARCH 30. and the non-production of the written pedigree had been rightly treated
 — by the High Court as of important effect. A question arose whether the
 PRIVY [466] evidence of the only four witnesses to whom, of all the sixteen
 COUNCIL. witnesses for the plaintiff, the District Judge had given credit, was
 — admissible within the Indian Evidence Act, I of 1872. There was a doubt
 17 A. 456 whether the statements reported as having been made were relevant to
 (P.C.)= prove the pedigree, especially in reference to the link which consisted in
 22 I.A. 139= connecting Sheo Bakhsh Singh with Raja Daljit Sahai as his younger son.
 6 Sar. P.C.J. The witnesses did not speak as proving statements of deceased persons
 593. who had special means of knowledge. They spoke as persons deriving
 their information from a pedigree in writing which they had seen.
 Reference was made in connection with the proof of pedigree according to
 the law of evidence in England, to *Davies v. Lowndes* (1). In the Indian
 Evidence Act, I of 1872, ss. 32, 50 and 158 were referred to and compared
 with the above.

The non-production of the written family pedigree, referred to as
 having existed, gave rise to the doubt whether it might not have been
 kept back because it would have contraverted the statements of the wit-
 nesses, rather than have supported them. The documentary evidence,
 such as had been produced, was rather matter of corroboration than of
 independent proof. It had been inferred that the Raja Ram Saran Sahai
 admitted, by not denying, that the appellant's father was related to him
 in the manner alleged in the plaint. This was hardly sufficient ground for
 the inference that he admitted the degree of relationship, and the evidence
 had failed to establish it.

Mr. J. D. Mayne replied.

Their Lordships' judgment was, afterwards, on the 30th March,
 delivered by Sir R. COUCH:—

JUDGMENT.

The appellant in this case brought a suit in the Court of the Subordin-
 ate Judge of Mirzapur against the respondents and others to recover
 possession of a raj and large estates, the greater part of which are situate
 in pargana Bejaigarh, zilla Mirzapur. The suit was tried by the District
 Judge, who decided it in the appel-[467] lant's favour and gave
 him a decree for possession of the property claimed, except six mauzas,
 against the respondents. They separately appealed to the High Court
 at Allahabad, which Court on the 19th July 1889 reversed the decree of
 the District Judge and dismissed the suit. The appellant's case is that
 Raja Ram Saran Sahai, who was possessed of the property, was the lineal
 descendant of Raja Harhar, or Harihar Sahai, the son Raja Daljit Sahai
 who died between 1781 and 1790; that Raja Ram Saran Sahai, who died
 on the 8th December 1853, left a widow, Rani Pirthiraj Kuar, and a
 daughter, Radhe Prasad Kuar; that the appellant is the eldest of the three
 sons of Babu Lachhman Saran Singh, the lineal descendant of Babu Sheo
 Bakhsh Singh, the younger son of Raja Daljit Sahai; and that Rani
 Pirthiraj Kuar died on the 19th April 1886. The appellant filed his plaint
 on the 23rd September 1886. The respondents, who were in possession,
 appear to have obtained it in the following manner:—Rani Pirthiraj
 Kuar, having taken possession of the property after the death of her hus-
 band on the 28th April 1857, made deeds of gift of parts of it in favour

(1) 7 Scott N. R. Com. P. 141.

of her daughter Radhe Prasad Kuar. She died on the 13th April 1859, and her husband, Babu Brijendar Bahadur, was, with the consent of Rani Pirthiraj Kuar, recorded as zemindar and proprietor of the property, which was the subject of the deed of gift of the 28th April 1857. On the 15th January 1872, Rani Pirthiraj Kuar executed a deed of gift of the whole of her property, with the exception of Taluka Silhat, in favour of Babu Brijendar Bahadur. He died on the 4th August 1879, leaving no issue, and the name of Musammatt Dharamraj, his widow, was recorded in the revenue papers. On the 21st November 1879, she and Rani Pirthiraj Kuar, by a deed of gift and agreement gave and assigned to the first respondent, the nephew of Brijendar, all their interests in the estates belonging to the Raj of Bejaigarh, and he was put into possession and recorded as proprietor of them with the assent of Rani Pirthiraj Kuar.

In his written statement the first respondent denied that the appellant belonged to the family of Raja Ram Saran Singh. [468] He also alleged that Lachhman Singh had been convicted of offences under Act XXV of 1857 (a mistake for Act XI of 1857); that his whole property and rights were forfeited to the Government; and therefore that the appellant had no right to sue. He also relied upon the law of limitation. The defence of the second respondent was in substance the same.

The appellant's evidence was both documentary and oral. It will be seen hereafter that the latter is of little value. In a proceeding recorded by the Settlement Officer and Deputy Collector of the Mirzapur district on the 9th May 1851, the question being who should be recorded in the Collectorate as proprietor of two mauzas, Bamangaon Sindwari and Soli, tappa Silhat, pargana Bejaigarh, it appears that Lachhman Singh, the appellant's father, presented a petition to the effect that the mauzas had been "from the time of Raja Gobind Saran Sahai" (the father of Raja Ram Saran Sahai) "in the possession of the applicant's ancestors and the applicant himself, without payment of revenue, in this manner, that Raja Daljit Sahai had two sons (1) Raja Harhar Sahai and (2) Babu Sheo Bakhsh Singh. Again, Raja Harhar Sahai had four sons, viz., (1) Raja Pirthipat, (2) Babu Dunya Singh, (3) Babu Gurdatt Singh and (4) Zalim Singh. Babu Sheo Bakhsh Singh had two sons, (1) Babu Darb Singh and (2) Babu Dhurab Singh. Babu Dhurab Singh had a son, Babu Deonath Singh, and Babu Darb Singh had Babu Aman Singh, the father of the applicant. Babu Deonath Singh died childless. His widow, Bahoria Jawahir Kuar, is his heir. She is alive. Raja Gobind Saran Sahai in his lifetime granted the aforesaid villages revenue free to Babu Darb Singh and Babu Dhurab Singh, the applicant's ancestors, for their maintenance. From that time the applicant's ancestors, and after them the applicant, have as usual been in zamindari possession of the said villages together with all the mal and sair items without paying any Government revenue. But in the public record the name of Raja Ram Saran Sahai is entered in the column of lambardar." It was ordered that the applicant should produce his evidence, and that the raja's mukhtar should file his reply and adduce his evidence, and [469] that the kanungo be called upon to submit a report. On the 2nd January 1851 the raja by his mukhtar filed his reply. It is as follows:—

"The said applicant,* who has no complete title deed, calls himself a zemindar, and says that he never paid the revenue of the villages Bamangaon and Soli, and that he has been long in possession. But the fact is that the said villages constitute the ancestral zamindari of the petitioner under a decree of the Civil Court, and that he has been

[* In 6 Sar. P.C.J. 600 we find for "applicant," "appellant."]

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paying the Government revenue from year to year to the Collector, obtaining receipts and discharges from him. Formerly, Babu Darb Singh and Babu Dhurab Singh were the doorkeepers of the petitioner's ancestors, and that they therefore, having built a house at mauza Bamangaon, took up their residence in it, and made an application for the lease of those villages. Accordingly Raja Gobind Saran Sahai, the petitioner's ancestor, made over the village Bamangaon to Babu Darb Singh, at a jama of Rs. 55, and mauza Soli to Babu Dhurab Singh, at a jama of Rs. 35, without executing any deed. These persons continued to pay the above-mentioned jamas into the petitioner's office during their lifetime. Babu Darb Singh used to be paid a maintenance allowance of Rs. 46 per annum, and Babu Dhurab Singh of Rs. 30 per annum, from the petitioner's office, and both these persons served the raj and the gaddi throughout their lives. But since 1250 Fasli the applicant, at the instigation of the mischiefmakers in the pargana, would neither pay the revenue nor perform the services rendered by his ancestor. Under these circumstances the villages should be resumed by reason of the revenue remaining unpaid. The applicant's allegation of maintenance allowance is wholly false. If the applicant's ancestor was an own brother of Raja Harihar Sahai, he should produce a grant made by that raja, but he had no connection with the petitioner's ancestor. If the ancestor of the applicant considered himself to be an equal or brother, he should have asserted his claim in the court when a suit was brought by the petitioner's ancestor. Babu Dhurab Singh died childless, and the applicant has nothing to do with mauza Soli. As regards the arrears of revenue relief will be sought from the court. The revenue not having been remitted by the Government to the petitioner, he could not absolve others from payment thereof. This is a matter which is to be taken into consideration by the court.

This is the official translation of the document. The District Judge in his judgment has given his own translation, in which instead of "were the doorkeepers of the petitioner's ancestors," it is "used to live at the threshold of petitioner's ancestors." The latter translation seems rather to show that "doorkeeper" should not be taken to mean merely a servant. This proceeding appears to their Lordships to be important evidence. There is a clear statement by Lachhman of the pedigree now relied upon when there was no question as to the succession to the raj. The reply of the [470] raja is not such as might be expected if Darb Singh and Dhurab Singh were not relations, but were only servants. The denial of the appellant's ancestor being a brother of Raja Harihar Sahai is argumentative rather than direct. There was no occasion to produce a grant to prove it or to have asserted the claim before in court. The order of the Settlement Officer is not material to the present question. It was that the petitioner's ancestors held the villages revenue free.

On the 7th April 1854 a proceeding relating to mutation of names by inheritance was recorded by the Collector of Mirzapur. It states that a petition of the Tahsildar of Shahganj, dated the 10th December 1853, was received, containing information of the death of Raja Ram Saran Sahai, the raja of pargana Bejaigarh; that the kanungo of the pargana also submitted a report on the 14th of that month stating that the raja died on the 8th December 1853, leaving Rani Aprup Kuar, his mother, aged 60 years, Rani Pirthiraj Kuar, widow, aged 40 years, and Babu Radhe Prasad Kuar, daughter, aged 11 years, as his heirs; and that besides these persons Babu Lachhman Saran Singh was also a near heir. He (Lachhman), the report says, writes "that Raja Daljit Singh had two sons, Raja Harihar Sahai and Babu Sheo Bakhsh Singh; that Raja Harihar Sahai had four sons, Raja Pirthipat, Babu Duniapat, Babu Gurdatt Singh, and Babu Zalim Singh; that Raja Pirthipat, Babu Duniapat, and Babu Zalim Singh had no children; that Babu Gurdatt Singh's son was Raja Gobind Saran Sahai, whose son was Raja Ram Saran Sahai; and Babu Sheo Bakhsh Singh's sons were Babu Darb Singh and Dhurab Singh; that the last-named person died childless; and that Babu Darb Singh's son was Babu Aman Singh, whose son is Babu Lachhman Saran Singh."

It is then stated in the record of the proceeding that the kanungo was ordered to furnish a report as to whether the ancestor of Babu Lachhman Saran Singh used to get any maintenance allowance as brother of the raja from this estate, and also to state who then managed the estate of the deceased raja and paid the Government revenue; that afterwards Rani Pirthiraj Kuar, [471] zemindar, filed a petition, to the effect that she had succeeded as heiress to all the property left by her deceased husband, and she prayed that her name should be entered in the official papers by expungement of that of the deceased.

It is to be observed here that the widow could only be the heiress of her husband if he was separate in estate from the other branch of the family. Her claim to be the heiress may reasonably be taken to mean that he was separate in estate. It would be evidence against her, and is also evidence against the first respondent, who came into possession by virtue of her gift.

The record states that the report of the kanungo was to the effect that the ancestors of Babu Lachhman Saran Singh received only mauza Bamangaon and Soli as a provision for their maintenance from the raja as bila-den (or rent-free bhuwad) allowance to a brother, and that these villages were still held in lieu of maintenance; and that the estate of the deceased raja was entirely managed by Rani Pirthiraj Kuar, and the revenue paid by her. The record then sets forth a petition of Lachhman to the effect that he and the raja "were cousins, the descendants of a common grandfather;" that Raja Ram Saran Sahai had granted the villages Bamangaon and Soli "as a provision called bhuwad for his necessary expenses;" and that under Regulation X of 1793 a woman was prohibited from engaging for payment of the Government revenue, "and being a sarbarakar (manager)," and therefore it was but just that the management of the official matters should be entrusted to him. He seems not to have disputed that the widow was the immediate heir for her life. Rani Pirthiraj Kuar filed a reply to this petition to the effect that "Raja Gobind Saran Sahai was the only son of his father, and he had neither a brother nor a first cousin; then how can the objector be a cousin (brother amzad) of the deceased raja, and how can he have right or title to the estate?" This is evasive. It gives the literal meaning to "grandfather," which could not have been intended, as in the pedigree the common ancestor was more remote. The order was that the name of Rani Pirthiraj [472] Kuar should be entered as lambardar, the Collector saying:—"The objection of Babu Lachhman Saran Sahai, who urges his own right, cannot be admitted. He is three or four degrees removed from the deceased raja."

The proceeding for mutation of names was immediately followed by an application by Pirthiraj Kuar for a certificate of heirship under Act XX of 1841 to the Judge of Mirzapur. The proceeding recorded by him on the 5th May, 1854, states that Pirthiraj Kuar applied as the only heir to the deceased raja, which would be true if he and Lachhman were separate in estate; that Lachhman filed his objections to the effect that the certificate of heirship was to recover debts and not to get possession of the zamindari estate and to secure the gaddi of the raj, but that it was known to all that the objector and Raja Ram Saran Sahai "were cousins, being the descendants of a common grandfather, and that the zamindari and the raj (estate) of Bejaigarh is a hereditary property which has not up to this day been ever partitioned (divided) according to the customs and usage of the raj. It is thus clear that after the

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1895 death of Raja Ram Saran Sahai, the objector and the Rani Saheba were
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 — a *pardah-nashin* lady, he was the only person entitled to manage the raj
 PRIVY and the estate. The decision of the Judge was that the objections of
 COUNCIL. Lachhman could not be allowed "because, according to *Macnaghten*, it is
 — the general rule of the Benares School of Hindu law, which also applies
 17 A. 456 to these parts, that when there is a separation and no son, the widow as
 (P.C.)= against other heirs has a preferential right. It appears that the objector
 22 I.A. 139= and the deceased raja were separate, because irrespective of the deposition
 6 Sar. P.C.J. of the witnesses of the rani-applicant, who spoke of the separation, it
 593. appears from the proceedings of the Revenue Court, dated 9th May, 1851,
 the contents of which are not only admitted by the objector's witnesses,
 but by the objector himself, that they were separate; that is, it shows
 that the objector and his ancestors were in separate possession for a long
 time of the villages of Bamangaon, Sayedwari and Sani Balam for their
 maintenance." It [473] was accordingly ordered that the objections of
 Lachhman Singh be rejected and a certificate be given to Rani Pirthiraj Kuar.

It thus appears that Rani Pirthiraj Kuar relied on the separation as
 entitling her to the certificate and that on that ground the decision was in
 her favour. This is strong evidence against the respondents of the
 separation. Their Lordships are of opinion that there was a separation,
 and this disposes of the objections of the forfeiture by Lachhman and the
 law of limitation. Lachhman, when he was convicted, had no property or
 right in the estates that could be forfeited. He could only be entitled as
 heir to the raja upon the death of the widow if he survived her. It is
 also to be observed that Pirthiraj Kuar appears in this proceeding not to
 have denied the relationship as she did in the previous proceeding, but
 only evasively.

The only question, then, is whether the evidence is sufficient to prove
 that the appellant was the heir of Raja Ram Saran Singh on the death of
 Pirthiraj Kuar. Of the appellant's witnesses the District Judge was of
 opinion that only four had "some claim to special means of knowledge;"
 that the rest had not, and therefore that their opinions were "worthless."
 As no written pedigree was produced, he held that their evidence, so
 far as it was derived from such a pedigree, was clearly inadmissible
 under s. 59 of the Evidence Act. As to their being members of
 the same family, he said they were so remotely connected with the last
 raja's family that their opinion as to the appellant's connection, step by
 step, with the last raja was of little weight. He considered that the wit-
 nesses of the defendant (the respondent Bhupindar Singh), who spoke as
 to the raja's pedigree and asserted that Raja Daljit had but one son,
 Harhar, had "no special means of knowledge whatever, and their evidence
 on the point is worthless." The High Court agreed with the District
 Judge as to the oral evidence except that of the four witnesses. The learned
 Judges appear to have thought that the evidence derived from a pedigree not
 produced was admissible, because the questions-in-chief put by the plaint-
 iff's pleader to the witnesses were not objected to. But after stating the
 [474] evidence rather fully they said they were of opinion that as no effort
 was made to produce a pedigree, or account for its non-production, the
 evidence was worthless. Their Lordships think little, if any, weight
 should be given to this evidence. This opinion on the case is founded
 upon documentary evidence. That appears to show that Lachhman as
 far back as 1851 asserted his relationship, and set out the pedigree upon
 which the appellant now relies. On the death of the raja in 1854, according

to the report of the kanungo, Lachhman again set out his pedigree and claimed to be a near heir. This was met by the rani by the allegation that she was the heiress, and in the certificate proceedings she appears to have examined witnesses to prove separation, which would show that she was the heiress, but is consistent with the claim of Lachhman according to his pedigree. She does not appear in this proceeding to have denied his relationship, and her conduct not long before her death agrees with this; though it may perhaps be explained by her having quarrelled with the respondents.

Their Lordships have come to the conclusion that the evidence is sufficient to prove that the appellant was, on the death of Rani Pirthiraj Kuar, the heir of her husband the raja, and was entitled to the estates, of which possession was decreed to him by the District Judge; and they will humbly advise Her Majesty to affirm that decree and to reverse the decrees of the High Court, and to order the appeals to it to be dismissed with costs. The respondents will pay the costs of these appeals.

Appeal allowed.

Solicitor for the appellant—Mr. T. C. Summerhays.

Solicitors for the respondent, Raja Bhupindar Bahadur Singh, Messrs. Pyke and Parrott.

17 A. 475 = 15 A.W.N. (1895) 104.

[475] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

UMRAO CHAND (*Petitioner*) v. BINDRABAN CHAND AND ANOTHER
(*Objectors*). [23rd March, 1895.]

Letters Patent, s. 10—Act No. V of 1881 (Probate and Administration Act), Ch. V—Probate—“Order”—“Decree”—Civil Procedure Code, ss. 2, 591—Appeal.

An appeal will lie under s. 10 of the Letters Patent of the High Court of Judicature for the North-Western Provinces from the judgment of a single Judge of the Court in appeal from an order of a District Judge granting probate of a will under Chapter V of Act No. V of 1881, and the Bench hearing such an appeal under s. 10 of the Letters Patent is not debarred from reconsidering the findings of fact arrived at in the judgment under appeal.

THIS was an appeal under s. 10 of the Letters Patent from a judgment of Knox, J., setting aside a grant of probate made by the District Judge of Agra.

The facts of the case are thus given in the judgment under appeal:—

“This is an appeal from an order, dated the 7th March, 1894, passed by the District Judge of Agra, on an application made to him by one Umrao Chand for probate of the will of Ghansham Chand, or for letters of administration with a copy of the will annexed. The case was a contentious case: therefore, as provided by s. 83 of Act No. V of 1881, the proceedings before the Judge had to take the form as nearly as might be of a suit according to the provisions of the Code of Civil Procedure. The petitioner for probate had to take the place of plaintiff and the persons who opposed the grant of probate had to appear as defendants.

* Appeal No. 1 of 1895, under s. 10 of the Letters Patent from a judgment of Knox, J., dated the 26th November 1894.

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MARCH 23. The burden of proving that the will was such a will that probate could be granted lay upon the plaintiff, in other words, upon the applicant for probate. He had to prove, to the satisfaction of the Judge, that the writing for the probate of which he asked was the last will and testament of Ghansham Chand and that it had been duly executed. In support of these facts three witnesses were produced, and [476] the only comment that the learned Judge makes upon their evidence is as follows:—"The genuineness of Ghansham Chand's will and the *mala fides* of the objectors are clearly shown."

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"It is little wonder that in the face of such a perfunctory judgment the learned counsel who appeared for the appellants before me has objected that there has been virtually no trial of the case in the Court below. The objection is certainly a sound one and entails upon me the necessity of doing what the lower Court has left undone, *i.e.*, of weighing and examining the evidence which has been put forward for grant of probate."

The Court then proceeded to deal with the evidence tendered in the Court below and came to the conclusion that it was not sufficient to warrant the granting of probate of the will of Ghansham Chand, and accordingly set aside the order of the District Judge.

The applicant preferred an appeal under s. 10 of the Letters Patent. Mr. D. N. Bannerji, for the appellant.

The Hon'ble Mr. Colvin and Munshi Ram Prasad, for the respondents.

JUDGMENT.

EDGE, C.J., and BANERJI, J.—This is an appeal brought under s. 10 of the Letters Patent from the judgment or decree of our brother Knox. Our brother Knox had before him an appeal from an order made by the District Judge of Agra under Act No. V of 1881 granting probate of a will propounded before him.

A preliminary objection was taken that an appeal did not lie under s. 10 of the Letters Patent in this case. It was contended that the order of the District Judge of Agra, granting probate was not a decree, but was simply an order, to which s. 591 of Act No. XIV of 1882 applied. That contention was based on the fact that s. 86 of Act No. V of 1881 gives an appeal to the High Court from a District Judge from an order made by him by virtue of the powers conferred on him by Act No. V of 1881, and to the fact that, in that Act, the orders of the District Judge are referred to as [477] "orders," not as "decrees." The contention was also supported by a reference to s. 83 of Act No. V of 1881. It appears to us that, although the term used to express the operative decision of the District Judge in cases arising under Chapter V of Act No. V of 1881 is "order," still, when applying Act No. XIV of 1882, we must see whether the order of Chapter V of Act No. V 1881 would be an order or would be a decree, as those terms are defined in s. 2 of Act No. XIV of 1882. Section 591, as was decided in Letters Patent Appeal No. 31 of 1894, in the case of *Richard Wall v. J. E. Howard* on the 18th instant (1), must be read with s. 588, and should be construed as if the words "under this Code" were inserted between the words "by any court" and the words "in the exercise of." That being so, if the order from which the appeal was brought to this court in this case was not an order as defined by Act No. XIV of 1882, but was a decree, Chapter XLIII of Act No. XIV of

(1) 17 A. 438 = 15 A.W.N. (1895) 89.

1882 would not apply to it, or to any subsequent appeal arising out of it. An order, as defined in s. 2 of Act No. XIV of 1882 means—"the formal expression of any decision of a Civil Court which is not a decree, as above defined." For present purposes a decree, as defined in that section, means—"the formal expression of an adjudication upon any right claimed, or defence set up, in a Civil Court, when such adjudication, so far as regards the court expressing it, decides the suit or appeal."

There can be no doubt that the order of the District Judge granting probate did decide, so far as his court was concerned, not only a right to have the probate granted, but the defence which was set up to the granting of the application for the probate; consequently it must be a decree within the definition of s. 2 of Act No. XIV of 1882, and, as such, Chapter XLIII of Act No. XIV of 1882 did not apply.

It was also suggested, although the point was not pressed, that in this Letters Patent Appeal we were bound by the findings of fact of our brother Knox, and that the appeal before us could not be dealt with in the same way in which a first appeal to this Court [478] might be dealt with. That contention would place an appeal under s. 10 of the Letters Patent in the same position as an appeal to which Chapter XLII of Act No. XIV of 1882 applies. Chapter XLII limits the right of appeal from a decree passed in appeal by a court subordinate to the High Court, and only applies when the appeal is one from a decree passed in appeal by a court subordinate to the High Court. The appeal to this High Court having been a first appeal, and not an appeal to which Chapter XLII of Act No. XIV of 1882, applies, the parties to the appeal are entitled to question not only the law, but the findings of fact of the Judge of this court from whose judgment or decree this appeal has been brought under s. 10 of our Letters Patent. It would be otherwise if the appeal to this Court had been an appeal to which Chapter XLII of Act No. XIV of 1882 applied. Then the Bench sitting in the Letters Patent appeal would be bound by the same rule which bound the single Judge from whose decree or order the appeal was brought. We hold that an appeal lay from the judgment or order of our brother Knox, and that the parties were entitled to have this Bench consider not only the law, but the evidence in the case.

[The court then proceeded to consider the case on the merits, and arriving at the same estimate of the evidence as that taken in the judgment under appeal, dismissed the appeal. The remainder of the judgment, consisting solely of a discussion of the evidence, is unnecessary for the purposes of this present report.—ED.]

*[Now to consider this case on its merits. The will which was propounded was alleged by the petitioner to have been the last will and testament of one Ghansham Chand, who died on the 17th July, 1891. The evidence for the petitioner was that Ghansham Chand had resided at Jeypur for some two years before his death, that his wife Musammat Mangli resided at Muttra, which was Ghansham Chand's native place, and that on the 15th of July a telegram was received at Muttra requesting Musammat Mangli to send Rs 50 to Ghansham Chand by one Ganesh, a servant. If the story of the petitioner be true, what followed was this:—Musammat Mangli and Ganesh, instead of going by train from Muttra to Jeypur started off in an *ekka* to Bhartpur, where they picked up a niece of

* [Here commences the portion of the judgment in 17 A. 475 not reported in the I.L.R. Series.—ED.]

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MARCH 23. Ghansham Chand, and whence they proceeded by train to Jeypur, arriving there in the early morning of the 16th of July. One observation is that they adopted a somewhat expensive method of sending Rs. 50 to Ghansham Chand. However, Musammat Mangli's story is that on their arrival at Jeypur, Ghansham Chand was in a perfect state of health, and that between the early dawn, when she and her niece arrived at Jeypur, and midday of the same day, the will in question was drafted out by the servant Ganesh, and that Ghansham Chand being perfectly well and in good health, and about 52 years of age, proceeded to execute, and did execute, the will in the presence of Musammat Mangli, Ganesh, Din Dyal and a resident of Jeypur. According to the story for the petitioner the will having been executed, Musammat Mangli, Ganesh, and the niece and Ghansham Chand proceeded the same day to the Railway station in order to go to Muttra. They missed the train, but left by the train which left at five o'clock the following morning, but when they got to Achnera, Ghansham Chand suddenly died, having drunk a jugful of cold water.

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The telegram was not produced, and we must say that we entirely disbelieve the story as to that telegram. We think it exceedingly improbable that, if Ghansham Chand was in good health, his wife and niece should have rushed off to Jeypur in hot haste on receipt of the telegram. He had been residing in Jeypur, away from his wife and niece, for two years certainly, and it is somewhat remarkable that they did make this hurried journey to Jeypur, which could be accounted for if the news they had received by telegram was that Ghansham Chand was in a dangerous condition, and that they should, on the same day, on which they arrived at Jeypur, proceed to remove Ghansham Chand to Muttra, there being nothing to suggest that he had any previous intention of leaving his duties at the temple at Jeypur. It is further remarkable that this man, who was in a robust state of health, should have died suddenly on the railway journey from Jeypur to Muttra. We have come to the conclusion that the whole story as to the health of Ghansham Chand on the 15th and 16th July was false, except that portion that as a matter of fact he died at Achnera. We believe that he was in a dangerous state of health, and that the object of the journey was to bring him back to his native place, Muttra, in order that he might die there.

Musammat Mangli was called, and she swore that the will was executed by her late husband, and that she put her mark to it as an attesting witness. Ganesh was called: he was the servant of the family. He also, if his evidence is true, proved the execution of the will, and that he witnessed it, on the 16th of July, 1891. Din Dyal was called, and gave similar evidence: He was a man who had been employed to prepare one Umrao Chand for his College examinations. Now Umrao Chand was a nephew, sister's son, of Ghansham Chand, and the will which has been propounded, after a bequest of Rs. 100 a year in favour of charity, and Rs. 200 a year as maintenance for Musammat Mangli, during her lifetime, gave all the rest of Ghansham Chand's property to Umrao Chand. It is unfortunate, to say the least of it, that those three persons all, more or less, concerned for Umrao Chand, should be three out of the four witnesses of the will. The will, on the face of it, appears to have been witnessed by another man, described as a resident of the Jeypur Raj: who the gentleman is, we do not know; he was not called as a witness.

The will, according to the petitioner, was executed on the 16th of July, and Ghansham Chand died on the 17th of July, 1891. On the 16th of September, 1891, Musammat Mangli executed a power of attorney

in favour of the father of Umrao Chand and certain other persons. That power of attorney appointed those persons to act as her attorneys in Court matters and in the management of zemindari and other property. She had no property, except such as had belonged to her husband. The power of attorney makes no mention of any interest of Umrao Chand in the property, but deals with it as her own, and it is described as her own. It is exceedingly improbable, if the will which has been propounded, had been executed, that Musammât Mangli would have made a power of attorney in favour of, amongst other persons, Umrao's father. He was bound to know of the existence of the will, if it did exist, and it is hardly probable that, if the will had been made, Umrao Chand's father would have allowed Musammât Mangli to describe the whole property as her own, and to make a power of attorney, which, in fact, negatived any interest of Umrao Chand in the property.

There is on the record another document. It is an official copy of a petition presented to the Court of Jeypur on the 20th of August, 1891. It bears an endorsement, by the Munsarim of the court that it was admitted by Musammât Mangli. Musammât Mangli in her deposition said that she did not remember presenting a petition in the Court of Jeypur. That petition, which purports to have been presented on behalf of Musammât Mangli, was one for the granting of a certificate to collect the debts due to Ghansham Chand, and in it there is no reference to any will or to Umrao Chand having any interest in the property except the interest of an adopted son. It is not suggested now that Umrao Chand had been adopted by Ghansham Chand.

The will in question became for the first time public in January, 1892, and until January 1892 no person, except Musammât Mangli, interested in questioning the devolution of title effected by the will was aware that any such will, or any will at all, was said to have been executed by Ghansham Chand.

On the whole we agree with the view of the evidence taken by our brother Knox, and we hold that it is not proved that the will which was propounded was the will of Ghansham Chand.

The District Judge, from whose order this appeal was brought to this Court had not in this case dealt, in his judgment, in any but the most perfunctory manner, with the evidence in the case. He did, however, devote his energies to a criticism of the order made by a Judge of this Court, in an appeal, on the previous application for probate of this will. It is most irregular and improper for a District Judge to question the ruling of any Judge of the High Court to which he is subordinate; he is bound as a subordinate Court to take the law without question from the Court to which he is subordinate, and it so happens that his criticism in this case was incorrect. If the District Judge had devoted the energy he gave to criticising the ruling of this Court to a consideration and analysis of the evidence before him, he probably would have arrived at a different conclusion on the facts, as he is a Judge of no mean ability.

We dismiss this appeal with costs.]

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17 A. 475 =

15 A.W.N.

(1895) 104.

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17 A. 478 = 15 A.W.N. (1895) 109.

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APPELLATE CIVIL.

APPEL-
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CIVIL.*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.*IMDAD ALI (*Judgment-debtor*) v. JAGAN LAL AND ANOTHER
(*Decree-holders*).^{*} [23rd March, 1895.]17 A. 478 =
15 A.W.N.
(1895) 109.*Execution of decree—Civil Procedure Code, s. 214—Objection by representative of party to the suit to the jurisdiction of the Court which passed the decree.*

Section 214 of the Code of Civil Procedure applies as well to a dispute arising between the parties contemplated by that section in relation to the execution of a [479] decree after it has been executed, as it would to a dispute between such parties relating to the execution of a decree before it had been executed.

The question of the competency of the Court charged with the execution of a decree to determine whether the Court which passed the decree had jurisdiction to pass it, considered. *Muhammad Sulaiman Khan v. Fatima* (1) and *Haji Musa Hoji, Ahmed v. Purmanand Nursey* (2) referred to.

[F., 24 A. 291 (294); 3 A.L.J. 601 = A.W.N. (1906) 233; 15 Ind. Cas. 832 (833) = 5 S.L.R. 260 (262); 2 O.C. 366 (370); R., 19 A. 332; 21 B. 314 (319); 33 M. 167 (169) = 6 M.L.T. 271 = 3 Ind. Cas. 739 (740); 14 C.P.L.R. 92 (93); 1 O.C. 49 (50); 7 O.C. 199 (201); 20 P.R. 1898; 163 P.L.R. 1901; 48 P.R. 1906 = 104 P.L.R. 1906; D., 23 A. 476 (478); 32 A. 301 (304) = 7 A.L.J. 228 (231) = 5 Ind. Cas. 897; 21 B. 456 (458).]

THE facts of this case are fully stated in the judgment of the Court. *Maulvi Ghulam Muftaba*, for the appellant.

Mr. *Roshan Lal* and *Munshi Madho Prasad*, for the respondents.

JUDGMENT.

EDGE, C.J., and BANERJI, J.—The respondents to this appeal under the Letters Patent brought a suit against one Muhammad Jalil and one Musammat Hamid-un-nissa for possession of certain property. Musammat Hamid-un-nissa died before the decree was made in that suit, and the decree was made as against her and Muhammad Jalil without any representative of Musammat Hamid-un-nissa being brought on the record. The decree was in favour of the plaintiffs for possession of the property in suit. After that decree was made the heir and legal representative of Musammat Hamid-un-nissa, who is the appellant here, Kazi Muhammad Imdad Ali, brought an appeal from that decree. That appeal was dismissed without costs, on the ground that Muhammad Imdad Ali had no *locus standi* to appeal, as he had not been made a party to the record of the suit. After the dismissal of that appeal the decree-holders, respondents here, presented an application to the Court which had passed the decree, asking to be put in possession in execution of that decree. In that application they described Imdad Ali as the legal representative of Musammat Hamid-un-nissa, deceased. No notice was issued or given to Imdad Ali on that application for execution, and behind his back the order for execution was made. It was enforced by ousting him from possession of and putting the decree-holders in possession of the property. Subsequently Imdad Ali presented an application to the Court which had executed the decree, asking the [480] Court to hold that the decree was null and void and

* Appeal No. 57 of 1894, under s. 10 of the Letters Patent from a judgment of *Burkitt, J.*, dated the 8th November 1894.

(1) 11 A. 314.

(2) 15 B. 216 (219).

incapable of execution, and to restore him to the possession of which he had been deprived. In that application he described himself as the heir of Hamid-un-nissa, and he alleged that the decree-holders had knowingly and intentionally omitted to make him a party to the suit after the death of Hamid-un-nissa. He described his application as one made under s. 332 of the Code of Civil Procedure. The Munsif dismissed that application, holding that the dismissal of Imdad Ali's appeal precluded him from questioning the right of the decree-holders to the decree which they had obtained.

On appeal the District Judge set aside the order of the Munsif and granted Imdad Ali's application. From that order of the District Judge an appeal was brought to this Court by the decree-holders. The learned Judge, before whom that appeal came, held that as the application of Imdad Ali purported to be one under s. 332 of the Code of Civil Procedure, no appeal lay to the District Judge from the decision of the Munsif, and he set aside the order of the District Judge and restored the order of the Munsif. From that order of the Judge of this Court this appeal has been brought under s. 10 of the Letters Patent.

It was contended by Mr. *Roshan Lal* for the decree-holders, respondents, that the application of Imdad Ali was in fact an application under s. 332, and consequently that Imdad Ali's sole remedy was by a suit; and he further contended that s. 244 of the Code of Civil Procedure did not apply in this case, as the decree had been fully executed.

Now it appears to us, having regard to the object of s. 244, that that section would apply as well to a dispute arising between the parties contemplated by that section, in relation to the execution of the decree after it had been executed, as it would to a dispute between such parties relating to the execution of a decree before it had been executed.

We think, for instance, that it was not the intention of the Legislature that a dispute between the parties to the suit, or [481] their representatives, as to the amount for which the decree was to be executed, should, if it arose, be decided under s. 244, and that a dispute subsequent to the execution of the decree, between those same parties, as to whether the decree had been executed for a greater amount than the decree-holder was entitled to under the decree, should not be decided under s. 244. To take an example, let us assume that the decree having been fully executed, the Court, in error, proceeds to execute the decree again by handing over to the decree-holder the amount deposited in Court by the judgment-debtor. We cannot conceive that it was the intention that in such case the judgment-debtor should be forced to bring a suit for the recovery of the amount so handed over in excess, and should not have his remedy under s. 244. There is no doubt that Imdad Ali described his application to the Munsif as made under s. 332 of the Code of Civil Procedure. It was, in our opinion, an application which could not succeed under s. 332 of the Code of Civil Procedure, as that section cannot apply where s. 244 applies. Section 244 applies to the representative of the party to the suit in which the decree was made. Imdad Ali was a representative of the party to the suit in which the decree was made, although that party died before the decree was made; and further, although it is not essential to our judgment in this case, there is the fact that the application for execution of the decree was made as against Imdad Ali as representative of the deceased Hamid-un-nissa. A representative of a party to a suit in which a decree has been made, when there is a dispute between him and the decree-holder as to the execution of the decree, cannot oust

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1895 the jurisdiction of the Court under s. 244 by making an application
 MARCH 23. under s. 278 or s. 332, unless, indeed, he claims the property as
 — trustee for a third party. The Munsif in the present case was bound
 APPEL- by s. 244 to deal with the application in question here, no matter
 LATE under what section it was headed, as an application coming under
 CIVIL. clause (c) of s. 244, and as a matter which had to be determined by
 — an order of the Court executing the decree, and not by a separate suit.
 17 A. 478= The point here was that the proceedings in execution were null and
 15 A.W.N. [482] void, and that the decree was incapable of execution, and that it
 (1895) 109. had never been legally executed against Hamid-un-nissa and her estate.
 The question as to whether the decree is capable of execution is a question
 relating to the execution of decree, and, in our opinion, the very nature
 of the objections raised by Imdad Ali precluded any contention that the
 decree had been validly executed. There can be no doubt, in our opinion,
 that the Court charged with the execution of a decree can consider the
 question as to whether the Court which passed the decree had jurisdiction
 to pass it, unless the decree itself precludes that question. We think
 that that proposition follows from the principle in *Muhammad Sulaiman
 Khan v. Fatima* (1), and it is recognised by Farran, J., in *Haji Musa,
 Haji Ahmed v. Purmanand Nursey* (2). In this case the decree having
 been made against Hamid-un-nissa and her estate after she had died, and
 when no representative of hers was on the record, was, so far as her
 representative and her interest in the property are concerned, a void
 decree and incapable of execution; and it follows that the proceedings in
 execution of that decree, so far as Hamid-un-nissa's property was con-
 cerned, were *ultra vires* and without jurisdiction. That being so, and it
 being quite clear that the application of Imdad Ali, although described as
 made under s. 332, was one to be dealt with under s. 244, we hold that
 the appeal lay: and we also hold that, the order in execution being *ultra
 vires* and without jurisdiction. Imdad Ali was entitled to have those pro-
 ceedings in execution, so far as the property of Hamid-un-nissa was con-
 cerned, set aside, and we make an order accordingly and direct that an
 order be made that he be put in possession. The appellant will have his
 costs in all Courts.

Appeal decreed.

17 A. 483 = 15 A W.N. (1895) 110.

[483] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

RAM RATAN AND OTHERS (*Defendants*) v. LALTA PRASAD (*Plaintiff*).^{*}
 [3rd April, 1895.]

*Regulation No. IV of 1876—Act No. IV of 1882 (Transfer of Property Act), s. 88—Civil
 Procedure Code, ss. 1, 2, 19, 24—Jurisdiction—Mortgage—Mortgaged property
 situated partly in district of Moradabad and partly in the Tarai—Suit for sale in
 Moradabad Court.*

Held that the Courts of the Moradabad district had no jurisdiction to pass a
 decree, in a suit for sale on a mortgage, for sale of land situated in the Tarai, to
 which at the time of the mortgage and of the suit thereon Regulation No. IV of
 1876 applied, by reason merely of a portion of the property mortgaged being
 situate in the Moradabad district.

^{*} First Appeal No. 963 of 1893, from a decree of Pandit Rajnath, Subordinate
 Judge of Moradabad, dated the 22nd May 1893.

(1) 11 A. 314.

(2) 15 B. 216 (219).

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *T. Conlan* and *Pandit Sundar Lal*, for the appellants.

Mr. *D. N. Banerji*, *Babu Jogindro Nath Chaudhri* and *Babu Ratan Chand*, for the respondent.

JUDGMENT

EDGE, C. J., and BANERJI, J.—The suit in which this appeal has arisen was brought in the Court of the Subordinate Judge of Moradabad. It was a suit for sale under s. 88 of Act No. IV of 1882. A very small portion of the property mortgaged, viz., 50 square yards, was situate in the district of Moradabad. It is said, but we need not decide the point, that those 50 yards only existed in imagination, and were entered in the bond to give the Court of Moradabad jurisdiction and to allow of registration in that district. The other portion of the property mortgaged by that bond was in the Tarai district under the Government of the Lieutenant-Governor of these Provinces and within the district to which, at the time when the mortgage was made and this suit was brought, Regulation No. IV of 1876 applied. The Subordinate Judge passed a decree for sale, not only of the Moradabad property, but also of that portion which was in the district of the Tarai.

The defendants who have appealed here were purchasers subsequent to the mortgage of the mortgaged property in the Tarai [484] district. The other defendants have not appealed. *Pandit Sundar Lal*, on behalf of these defendants-appellants has contended that the Court of Moradabad had no jurisdiction to entertain the suit, so far as it related to the property in the Tarai district. He also contended that so far as the property in the Tarai district is concerned the suit is barred by twelve years' limitation by rule 3 of Chapter I of the schedule to Regulation No. IV of 1876. On the other hand Mr. *D. N. Banerji*, for the plaintiff-respondent, contended that s. 19 of Act No. XIV of 1882 gave the Court of Moradabad jurisdiction to entertain the suit as brought.

By s. 3 of Regulation No. IV of 1876 it is enacted that the Tarai district shall not be subject (a) to the jurisdiction of the Courts of civil judicature constituted by the Regulations of the Bengal Code and by the Acts passed by the Governor-General in Council.

* * * * *

(c) to the system of procedure prescribed by the said Regulations and Acts for the said Courts of civil judicature.

(d) to the civil jurisdiction of the High Court for the North-Western Provinces.

By s. 1 of Act No. XIV of 1882 the application of Act No. XIV of 1882 is excluded from the scheduled districts as defined in Act No. XIV of 1874. The Tarai district in question is one of those scheduled districts. Now the only section which could have given the Court at Moradabad jurisdiction to entertain the suit so far as it related to the property in the Tarai district, if it had not been for s. 1, was s. 19 or s. 24; but as s. 19 only applies where the immovable property is situate within the limits of different districts, we have to see whether "district" has a special meaning when used in that section. For that purpose we must turn to s. 2 of Act No. XIV of 1882, and there we find "district" defined; but that section is one of the sections which by s. 1 are excluded from consideration when dealing with a question in a scheduled district. Consequently in our opinion s. 19

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1895 [485] could not give the Court at Moradabad any jurisdiction to entertain a suit relating to immoveable property in the Tarai district.
 APRIL 3. — We do not intend to decide the question of limitation, but we merely
 APPEL- say this, that if the Court at Moradabad had jurisdiction to decree a sale
 LATE of this property in the Tarai, this anomaly would arise; it might be that
 CIVIL. so far as the Court at Moradabad was concerned the limitation in that
 — Court for a sale of property would, under art. 147 of sch. ii of Act
 17 A. 483 = No. XV of 1877, be sixty years, whereas if the suit had been brought in
 15 A.W.N. the Court of the Tarai district, the limitation would, by reason of rule 3
 (1895) 110. of Chapter I of the schedule of Regulation No. IV of 1876, be twelve
 years. We say we do not decide what would be the limitation applicable in the Court of Moradabad so far as it relates to the property in the Tarai. That is by no means an easy question, but we are not called on to decide it.

We decree this appeal in so far as the decree of the Court below was a decree for sale of the property in the Tarai and in so far as these appellants are concerned; and in so far as these defendants-appellants and the property in the Tarai are concerned, we dismiss the suit with costs.

Appeal decreed in part.

17 A. 485 (F.B.) = 15 A.W.N. (1895) 96.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Banerji and Mr. Justice Burkitt.

IN THE MATTER OF THE PETITION OF RAHMAT-ULLAH.*
 [5th April, 1895.]

Magistrate of the District, powers of—Criminal Procedure Code, s. 144—Executive powers of Magistrate—Order which might have the effect of interfering with the execution of a decree of a Civil Court.

A District Magistrate has no power either under s. 144 of the Code of Civil Procedure or in his executive capacity to make an order for the re-building of a structure on private land which has fallen into disrepair or been pulled down, neither has he power to make any order which would have the direct effect of interfering with the execution of a decree of a Civil Court.

[486] THIS was a reference made by the Sessions Judge of Benares in respect of certain orders passed by the District Magistrate. The circumstances which gave rise to the passing of the orders in question are thus stated in the explanation tendered by the Magistrate:—

"The Lath Bhairon is a very famous place of worship for the Hindus and is one of the most sacred places in Benares * *

* On one side of it there is a tank called Kapal Mochin which is held sacred by Hindus, and there is a house lately built for the *goshain* who lives there as permanent *pujari* and receives fees from pilgrims. Adjoining the famous Lath there is a mosque or *idgah*—an object of veneration by Muhammadans. Close to the tank and on both sides of the stairs leading to the mosque there were two dalans, which are called by the Hindus 'dharmsalas,' and 'baradaris' by the Muhammadans. * * *

* Criminal Revision No. 80 of 1895.

"In 1889 Nepal Nath, *goshain*, the former pujari, brought a suit against Haji Supan for possession of the whole of the land. He got a decree for only a small portion of the land, but not including that on which the Lath itself and the *dharmsalas* stand. * * *

"Last year (1894) the Muhammadans collected materials for building at the Lath. The Hindus in accordance with the old orders on the subject objected. It was then found that the *goshain* in charge had come to an agreement with the Muhammadans; the latter were to be allowed to repair their *farash* and the Hindus to build a wall round the Lath. * * *

"At last during the rains the Muhammadans, without any orders, removed the *baradaris*, thus causing great inconvenience and general excitement amongst the Hindus. * * *

The District Magistrate thereupon passed certain orders which may be thus summarised:—(1) The petitioner and others were ordered to rebuild at once the *baradaris* which they had dismantled; (2) Muhammadans were directed not to trespass in a certain house [487] regarding which a complaint had been made on behalf of the Hindus interested in the premises in question; and (3) no party, Hindu or Muhammadan, holding a decree affecting any portion of property at this place was to be permitted to execute it without report to, and permission of, the District Magistrate.

Against these orders Rahmat-ullah and others applied in revision to the Sessions Judge, who, taking the view that the orders were *ultra vires* of the Magistrate referred the case to the High Court, as stated above.

Mr. J. E. Howard and Mr. Amir-ud-din, for the applicants.

Mr. E. A. Howard, for the opposite parties.

The Officiating Public Prosecutor (Mr. A. H. S. Reid), for the Crown.

JUDGMENT.

EDGE, C. J., BANERJI and BURKITT, JJ.—We have to consider in revision certain orders, passed by the Magistrate of Benares. So far as we need refer to those orders, they were that one Rahmat-ullah should re-build two *baradaris* which, according to the order, had partly fallen in the rains, and which he had by misconception dismantled. The order directed the applicant in the proceeding in revision to re-build them on their old site, and of the same shape and stone structure as they were formerly, and directed him to begin the re-building at once. The other part of the order was that nobody, even though possessing a decree for the plot there, should act without report to, and permission of, the District Magistrate in any new way in dismantling, building, repairing, or should cut or get cut any tree from the place there without report to, or permission of, the District Magistrate. The District Magistrate's explanation of his powers was that he had got power to make these orders as an executive officer; and he also suggested that, whether he had power or not as an executive officer, they were good orders under s. 144 of Act No. X of 1882, and, as such, ought to be upheld by this Court. When the matter came before us, we were anxious to ascertain whether there was any statutory authority conferring power on Magistrates to make orders such as these, and we directed notice to [488] go to the Magistrate to show cause why his order should not be set aside. The Public Prosecutor has appeared here to show cause. His contention has been, as to the order to re-build, that that was an order which could lawfully be made under s. 144 of Act No. X of 1882; that it came under the words "to take certain order with certain property in

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his possession or under his management," that is to say in the possession, or under the management, of Rahmat-ullah. Those words are undoubtedly very wide and equally vague, but we must assume that the Legislature in using those words in the section did not intend to give a Magistrate such extraordinary powers as would enable him to order, under that section, a building which had fallen down in private grounds to be re-built by the owner of those grounds. If Mr. *Reid's* contention as to the re-building part of the order were correct, a litigant who had established his right to open windows in his house or to maintain open ancient windows in his house could be restrained for two months by a Magistrate's order under s. 144; and in certain cases; by a further order of a Local Government under that section, permanently, from availing himself of the right decreed to him by the Civil Court, and that even if the decree were a decree of the Queen in Council. We may give another illustration. A, a private person, in order to prevent his neighbour B overlooking A's premises, might put up a hoarding on his own land, and on his removing it, if B objected that the removal of the hoarding would cause annoyance to him and his family, who could be overlooked from A's ground, the Magistrate could, if Mr. *Reid's* contention is correct, make a lawful order under s. 144 ordering A to resuscitate the hoarding on his own ground, which he had pulled down. There must be a reasonable construction put on these vague words of the statute.

To refer to the other portion of the order. Mr. *Reid* at first contended that the Magistrate would have jurisdiction under s. 144 to restrain a man from executing a Civil Court decree, if he was not satisfied that the man was rightfully entitled to execute the decree in the way in which it was being executed. The execution of a Civil Court decree is provided for by the Code of Civil Procedure, [489] and, in our opinion, a Magistrate has no more jurisdiction to interfere with the execution of a Civil Court decree than he has to question the legality or propriety of the decree itself.

Where a Magistrate happens to be Collector, he may have to execute the decree, if execution is sought against ancestral property, but there he is a *quasi* Court executing the decree; but, as Magistrate, his duty in connection with the execution of a Civil Court decree begins and ends with the rendering of necessary protection to the officers of the Civil Court lawfully executing the decree of the Civil Court, and neither he nor the Local Government, under s. 144, has any jurisdiction to make any order restraining the execution of a Civil Court decree, or threatening with a prosecution under s. 188 of the Indian Penal Code any person who attempts to execute a Civil Court decree in the particular place, without the Magistrate's permission.

The authority of every Magistrate to do any act as Magistrate or as Collector, if such authority exists, must ultimately be found in the powers conferred by Parliament. The immediate power may be an executive order of the local administration, but the power of the local administration to make an order must be derived either directly or indirectly from Parliament, and it is a mistake to assume that, because an officer is an executive officer or a judicial officer, he has any power to interfere with private or public persons which cannot be derived from a lawful origin, *viz*, the Acts of Parliament.

We hold that these orders in the respects which we have mentioned were *ultra vires*, and that the Magistrate had no power or jurisdiction to make them.

In order to avoid being misunderstood, we think it right to say that it is necessary that a Magistrate should have the extensive powers which are conferred on him by s. 144 of Act No. X of 1882, and we think that as long as his order is within that section, that is, so long as he has jurisdiction under that section to make it, he should be given the widest discretion. The powers under that section are intended to be used summarily for the protection of the [490] public, including private individuals, and the preservation of the peace. If this order had been one which the Magistrate had power to make under s. 144, we should have had no jurisdiction or power to interfere with it. We may say further that the Magistrate of Benares, in our opinion, acted with the very best intentions, but unfortunately he did exceed his jurisdiction.

Our order is that the orders prohibiting any persons from executing Civil Court decrees in that place and directing Rahmat-ullah to re-build the *baradari* are hereby set aside.

The proceedings which have been instituted under s. 188 of the Indian Penal Code for disobeying the orders we have set aside must be discontinued, otherwise a remedy may be sought by application to this Court.

16 A. 490 = 15 A.W.N. (1895) 113.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Aikman.

THE ELGIN MILLS COMPANY (*Opposite Party*) v. THE MUIR MILLS COMPANY (*Petitioner*).^{*} [16th April, 1895.]

Act No. V of 1888 (Inventions and Designs Act), ss. 4, 30—Invention—Improvement—Combination of known substances to produce a known result—Burden of proof.

Held, that a combination, effected by placing one known material side by side with another known material, not involving the exercise of any special inventive power, and ending in a result which differed from previous results only because the materials so placed produced an improved article, did not amount to an "invention" as defined by Act No. V of 1888.

Held further, that it is for the person who claims an exclusive privilege under the Inventions Act to prove that the facts exist which entitle him to the privilege claimed.

THIS was an appeal under s. 10 of the Letters Patent from a judgment of Blair, J. The facts of the case are as follows:—

In the year 1890, one Clarence Noble Cline, then an employé of the Elgin Mills Company, Cawnpore, obtained under Act No. V of 1888 a patent in respect of a particular kind of tent devised by him, which he called "the native cavalry trooper's pal." In the same [491] year the patentee sold his patent to the proprietors of the Elgin Mills Company, Cawnpore. Thereupon the Muir Mills Company, respondents in the present appeal, applied to the High Court under s. 30 of Act No. V of 1888 for a rule calling upon the above-mentioned vendor and his vendees to show cause why it should not be declared that an exclusive privilege in respect of the tent known as the "native cavalry trooper's pal" had not been acquired under Part I of the said Act, on the grounds—"(i) that

^{*} Appeal No. 80 of 1893, under s. 10 of the Letters Patent, from an order of Blair, J., dated the 27th May 1893.

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the said alleged invention was not at the date of the delivery or receipt of the application for leave to file the specification a new invention within the meaning of the said Act; (ii) that the said applicant, Clarence Noble Cline, was not the inventor thereof; and (iii) that the said Clarence Noble Cline has knowingly included in the application for leave to file the specification and in the specification, as part of his alleged invention, things which were not new and whereof he was not the inventor." Upon this application a rule was issued as prayed, and an issue was framed by Mr. Justice Straight—"Whether the tent described in the specification was a new invention within the meaning of Act No. V of 1888."

The rule came on for hearing before Blair, J., who found in effect that inasmuch as no single part of the patented tent was in any sense an invention, a patent could only be sustained for it as for an improvement; but that it was not such a marked deviation from previously existing tents of a similar nature as to warrant the grant of exclusive privileges in respect thereof. He accordingly made an order declaring that the defendants had not acquired any such exclusive privilege as that claimed in respect of the tent in question.

The defendants appealed.

The Hon'ble Mr. Colvin, Mr. W. K. Porter and Pandit Moti Lal, for the appellant.

Mr. T. Conlan, Mr. A. S. Strachey and Mr. D. N. Banerji, for the respondent.

JUDGMENT.

KNOX, J.—This is an appeal under s. 10 of the Letters Patent. The Muir Mills Company, who were plaintiffs and are now respon-[492]dents, prayed this Court to grant a rule under s. 30 of Act No. V of 1888, and to call upon the Elgin Mills Company, the present appellants, to show cause why the Court should not declare that an exclusive privilege in respect of a certain tent known as the "native cavalry trooper's pal" had not been acquired by the Elgin Mills Company aforesaid.

The appellants appeared and showed cause. They claimed that the tent in dispute was at the time of the delivery of the application for leave to file the specification and at the time of the receipt of such application a new invention within the meaning of Act No. V of 1888.

The finding of the Court was to the effect that the invention was not the result of such skill and ingenuity as to deserve the protection of a patent. It was held that, having regard to the common use of every single material and device used in the tent in dispute and to the way in which they had been previously used, it was not a new combination within the meaning of the law. It was neither more nor less than an aggregate of colorable deviations from perfectly well-known existing types, and in its combinations it produced no result that could be called a new result under the terms of the Patent Law. It was accordingly declared that an exclusive privilege in the invention, the property of the appellants, had not been acquired by them, and the rule granted on the application of the Muir Mills Company was made absolute.

In appeal it is contended that the tent, the subject-matter of the appeal, is a new invention within the meaning of the Act No. V of 1888. It is claimed for it that it combines cheapness, portability and adaptability to service requirement; a further contention is that it was for the Muir Mills Company, Limited, to prove that the tent was not properly the

subject-matter of a patent, and not for the appellant to prove the contrary.

There is not in Act No. V of 1888 any definition of the term "invention." All that the Act says is to be found in s. 4, clause (1), where it is laid down that the term "invention" includes an [493] improvement. Nor is much help to be derived from English Patent Law. In s. 46 of the Patent Designs and Trade Marks Act of 1883 "invention" is defined to mean any manner of new manufacture the subject of letters patent and grant of privilege within s. 6 of the Statute of Monopolies, and includes an alleged invention. Great stress was laid by the learned counsel for the appellants upon the concluding words "includes an improvement," and upon the fact that those words occur in the Act of 1859 and have been produced again under the definition of "invention" in Act No. V of 1888. He maintains that as he can show that the tent, the subject-matter of this dispute, is an improved tent as compared with other tents, it must be taken to come within the term invention as used in Act No. V of 1888. He clears the ground by expressly alleging that his clients do not claim anything new in the component parts of the tent, but they claim a combination, which from the points of portability, cheapness, accommodation, lightness and general suitability is far in advance of other tents of the same class hitherto known. He called our repeated attention to evidence in the case, particularly that taken by commission of Lieutenant-General Sir Charles Gough, as showing that his clients had satisfied what was wanted by the Military Department at that time, where others had made similar tents and failed. Thus, as his clients had brought into existence an improved tent and no identical tents had been proved to be in existence or used before, he claimed that the terms set out in the Act had been satisfied and that his tent was an "invention."

For the nature and description of the subject-matter of this litigation no better evidence can be cited than the evidence of Mr. Cline, the gentleman who claims to be the inventor. This will be found set out in the judgment from which this appeal has been filed. From a perusal of it, it is abundantly evident that the result at which Mr. Cline arrived was not arrived at by any act or process of welding into one new manufacture substances which had previously been known and in common use in the manufacture of tents. What Mr. Cline did is summed up, and justly summed up, by my brother Blair in his judgment when he says that the result attained was [494] "neither more nor less than an aggregate of colourable deviations from perfectly well-known existing types." In support of his argument that the "combination," as the learned counsel would term it, of these perfectly well-known types is recognized as a proper subject for a grant of Letters Patent, we were referred to the case of *Hill v. Thompson and Foreman* (1), and particularly to the passage where Lord Eldon lays down that there may be a valid patent for a new combination of materials previously in use for the same purpose or for a new method of applying such materials. This is perfectly correct; but the case before Lord Eldon was one concerning the use or application of slags or cinders thrown off by the operation of smelting to the production of good and serviceable metal, and the combination of which the Lord Chancellor spoke, and spoke with some doubt as to its being a good subject for a patent, was a method of producing a more beneficial and effectual result from the adhibition of materials previously known. The next case to

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(1) 8 Mer. 622 = 1 Web. P.C. 229.

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which we were referred was that of *Crane v. Price* (1), wherein it was laid down that if the result produced by a combination of a particular kind were either a new article or a better article or a cheaper article to the public than that produced before by the old method, such combination is an invention or manufacture intended by the statute and may well become the subject of a patent. The combination here under consideration was the application of anthracite or stone coal combined with hot air blast in the smelting or manufacture of iron from ironstone, &c. It was, as pointed out, a combination which fell within the principle exemplified by Abbott, C. J., in *Reg. v. Wheeler* (2) as a new process to be carried on by known implements or elements acting upon known substances and ultimately producing some other known substance, but producing it in a cheaper or more expeditious manner or a better or more useful kind. In that case a number of instances are given in which patents were granted where the invention consisted in no more than in the use of things already known, and acting with them in a manner already known, and producing effects already [495] known, but producing those effects so as to be more economically or beneficially enjoyed by the public. All the instances given are, however, instances not of producing a result by the mere juxtaposition of materials already known but of producing a result by welding or fusing into one substance two or more materials already known.

The third case quoted was that of *Cannington v. Nuttall* (3). This was the case of a combination obtained by the applying of a well-known principle in the mode of manufacturing glass, a combination which involved the mechanical action of several materials so as to result in a perfectly new and distinct result.

The cases of *Murray v. Clayton* (4) and of *Sykes v. Howarth* (5) were also cases of combinations involving mechanical processes, and in this respect differ from the combination for which a patent is claimed in the present case. In short, we have not been referred to a single case either in English or Indian law where a patent has been the subject of litigation and held valid in which the combination was merely the result of placing one known material side by side with another known material and ending in a result which differed only from previous results because the particles or materials thus placed in juxtaposition produced a result which might be considered an improvement or better adapted for a particular purpose.

We agree, therefore, with the view which was taken in the judgment under appeal and find in the subject-matter of this appeal no invention such as would entitle it to be protected by a patent.

As regards the contention that the burden of proof has been wrongly laid, we are of opinion that this too fails. Under s. 30 of Act No. V of 1888 any person may apply to a High Court for a rule to show cause why the Court should not declare that an exclusive privilege in respect of an invention has not been acquired. Upon trial of questions of fact arising upon such an application such as arose in this case, whether or not the tent was a new inven-[496]tion, it seems to us that it is for the person who claims an exclusive privilege and is in possession of the facts which, in his opinion, entitle him to that exclusive privilege, to show that those facts exist.

No authority to the contrary was shown to us.

(1) 1 Web. P.C. 303.

(2) 2 B. and Ald. 345.

(3) L.R. 5 E. and I.A. 205.

(4) L.R. 7 Ch. App. 570.

(5) L. R. 12 Ch. Div. 826.

JUDGMENT.

AIKMAN, J.—I concur with my brother Knox in thinking that this appeal must be dismissed. In my opinion the tent devised by Mr. Cline is not a new invention within the meaning of the Act and cannot therefore form the subject-matter of a valid patent. The word "invention" is nowhere authoritatively defined in our law. Sub-section (1), s. 4 of the "Inventions and Designs Act, 1888 (invention includes an improvement") is not a definition. The learned counsel for the appellant company contended strenuously that as the new tent was approved of by the military authorities, it was evidently an "improvement" on pre-existing tents and was therefore an "invention" with reference to the above quoted sub-section.

But although an "invention" includes an improvement, it does not by any means follow that every improvement is an invention. It is impossible, I consider, to lay down any hard-and-fast rule as to what improvements should be considered to be inventions.

To justify the grant of the exclusive privilege of a patent, there must be a certain amount of invention or inventive faculty displayed.

It will be a question for the Court to determine whether the amount of inventive power displayed is such as to justify the grant of a patent. What the inventor here claimed as the subject-matter of a patent is, to use his own words, "a new general combination of a tent." By this I presume he means a combination of various features found in previously existing tents so as to form what is practically a new tent. Although every invention may be said to be a "combination" of some kind, it by no means follows that every "combination" deserves to be called an invention. The question we have to ask in this case is, "did the combination in question require [497] (to employ the words used in *Saxby v. Gloucester Wagon Co.* (1),) an exercise of such an amount of skill and ingenuity as to entitle it to the protection of an exclusive grant?"

This question must, I hold, be answered in the negative. How was the tent in question evolved? The military authorities wanted a tent with a certain amount of accommodation within certain limits of price and weight, and Mr. Cline devised a tent with which the military authorities professed themselves satisfied. How was this result attained? Not by the employment of any novel material in the construction of the tent, or by the adoption of any new time-saving or labour-saving process, but simply, as is clear from Mr. Cline's evidence, by cutting down the quantity of material employed. The first advantage which is claimed by the appellants for their tent is its cheapness. But this cheapness can only result from one of two causes; either from the appellants being content with a smaller margin of profit, or from less material being employed; and neither of these reasons would supply an adequate ground for a patent.

The greater portability claimed for the tent is in like manner due simply to less material being employed in its construction. And an inspection of the tent has satisfied me that this advantage has been gained by the sacrifice of comfort and practical utility.

That the so-called invention has no real claim to novelty is in my opinion proved. It was at the instance of Sir Charles Gough that the patent was applied for, and yet he is compelled to admit that, except in

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(1) L. R. 7 Q. B.D. 305 at p. 312.

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one trifling detail, the number of tent pegs, "it would require a very expert person to notice any difference" between the patent tent and the old bell tent (see his cross-examination on p. 3 of respondent's paper-book).

I concur in thinking the appeal should be dismissed with costs.

Appeal dismissed.

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15 A.W.N.
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17 A. 498 (P.C.) = 22 I.A. 193 = 6 Sar P.C.J. 635.

[498] PRIVY COUNCIL.

PRESENT :

Lord Watson, Lord Morris and Sir R. Couch.

[On appeal from the High Court at Allahabad.]

IN THE MATTER OF PARBATI CHARAN CHATTERJI, *Appellant.*
[20th June 1895.]

Reasonable cause, within s. 8 of the Letters Patent (High Court, N.W.P.), 17th March 1866—Offer to give a gratification, contrary to s. 36 of the Legal Practitioner's Act, (XVIII of 1879)—Abetment, within ss. 41 and 116, Indian Penal Code—Special law.

A vakil of the High Court signed and sent a letter to another vakil of that Court, who practised in District Courts subordinate thereto. The purport of this, which was one of several printed forms prepared for circulation to vakils practising in districts, was to the effect that the vakil, to whom it was addressed, "could easily send his clients' cases, both civil and criminal," to the writer, who would conduct them in that Court. And,—“as a remuneration,”—the fees paid by the clients would be shared between the writer and the vakil who had sent the cases.

The Judicial Committee concurred substantially in the conclusions of the High Court that this was an incitement within s. 116 (abetment) of the Indian Penal Code to commit an offence made penal by s. 36 (which was a special law within s. 41 of that Code) of Act No. XVIII of 1879, the Legal Practitioners' Act. This misconduct had been aggravated by the appellant's having denied to the Vakils' Association, North-Western Provinces, and caused evidence to be called to negative his having signed the printed letter, which he had signed. Thus, there was "reasonable cause" within s. 8 of the Letters Patent of March 17th, 1866, establishing the High Court, for his suspension, to which, for four years from the date of that Court's order, his punishment was reduced.

[R., 29 A. 95 = 4 A.L.J. 34 = 9 Bom.L.R. 9 = 5 C.L.J. 130 = 11 C.W.N. 273 = 17 M.L.J. 74 = 2 M.L.T. 1 (P.C.); 32 B. 106 = 10 Bom.L.R. 21 = 3 M.L.T. 131 (132); 34 M. 29 (37) = 20 M.L.J. 500 (510) = 8 M.L.T. 22 = 1910 M.W.N. 163 = 6 Ind. Cas. 313 = 11 Cr.L.J. 310; 3 N.L.R. 40 (45).]

APPEAL from a judgment and order (20th June 1893) of the Chief Justice and the Judges of the High Court.

The question here was whether the conduct of a vakil of the High Court had been such as to authorize and require the exercise of the power of the High Court, conferred upon it by s. 8 of the Letters Patent of the 17th March, 1866, to remove or suspend a vakil.

On the 19th May 1891 he obtained a certificate of enrolment as one of the vakils of the High Court, having previously been authorized, in May 1882, to appear, plead and act in the subordinate Courts.

[499] On the 2nd May 1893 he was served with a notice to show cause why his name should not be removed from the roll of vakils, and why proceedings should not be taken against him for an offence against s. 36 of the Legal Practitioner's Act, 1879, coupled with the abetment sections of the Penal Code.

On the 31st May 1893 cause was shown before a Bench of all the Judges of the High Court, and on the 20th June following, their judgment was given by the Chief Justice, ending with an order that the name of this vakil should be struck off the Roll, and that he should return his vakil's certificate to the Registrar of the High Court. The notice to show cause followed upon a communication received by the Registrar from the Vakils' Association, North-Western Provinces, enclosing the printed letter which is set forth in their Lordships' judgment. That letter, addressed and sent to Mr. E. Newton, a vakil of the High Court practising at Meerut, had been forwarded to a member of the Bar at Allahabad, and had been brought to the notice of the Association. On the 15th December 1892, in answer to a letter from the Secretary of the Association, the appellant wrote denying, in effect, that the signature was his; and enclosed a letter of the 6th December from his clerk, Nand Kishore, in which the latter had stated that he, the clerk, had written the name. The Association then passed the following Resolution, dated the 30th January 1893:—

"This Association considers the explanation of Mr. Parbati Charan Chatterji, regarding the printed letter received from the Bar Library, as unsatisfactory, and dissents from the views expressed therein as to the position of vakils. But having regard to the fact that Mr. Parbati Charan Chatterji has denied his signature to the letter in question, it is resolved that the said letter, together with Mr. Parbati Charan's explanation and enclosures thereof, be sent to the Registrar for the information of the Hon'ble Court, and that, pending the final orders of the Court, no action be taken by the Association in the matter.

"Resolved, further, that a copy of this resolution be furnished to Mr. Parbati Charan Chatterji."

[500] The letter was, accordingly, sent to the Registrar, who, on the 16th February, wrote to the appellant, asking directly whether the signature was his. The answer was evasive. Cause was shown on the 31st May, when a number of memoranda and of vakalatnamas, bearing the appellant's signature, were produced for the purpose of comparison with the signature to the letter in question. The conclusions of fact contained in the following extract from the judgment of the High Court, delivered by the Chief Justice on the 20th June, are all that are required for the purposes of this report. The analysis of the evidence which the judgment contained is omitted.

After stating the course of procedure the judgment continued as follows:—

"At the hearing on the 31st May his counsel had not admitted that the signature in question was made by Babu Parbati Charan Chatterji, although we understood Mr. Conlan to say that the signature would not be denied. Nand Kishore had been examined by Mr. Reid, with the object of showing that the signature had been made by Nand Kishore, and not by Babu Parbati Charan Chatterji. After the memoranda of appeal, and the vakalatnamas had been examined by the Judges, by Mr. Reid and by the Public Prosecutor, Aadit Kishore, who was a clerk of Babu Parbati Charan Chatterji, was called and examined by Mr. Reid, and was cross-examined by the Public Prosecutor. As Mr. Reid had examined Aadit Kishore as to certain alleged statements of Nand Kishore, which had not been put to Nand Kishore in cross-examination, Nand Kishore was recalled. We informed the Public Prosecutor that we did not require to hear him, and thereupon Mr. Reid

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- PRIVY "This Court is, by s. 8 of Her Majesty's Letters Patent, under
COUNCIL. "which this Court was constituted, empowered to remove or suspend from practice, on reasonable cause, any advocate, vakil or attorney on the Rolls of the Court. There is no power conferred on the Court to delegate to any other tribunal the exercise of that jurisdiction in the case of advocates, vakils and attorneys. The 'reasonable cause' referred to in s. 8 of the Letters Patent must be made out by the admission of the party concerned, or on evidence, to the satisfaction of the Court. There is, in these Provinces, no body or authority other than the Judges of this Court, sitting as a Court, which can act under s. 8 of the Letters Patent, or can remove, or suspend from practice, any advocate, vakil or attorney on the rolls of this Court. Sections 12, 13, 14 and 15 of Act No. XVIII of 1879 do not expressly apply, and are by s. 38 of that Act expressly excluded from application to advocates, vakils and attorneys admitted and enrolled by any High Court under the Letters Patent by which such Court is constituted.
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(P.C.) = "Consequently this Court was the only authority the attention of
22 I.A. 193 = "which the Vakils' association could invite to the conduct of Babu Parbati Charan Chatterji in his capacity as a vakil.
6 Sar. P.C.J. 635. "Pursuant to the direction and authority given by s. 27 of Act No. XVIII of 1879, this Court has from time to time fixed and regulated the fees payable by any party in respect of his adversary's advocate, pleader, vakil or attorney. The fees so payable are, as a rule, *ad valorem* fees on the amount or value of the claim. Such fees as are allowable on taxation between party and party in respect of an advocate, vakil or attorney in this Court, upon all proceedings on the appellate side of this Court, are fixed and regulated by the rules of this Court Nos. 204 to 223, including rules 222A, 222B, and 222C. These rules had been published in the local official *Gazette*, and were in force on, and prior to, the 10th October 1892.
- "The fees allowable on taxation between party and party in respect of an advocate, pleader, vakil or attorney in a Civil Court subordinate to this Court, upon all proceedings in such subordinate Court, are fixed and regulated by rules 37 to 51 of Circular Order of this Court No. 9 of 1889, and the Circular Order of this Court No. 5 of 1889, which were published in the local official *Gazette* and were in force on, and prior to, the 10th October 1892. [502] Rule 199 of the rules of this Court of November 30th, 1889, which was referred to in the course of the arguments on behalf of Babu Parbati Charan Chatterji, is as follows:—'Any advocate, attorney and vakil on the Rolls of the Court, not under suspension, may, in this Court and without filing any vakalatnama, appear, plead and act for any other advocate, attorney or vakil on the Rolls of the Court, not under suspension, in any suit, appeal or proceeding in the Court in which such other advocate, attorney or vakil is engaged for a client.' That rule was made by the Court in the interests of parties to litigation in this Court, and to enable the Court to dispose, without constant adjournments, of cases on the Daily Cause Lists. Prior to the making of rule 199 an advocate, attorney or vakil, who happened to be engaged before one Bench, could not have his brief held for him by an attorney or vakil in a case before another Bench, unless such last-mentioned attorney or vakil had obtained and filed in the case a vakalatnama. Rule 200 of the rules of

" this Court of November 30th, 1889, is as follows :—' No attorney or vakil, except when representing an advocate or another attorney or vakil shall appear or plead in any suit, appeal or proceeding in this Court until he has filed a vakalatnama authorizing him to act in the matter.'

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" This Court, under the circumstances mentioned in rule 199, but not otherwise, permits advocates, attorneys and vakils to hold briefs for each other in this Court, but does not recognize, nor has it ever recognized, any acting in business in the Court of an advocate, attorney or vakil as the agent or partner of any advocate, attorney or vakil practising locally elsewhere. To recognize any such acting would be to open wide the door for the evasion of s. 36 of Act No. XVIII of 1879. Section 36 of Act No. XVIII of 1879 applies to all legal practitioners, including advocates, attorneys, vakils, pleaders and mukhtars. One of the objects of rules 222 A and 222 B was indirectly to put a stop to practices which, the Court was aware, existed, and which were offences under s. 36 of Act No. XVIII of 1879. The other object was to ensure, as far as the Court could, that no [503] fees to an adversary's advocate, attorney or vakil should be allowed on taxation between party and party, except such as had been *bona fide* received and retained for work done in this Court by the advocate, attorney or vakil, and had been received before the court's order as to costs in the particular case was made.

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" As Mr. Conlan in the course of his argument on behalf of Babu Parbati Charan Chatterji drew our attention to paragraph 10 of the report of the 21st of August 1879 of the Select Committee to which the Bill, which subsequently became Act No. XVIII of 1879, was referred, we shall quote that paragraph before proceeding to a consideration of the evidence and the arguments in the case. The report was published in the *Gazette of India*, Part V, of the 23rd of August 1879, at pages 841 and 842. Paragraph 10 of that report, which refers to what subsequently became s. 36 of Act No. XVIII of 1879, is as follows :—
" Section 36 has been framed to put a stop to what is commonly known as the *touting* system—a system under which certain legal practitioners reward a *mukhtar* or other hanger-on of the Court who brings them business by allowing him a percentage on their fees. It is obvious that such a system, besides the degradation it involves to legal practitioners who resort to it as a means of obtaining business, also holds out to the *mukhtar* or other go-between a strong temptation to retain for his employer, not the most skillful pleader he can get for the fee allowed, but the pleader who will pay him the largest commission. The only objection we have heard to the abolition of this most objectionable system has proceeded from certain mukhtars, who urge that the commission allowed them by vakils is not a remuneration for procuring the employment of such vakils, but a payment for assistance rendered by them to such vakils by performing certain duties which would in other cases be performed by an attorney. The answer to this objection, it appears to us, is that, when the transaction is one *bona fide* of the nature thus described, the mukhtar can find no difficulty in agreeing with his employer to receive direct from him any remuneration to which he may be entitled.'

[504] " Section 36 of Act No. XVIII of 1879 makes it an offence for any legal practitioner to tender or give to any person, whether such person is a legal practitioner or not, or to consent to the retention by any person,

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" whether such person is a legal practitioner or not, of any gratification for
" procuring or having procured the employment in any legal business of
" himself, or any other legal practitioner. Section 36 also makes it
" an offence for any person, whether a legal practitioner or not, to receive
" from any legal practitioner any gratification in consideration of procur-
" ing or having procured his employment in any legal business. Sec-
" tion 46 of the Indian Penal Code (Act XLV of 1860), read with
" ss. 40, 41 and 107 of that Code, would make any person liable
" to be punished criminally as an abettor, who instigated any other
" person to commit an offence against s. 36 of Act XVIII of 1879,
" although the substantive offence under that section might not be
" committed. That such is the law is made clear by the illustration to
" s. 116 of the Indian Penal Code. Before dealing with the facts we
" shall consider what were the arguments addressed to us by Mr. Conlan
" and Mr. Reid, on behalf of their client. It was contended that Babu
" Parbati Charan Chatterji was uncertain whether the signature to the
" letter of the 10th October 1892 to Mr. Newton was, or was not, his sig-
" nature; that when the vakil was asked by the Vakils' Association whether
" he signed the letter himself he questioned his clerk, Nand Kishore,
" on the subject, and the clerk, at the suggestion of the vakil, wrote
" stating that he, the clerk, had signed the letter in question, and some
" others which were despatched on the 10th October 1892. It was also
" contended that what was suggested in the letter to Mr. Newton, and
" in the letters to others, was the formation of a limited partnership
" between Babu Parbati Charan Chatterji and each of the persons to
" whom a letter was sent, for the transaction of legal business in the High
" Court. It was further contended that on the true interpretation of the
" letter, Parbati Charan was not offering to share his fees with Mr. New-
" ton in business, which might be sent to him by the latter's recommend-
" ation or assistance, as a gratification to Mr. Newton for procuring
" him legal business, but that [505] Parbati Charan was merely offering
" to pay out of his fees a remuneration to Mr. Newton for such services
" as Mr. Newton might render in preparing a brief, or instructions, for
" Parbati Charan. It was also contended that the latter intended the
" suggested arrangement to apply only to those cases coming to this
" Court in appeal in which he and Mr. Newton would be retained together
" in the appeal in this Court, and in which each of them would file, in this
" Court, a vakalatnama. In support of this latter contention Mr. Conlan
" relied upon the 'corrected and unsigned printed letter' which was
" enclosed in Parbati Charan's letter of explanation of the 15th of December
" 1892 to the Vakils' Association. When we asked Mr. Conlan if his client
" could give the name of even one legal practitioner to whom a letter so
" corrected had been sent, he stated that Parbati Charan had been unable
" to give the name of any one. It will be seen, later on, that letters in the
" form of the one sent to Mr. Newton were sent to sixteen or twenty
" different legal practitioners, and that the despatch of such letters took
" place on three different days.

" It was also contended that the conduct of vakils should not be
" judged by the same standard as that to be applied to advocates who are
" barristers, and that Parbati Charan was by his proposed arrangement
" trying to counteract the alleged illegal practices of vakils in procuring legal
" business by the payment out of their fees of remuneration to persons who
" procured their employment in appeals and other legal business."

After further consideration of the arguments, and after discussing the

evidence, the judgment proceeded thus :—" In our opinion the letter of the 10th of October 1892 was nothing else than a letter offering to remunerate Mr. Newton for the procurement of legal business for Babu Parbati Charan Chatterji, who thereby was inciting Mr. Newton to commit an offence which was made penal by s. 36 of Act XVIII of 1879, and we so find. We find that Babu Parbati Charan well knew that in sending that letter of the 10th of October 1892 to Mr. Newton, and the other letters which were sent under his signature and by his orders [506] to other legal practitioners in these Provinces, he was committing not only a grossly improper act as a vakil, but was endeavouring to do, and to induce others to do, acts which were made penal by the Indian Legislature, and to originate and carry on for his own benefit under the thinnest possible disguise a system of *dalali* as pernicious in its consequences as the system of *dalali* which he alleges to be in practice amongst the members of Vakils' Association, and which he professes to reprobate. He had been a legal practitioner since 1882, and a vakil of this Court since the 10th of April 1891, and could not have been ignorant of the fact that since 1867, this Court, which was established in 1866, has, in the interests of suitors and of the profession to which he belongs, been vainly striving to put a stop to the system of *dalali*, by which certain legal practitioners procure their employment in legal business by sharing their fees in cases brought or sent to them with the persons who for such remuneration, and entirely irrespective of their merits and regardless of the interests of the suitors, bring or send legal business to such legal practitioners.

" In considering what our order should be in this case we cannot treat Babu Parbati Charan Chatterji as we might treat a young and inexperienced man who, in ignorance of the character of his act, had transgressed the rules of professional good conduct and brought himself unwittingly within the reach of the criminal law ; we cannot overlook the fact that, in order to conceal the true nature of his act, Babu Parbati Charan Chatterji induced his clerk, Nand Kishore, to sign the letter of the 6th of December 1892, which contained false statements as to the facts, or the fact that Babu Parbati Charan Chatterji used that letter to deceive the Vakils' Association of which he was a member ; nor can we overlook the fact that Babu Parbati Charan Chatterji instructed his counsel to call Aadit Kishore to give evidence, which he, Babu Parbati Charan Chatterji, must have known was false evidence. We regard these acts as aggravations of his offence. In this country, in which the concocting of false evidence and the preparation of false documents is but of too common occurrence, it is essentially in [507] necessary in the interests of the public that the legal profession should be kept as pure as possible. The duty which is imposed on this Court in the case of advocates, vakils and attorneys of this Court by s. 8 of Her Majesty's Letters Patent, and in the case of pleaders and mukhtars holding certificates under this Court by Act No. XVIII of 1879, is a grave and important, no less than a painful, duty, which the Court must perform in the interests of the bar, of the public and of the proper administration of justice.

" Our order is that Babu Parbati Charan Chatterji be struck off the roll of vakils, and that he return his certificate forthwith to the Registrar of this Court.

" As to the other rule, calling upon Babu Parbati Charan Chatterji to show cause why he should not be directed to be prosecuted criminally,

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" we discharge it. We should say that no attempt was made by or on behalf of Babu Parbati Charan Chatterji to prove that any advocate of this Court had expressed any approval of the letter of the 10th of October 1892, of the 'corrected and unsigned printed letter,' or of the arrangement which Babu Parbati Charan Chatterji had suggested or of the course which he adopted, and that nothing has appeared in this enquiry which detracts from the good character which Mr. Newton bears in the profession."

On this appeal Mr. *J. H. A. Branson* and Mr. *G. E. A. Ross*, for the appellant, argued that the letter of the 10th October 1892 should have received a construction more favourable to the appellant than it had. Without the application of ss. 41 and 116 of the Indian Penal Code to the special law of Act XVIII of 1879, s. 36, the act of the appellant in sending that letter could not have been dealt with as an infringement of the law; for there had not been, in fact, any tendering, giving or consenting to the retention of any gratification for procuring the employment of the appellant in legal business. The procuring business by agency paid for the purpose was the evil against which s. 36 was aimed; but a construction which the letter in question would bear was not that the appellant would directly pay for business being sent to him, but that the vakil whom he addressed would have the advantage of being himself [508] employed, and paid, for any work that he might perform. The advantage that the appellant might be understood to have offered was employment in return, there being no direct offer of payment for sending cases, but of payment for work that might be done for the client, of whose case the writer requested the guidance into his hands. However irregular such a participation in fees as was suggested might be, this construction was not identical with an abetment of an offence under s. 36. It must be remembered that the present case was that of a Vakil of the High Court writing to another Vakil of the same Court, and writing in a manner that showed him to be most desirous of keeping within the law. He not only expressed himself anxious to do so, but his object was to substitute a plan for the "dalali" system, which plan, although it might have been in itself reprehensible, was not in itself so clear a contravention of the law. That was so if this more favourable construction of the letter should be adopted. The real question, however, was whether or not the appellant's conduct had been such as to show him to be unfit to remain a vakil of the High Court, and such as to call for the exercise of the Court's power under s. 8 of the Letters Patent. It was submitted that neither in the sending of the letter now in question, nor in the subsequent denial of the signature, had the appellant been guilty of conduct which required a sentence so severe as that which had been pronounced upon him by the High Court. That Court had considered the appellant to have aggravated the original offence by his subsequent conduct, but there were circumstances which rendered it suitable that a mitigated sentence should be passed even if the same view were now taken of the appellant's case as that which had been taken by the High Court. Reference was made to *In the matter of F. W. Quarry* (1).

Their Lordships' judgment was delivered by LORD MORRIS :—

JUDGMENT.

The facts giving rise to this case are few in number. It appears that the appellant, who was enrolled as a vakil of the High Court

(1) 17 I.A. 199 = 13 A. 98.

in 1891, procured to be printed and forwarded a circular letter, in [509] October 1892, to, amongst other persons, a Mr. Newton, a vakil of the High Court, who was practising in that capacity in the District Court of Meerut. The letter addressed to Mr. Newton was in the following terms :—

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" Allahabad,
" Dated 10th October, 1892.

" From PARBATI CHARAN CHATTERJI,
" Vakil, High Court,
Allahabad.

" To E. A. NEWTON, ESQ.,
" Vakil, High Court,
Meerut.

" (Private and confidential.)

" DEAR SIR,

" I hope you will pardon me for taking the liberty thus to address you
" privately and confidentially for co-operation in a matter of business
" which may, if you agree with me, be calculated to promote our mutual
" interest.

" Without intending to boast, I venture to say that, as a vakil of the
" High Court, I claim the credit of working very hard in the interests of
" my clients whose cases are filed by me in the High Court. Being a
" High Court Vakil yourself, now practising in the District Court, you can,
" if you choose, very easily send your clients' cases, both civil and crimi-
" nal, which are fit to be filed in the High Court, to me, with a brief
" statement of the same, whenever necessary, and I shall undertake to
" conduct the same here. You may, I hope, find this course more busi-
" ness like and beneficial than the other one of allowing your clients to
" drift as they like after a case is lost in the Lower Courts.

" As a remuneration for your labours, I undertake to share with
" yourself, being a High Court vakil, the fees which may be paid by your
" clients to me; but the fees ought to be settled beforehand in almost every
" case, so far as possible, so that we may know whether a particular case
" will pay our joint exertions or not.

[510] * [" If you are a District Court pleader, the law, I think, pro-
" hibits me from sharing the fees of a High Court case with yourself.

" In that event, arrangement may be made in every case with clients
" to pay you separately for your labour in preparing briefs, &c. in the
" case.]

" If you approve of the suggestions made in this private letter and
" intend actually to co-operate, I shall feel obliged by your signifying your
" intentions to me as early as you find convenient to do so.

" Lastly, I request you to treat this letter as strictly private and
" confidential.

" Yours faithfully,
" P. C. Chatterji,
" Vakil, High Court.

" " By mutual consent and mutual aid,

" " Great deeds are achieved and discoveries made.' "

" (Private and confidential.) "

* Inasmuch as Mr. Newton was a vakil of the High Court, the words in the circular letter which are in brackets were struck out of the letter sent to him.

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Their Lordships do not think it necessary to go in detail into the matter, because they entirely agree with the conclusions arrived at by the High Court, namely, that the letter was within section 36 of Act No. XVIII of 1879.

Their Lordships also concur substantially in the conclusions arrived at by the High Court as regards the conduct of the appellant in having, at first, endeavoured to deny his signature to that letter, and also as regards the circumstances connected with the prosecution of the case before them.

The only question which remains to be considered is as to the amount of punishment inflicted by the High Court. The High Court directed the appellant to be struck off the Roll of Vakils, and to return his certificate to the Registrar of the High Court. Their [511] Lordships have come to the conclusion that this punishment may properly be mitigated. It is plain that the appellant in writing the letter thought that he was keeping within the law. He evidently wanted to go as close to the limits of the law as he possibly could without violating its provisions. This is shown by the fact that the bracketed paragraphs in the letter were to be struck out or retained according as the letter was addressed to a vakil of the High Court or not.

The number of letters which the appellant wrote to other persons besides Mr. Newton corroborates this view; for although the letters were marked "Private and Confidential," the appellant could never have imagined that what he was doing would not very rapidly become known. He thought that he had not violated the Act; and although he was clearly wrong in so thinking, their Lordships consider that it is a not unimportant element in the consideration of the punishment that should be meted out to him, that he did not wilfully violate the Act, but considered that he did not come within it.

Upon the whole facts of the case their Lordships are of opinion that the Order of the High Court should be varied, by directing that the appellant be suspended from practising as a vakil for a period of four years from the 20th June 1893. Their Lordships will humbly advise Her Majesty accordingly.

Order varied.

Solicitors for the appellant: Messrs. *Barrow and Rogers*.

17 A. 511 (P.C.) = 22 I.A. 199 = 6 Sar. P.C.J. 624.

PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Morris and Davey and Sir R. Couch.

[*On appeal from the High Court at Allahabad.*]

CHAJMAL DAS (*Plaintiff*) v. BRIJ BHUKAN LAL AND ANOTHER
(*Defendants*). [3rd May, 20th July, 1895.]

Interest on bond debt 'post diem solvendi.'

On the construction of a written contract to repay in two years from its date, money with interest at fifteen per cent. to be paid half-yearly, arrears of interest being added half-yearly to the principal, the Judicial Committee concurred with the High Court that there was no contract to pay interest at that rate after the date fixed for repayment.

[512] *Held*, that on that construction the creditor would be entitled, on default made in the repayment, to receive interest, but, technically, as damages assessed; and that the rate *prima facie* would be the same as that provided by the contract during the two years, although there is no rule of law making that rate necessarily the measure of the damages. The compounding of the interest after the expiration of the two years was disallowed, and an account was directed on the basis that the '*post diem*' should be simple, at 15 per cent. down to the date of the plaint, and after that date at six per cent. till payment.

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[R., 24 C. 699 (706) = 1 C.W.N. 437; 29 C. 43 (50); 15 C.L.J. 684 (687); 16 C.L.J. 264 = 16 Ind. Cas. 246 (250); 12 C.P.L.R. 18; 5 C.W.N. 356 (360); 11 Ind. Cas. 342 = 14 O.C. 106; 13 Ind. Cas. 148 (150) = 17 C.L.J. 87 (92); 2 N.L.R. 162, (P.C.); 7 O.C. 11 (13).]

APPEAL from a decree (7th March 1889) of the High Court, reversing a decree (3rd September 1887) of the Subordinate Judge of Mainpuri.

This suit was brought on the 18th March 1887 by the appellant, a zamindar and mahajan of Etah in the Aligarh district, against Narain Lal, Brijbhukan Lal and Raghubans Rai, described as legal heirs of Banki Lal, debtor, deceased in 1876 or 1877, who had executed a mortgage bond, dated the 20th March 1873, securing money lent to him by the plaintiff. With the defendants was joined Musammat Genda Puri, wife of Narain Lal, as *dakhil kharij* had been made in her name. She died on the 2nd August 1890; and Narain Lal died while this appeal was pending. The claim was for Rs. 5,000 principal and Rs. 11,000 interest, to be realized by sale of any of the property of Banki Lal, not only of that mortgaged.

The plaint set forth the mortgage bond, which is stated in their Lordships' judgment and added:—

"The Rs. 5,000 fell due on the 21st March 1875, when the cause of action first accrued. The deceased debtor paid in his lifetime Rs. 630 towards the half-yearly interest; and afterwards Musammat Sarsuti, his widow, and heiress, having succeeded to his estate, paid, on the 16th April 1877, Rs. 4,346, by executing and registering a lease to the plaintiff of zamindari villages, of which he remained in possession."

Sarsuti died before this suit was brought. The answer filed by Narain Lal alleged, amongst other things, that according to the accounts a balance would appear in favour of the estate, the [513] plaintiff having been in possession of the mortgaged villages since the fasli year 1283.

The questions now raised were whether the construction, placed by the High Court on the document of 20th March 1873, was right, and whether the plaintiff was not entitled to interest '*post diem*.' The matter of the interest was raised by an issue fixed in the Court of first instance, and was the subject of the difference of opinion between the original and the appellate Court.

The Subordinate Judge decreed the claim. On an appeal by Narain Lal and Genda Puri, a Division Bench of the High Court (EDGE, C.J., and TYRRELL, J.) gave the judgment, of which the following part is alone material to this report:—

"The third point, and the really material point which was argued before us, related to the plaintiff's claim for interest *post diem*. The plain construction, according to our view, of the mortgage in question, so far as interest is concerned, is that there was a covenant to pay the principal and interest at the expiration of two years, and there was no covenant to pay interest *post diem*. There is nothing in the record from which we can infer that it was the intention of the parties that *post diem* interest should be payable. If it was the intention of the parties that

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“ interest should be payable *post diem*, it would have been very easy to
“ express that intention by the use of a few apt words to that effect.
“ There is nothing here to show that it was contemplated that any interest
“ *post diem* should be payable. It has been contended that from the
“ covenant not to assign it may be inferred that it was the intention of the
“ parties that interest *post diem* should be payable. We do not put that
“ construction upon that covenant. And even if it bore any construction
“ such as suggested, we would hesitate to extend a covenant which ex-
“ pressly deals with the payment of principal and interest by a subsequent
“ covenant dealing with another matter. We have been referred to two
“ cases decided in this Court. One of those was the case of *Baldeo*
“ *Panday v. Gokal Rai* (1); and we may remark that the head-note in that
“ case is to a certain extent misleading. It could [514] “ not have been
“ found in that case that there was an express contract for the payment
“ of interest after the due date. Our reading of the document
“ then in question is that there was in fact no express contract of
“ any kind. The terms of that contract were in some respects different
“ from the present, and there were indications from the conduct of one
“ of the parties that in his view the contract was that he had to pay
“ *post diem* interest. How far that circumstance may have influenced the
“ mind of the learned Judges in construing the contract we do not know.
“ The other case was that of *Chhab Nath v. Komta Prasad* (2). The con-
“ tract there again is to some extent different from the contract before us,
“ and was apparently similar to that in *Baldeo Panday v. Gokal Rai*.
“ The learned Judges in that case considered that they were bound by
“ the decision of *Baldeo Panday v. Gokal Rai*.

“ We do not consider, under these circumstances, that we are bound
“ to construe this document as those Judges construed the document before
“ them. It appears to us that there is considerable danger attending the
“ applying to one document the judicial construction which has been, in
“ a previous case, applied to another, unless the two documents are exact-
“ ly in the same terms. This is a danger which has been strongly pointed
“ out by the late learned Master of the Rolls in England, Sir George Jessell.
“ We have come to the conclusion that there was here no contract to pay
“ interest *post diem*. In this case, after the death of the mortgagor his
“ widow granted a lease to the mortgagee for a term of ten years, and by
“ that lease a portion of the rent of the land leased was to be applied by
“ the mortgagee towards the satisfaction of the interest accruing or due
“ under the mortgage. We do not think that we can look at that transac-
“ tion as a means of putting a construction upon the mortgage in question.
“ The lady was a *pardah-nashin* lady, the mortgagee was her legal adviser,
“ and we have no evidence to show that she had any independent advice as to
“ her position or her liabilities under her deceased husband's bond. The
“ result is that we allow the appeal thus far that we hold that the mortgagee
“ was not entitled [515] to any interest *post diem*; that he is entitled to have
“ a decree for Rs. 5,000; and that he would also be entitled, if no interest had
“ been paid at all, to a decree for interest for two years: but as he admits
“ that Rs. 4,706 has been received by him as interest, we need not consider
“ the question of interest at all. We vary the decree below by giving the
“ plaintiff a decree for Rs. 5, 000, enforceable by sale of the hypothecated
“ property, without any interest. Three months' time is allowed for the
“ payment of the money by the judgment-debtors from the date when our

(1) 1 A. 603.

(2) 7 A. 393.

"decree reaches the Court below. Costs here and below will be paid by the parties in proportion to their success and failure."

Mr. C. W. Arathoon, for the plaintiff, argued that the High Court's construction of the document of the 20th March, 1873, was not correct. Interest '*post diem*' was in this case payable at the same rate as *ante diem*. The lease given by Sarsuti in April 1877, should have been considered to explain how interest was understood between the parties to be calculated after the expiration of the two years. Even assuming that the construction below was correct, the plaintiff should have been held entitled to interest as damages for non-payment on, and after, the due date. He referred to *Baldeo Panday v. Gokal Rai* (1) [Their Lordships mentioned *Cook v. Fowler* (2) in which Lord Selborne said:—"There is no rule of law upon a contract for the payment of money on a certain day, with interest at a fixed rate down to that day, that a further contract for the continued payment of interest at the same rate is to be implied."]. Mr. C. W. Arathoon continued to the effect that the rate of fifteen per cent. was the proper measure of damages, as a fair rate. On the subject of the allowance of such damages reference was made to *Gordillo v. Weguelin* (3).

Act XXXII of 1839, relating to interest on money payable at a date fixed in writing, was also cited (4).

[516] The respondents did not appear. Afterwards, on July 20th, their Lordships' judgment was delivered by LORD MORRIS:—

JUDGMENT.

This appeal has been argued before their Lordships *ex parte*. The appellant, Lala Chajmal Das, brought a suit in the Court of the Subordinate Judge of Mainpuri, on a bond dated the 20th March, 1873, executed by Banki Lal, deceased. The respondents represent Banki Lal's estate.

The bond is as follows:—"I Banki Lal . . . do declare.—That I owe Rs. 5,000, half of which is Rs. 2,500, on account of former and present loans as detailed at foot, to Chajmal Das; . . . and that, admitting the said debt, I promise that I shall pay the said money, with interest at the rate of Re. 1-4-0 per cent. per mensem, in two years; that interest shall be paid six-monthly; that in case of default in payment of interest on the expiry of any six months, it will be treated as principal, and being included in the principal, shall bear interest at the said rate; that the compound interest shall also be added six-monthly to the principal; that all payments will be noted on the back of the bond, and if not so noted, no plea of payment, oral or supported by a receipt or acquittance, &c., shall be valid; that until payment of this money the zamindari property in the villages specified below, belonging to me and pledged by me formerly with some other properties, shall continue pledged and hypothecated for this money, and shall not be transferred to any one in any manner; and that if a transfer is made, it would be invalid, and this money, principal and interest, be preferentially realisable. I have received back the former bonds, and accept this bond; no bond is held by, and no money is due to, the said creditor up to this day."

(1) 1 A. 603.

(2) 7 Eng. and Irish Ap. Ca. H. L. (1874), p. 27.

(3) L. R. 5 Ch. D. (1877) p. 287.

(4) *Gopaludu v. Venkata Ratnam* 18 M. 175; *Rama Reddi v. Appaji Reddi*, 18 M. 248; *Badi Bibi Sahibai v. Sami Pillai*, 18 M. 257, refer to interest.

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The appellant by his plaint, dated the 18th March, 1887, alleged that according to the terms of the bond there was then due for principal and interest the sum of Rs. 26,605; but that, as the property of the debtor was insufficient to satisfy that amount, he only claimed the sum of Rs. 16,000, and relinquished the residue. Various questions were raised, and were determined by the Subordinate Judge, and, upon appeal, by the High Court; but the only [517] question upon which this appeal has been brought is the decision on the 8th issue. This issue was as follows:—
"Is plaintiff entitled to receive compound interest and interest for the period subsequent to the date promised for payment, for not?" The Subordinate Judge was of opinion that the plaintiff was entitled to receive compound interest as claimed. The High Court on appeal reversed that judgment, and held that according to the true construction of the bond no interest was payable after the period of two years therein stated as the period fixed for the payment of principal and interest, and accordingly ordered that the respondents should only pay to the plaintiff the sum of Rs. 5,000, being the principal sum secured by the bond. Their Lordships are not prepared to dissent from the construction placed by the High Court on the bond in respect of there being no covenant by Banki Lal to pay interest after the fixed period of two years from the date of the bond, although it is difficult to suppose that this was the intention of the parties to the bond. But even on that construction the plaintiff would be entitled, on default being made in the payment, to recover interest technically as damages, and the rate would *prima facie* be the same as that provided by the bond during the two years, although there is no rule of law making that rate necessarily the measure of the damages.

Their Lordships are of opinion that the decrees of the Subordinate Judge and the High Court should be discharged; that an account ought to be directed by the High Court to ascertain what is due to the plaintiff on the bond up to the 20th of March, 1875, adding interest to principal as provided by the bond; that it ought to be declared that on the amount so ascertained the plaintiff is entitled to simple interest up to the date of the plaint at the rate of 15 per cent. per annum, and to simple interest at the rate of 6 per cent. per annum from the date of the plaint to the date of payment; and that accounts should be taken under the direction of the High Court on this basis; and that the amount found to be due in the result to the plaintiff should be decreed to him by the High Court accordingly, but that the amount so decreed should not in any [518] event exceed the sum of Rs. 16,000 claimed by the plaintiff. The defendants should pay to the plaintiff his costs incurred in the Court of the Subordinate Judge in proportion to the amount recovered by him. There should be no costs of the appeal to the High Court. The respondents must pay the costs of this appeal. Their Lordships will humbly advise Her Majesty accordingly.

Appeal allowed.

Solicitors for the appellant:
Messrs. Hamlin, Grammer & Hamlin.

17 A. 518 = 15 A.W.N. (1895) 115.

APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.*JAFAR HUSAIN (*Defendant*) v. RANJIT SINGH (*Plaintiff*).^{*}
[17th April, 1895.]Civil Procedure Code, s. 561—*Appeal—Objections—Withdrawal of appeal—Failure of objections.*

If an appeal in which objections have been filed under s. 561 of the Code of Civil Procedure is withdrawn, the objections cannot be heard. *Bahadoor Singh v. Bhugwan Dass* (1); *Ram Pershad Ojha v. Bharosa Kunwar* (2); *Shama Churn Ghose v. Radha Kristo Chaklanuvis* (3). *Coomar Puresh Narain Roy v. Messrs. R. Watson & Co.* (4); *Surbhai Dayalji v. Raghunathji Vasanji* (5); *Dhondi Jagannath v. The Collector of Salt Revenue and The Secretary of State for India in Council* (6) and *Maktab Beg v. Hasan Ali* (7) referred to.

[R., 23 A. 130 (133); 23 B. 692; 4 M. L. T. 482 (483).]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit Sundar Lal, for the appellant.

The Hon'ble Mr. Colvin, Mr. D. N. Banerji and Babu Rajendro Nath Mukerji, for the respondent.

JUDGMENT.

EDGE, C. J., and BANERJI, J.—Pandit Sundar Lal, for the appellant, has withdrawn this appeal. It had been, as a matter of fact, called on, but it had not been argued or opened when Pandit Sundar [519] Lal elected to withdraw. The appeal is accordingly withdrawn. The respondent to the appeal has filed objections under s. 561 of the Code of Civil Procedure. Mr. D. N. Banerji asked to be heard in support of those objections. Pandit Sundar Lal objected that, the appeal having been withdrawn, there was no hearing of the appeal upon which the respondent was entitled to take any objection to the decree of the Court below. So far as this appeal is concerned, there is no essential difference between s. 348 of Act No. VIII of 1859 and s. 561 of the present Code of Civil Procedure. Section 16 of the Court Fees Act, 1870, also points to the objections being argued at the hearing of the appeal. There is a long list of authorities in favour of the contention raised by Pandit Sundar Lal; those which may be mentioned are:—*Bahadoor Singh v. Bhugwan Dass* (1); *Ram Pershad Ojha v. Bharosa Kunwar* (2); *Shama Churn Ghose v. Radha Kristo Chaklanuvis* (3); *Coomar Puresh Narain Roy v. Messrs. R. Watson and Co.* (4); *Surbhai Dayalji v. Raghunathji Vasanji* (5); *Dhondi Jagannath v. The Collector of Salt Revenue and The Secretary of State for India* (6) and *Maktab Beg v. Hasan Ali* (7). Although a hardship arises in the case of a respondent who has taken advantage of the provisions of the Code of Civil Procedure, and filed objections to the decree under appeal, instead of filing a separate appeal, when the appeal is withdrawn, so as to deprive the respondent of his opportunity of supporting his objections, still we are bound to follow the long series of authorities, and hold that

* First Appeal, No. 319 of 1893, from a decree of Munshi Kamta Prasad, Assistant Collector, 1st Class, of Bijnor, dated the 12th September 1893.

(1) N. W. P. H. C. R. (1866). 23 = (1 Agra 23).

(2) 9 W.R. 328.

(3) 14 W. R. 210.

(4) 23 W. R. 229.

(5) 10 B. H. C. R. 397.

(6) 9 B. 28.

(7) 8 A. 551.

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15 A.W.N.
(1895) 115.

1895 the respondent in this case cannot be heard in support of his objections.
 APRIL 17. Many of the decisions, to which we have referred, were long anterior
 — to the passing of Act No. XIV of 1882, and ever since that Act was
 APPEL- passed, amendments to the Act have been made by the Legislature;
 LATE and the Legislature must be presumed to have known the course
 CIVIL. of decisions to which we have referred, and to have decided that
 — the respondent who takes advantage of the Code of Civil Procedure
 17 A. 518= to object to the decree under appeal by way of objection, and not
 15 A.W.N. by way of appeal, shall run the risk of having his objections [520]
 (1895) 115. defeated and his right of appeal barred by the effect of the Limita-
 tion Act, 1877, and be left without any remedy against a decree which
 might be open to question. For the above reasons we are unable to hear
 the objections filed by the respondent, and hold that they have fallen
 with the withdrawal of the appeal.

Under s. 220 of the Code of Civil Procedure, we make an order
 directing the appellant, Syed Jafar Husain, to pay the taxed costs of this
 appeal to the respondent, Chaudhri Ranjit Singh.

17 A. 520=15 A.W.N. (1895) 116.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

MAHABIR SINGH AND ANOTHER (*Plaintiffs*) v. SAIRA BIBI AND
 ANOTHER (*Defendants*).^{*} [17th April, 1895.]

Act No. IV of 1882, (Transfer of Property Act), s. 99—Usufructuary mortgage—Suit by mortgagee for sale of equity of redemption of mortgaged property in execution of a decree for mesne profits and costs.

Certain usufructuary mortgagees not having been put in possession of the mortgaged property by the mortgagor sued and obtained a decree for possession with mesne profits and costs. Under this decree the mortgagees were put in possession of the mortgaged property. They then applied for attachment and sale of the mortgaged property in execution of their decree for mesne profits and costs. This application was disallowed. The mortgagees then brought a suit for sale of the equity of redemption of the mortgaged property reserving their rights and interests under the mortgage. *Held*, that such a suit would not lie as being opposed to the intention of s. 99 of the Transfer of Property Act, 1882. *Azim-ullah v. Najm-un-nissa* (1) and *Jadub Lall Shaw Chowdhry v. Madhub Lall Shaw Chowdhry* (2) referred to.

[R., 35 C. 61 (F.B.)=6 C.L.J. 320 (329)=11 C.W.N. 1011; 4 A.L.J. 787=A.W.N. (1908) 1=3 M.L.T. 132; 13 C.L.J. 664 (669)=15 C.W.N. 748 (752)=9 Ind. Cas. 1034 (1037); 10 C.P.L.R. 21; 12 C.P.L.R. 26 (29); 18 Ind. Cas. 201 (202); 6 N.L.R. 20 (26); 7 O.C. 314 (315); D., 29 M. 424=16 M.L.J. 285.]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Abdul Raoof*, for the appellants.

Munshi *Ram Prasad* and Babu *Durga Charan Banerji*, for the respondents.

JUDGMENT.

EDGE, C. J., and BANERJI, J.—The plaintiffs in the suit in which this appeal has arisen were usufructuary mortgagees under [521] a

^{*} First Appeal, No. 106 of 1892, from an order of Munshi Lalta Prasad, Additional Subordinate Judge of Ghazipur, dated the 25th February 1892.

(1) 16 A. 415.

(2) 21 C. 34.

mortgage of the 19th of June 1883, which had been made in their favor by the defendants in the suit or by those under whom they claimed. The plaintiffs had been kept out of possession of the mortgaged property, and were obliged to bring a suit for possession. They brought a suit claiming not only possession, but also *mesne* profits, and on the 30th of January 1889, they obtained a decree for possession, for *mesne* profits and for costs. The plaintiffs-mortgagees were put in possession under the usufructuary mortgage of the 19th of June 1883, in pursuance of the decree of 30th of January 1889. They then sought to attach for the purpose of bringing to sale the mortgaged property in satisfaction of that part of their decree of the 30th of January 1889 which decreed them *mesne* profits and costs. The Subordinate Judge before whom the application for attachment was made dismissed the application, holding that s. 99 of Act No. IV of 1882 barred the plaintiffs' claim to execute their decree by the sale of the mortgaged property. That order was confirmed on appeal by this Court, and, after the decision of this Court in appeal, the plaintiffs brought the suit out of which this appeal has arisen. In this suit they asked for a decree for sale of the equity of redemption maintaining the rights and interest of the plaintiffs as mortgagees. The Subordinate Judge dismissed the suit, holding that by reason of ss. 99 and 66 of Act No. IV of 1882 the suit did not lie. The plaintiffs brought this appeal from that decree.

Section 99 was enacted with the object of preventing a mortgagee bringing the mortgaged property to sale except in pursuance of a decree obtained in a suit allowed by s. 67. Prior to the passing of Act No. IV of 1882 it was the constant custom of mortgagees to obtain, on other causes of action than their mortgages, decrees for money against the mortgagor, to bring the mortgaged property to sale in execution of those money decrees, and to have it sold, reserving their rights as mortgagees. The result of that was that in such cases, the sale being notified as one in which the property to be sold was subject to a mortgage, purchasers would not come forward to run the risk of harassing [522] litigation with the mortgagee in future suits, and the mortgagee or his *benamidar* was left in possession of the field, and in too many instances purchased the mortgagor's interest in the property for a mere song, and having got by such sale the mortgagor's interest for practically a trifling price, the mortgagee got the whole property into his hands. It was found from experience that the result of such a state of things was that the properties passed out of the hands of mortgagors into the hands of mortgagees in many cases for far less than their value, counting the mortgage-debt and the price paid at the sale under the money decree together. It was also found that such a state of things encouraged litigation, and it was to provide a remedy and to prevent the recurrence of such a state of things that s. 99 was enacted. It has been contended that in such cases the plaintiffs are placed in a difficult position. They are not entitled to bring a suit for sale under s. 67 on their mortgage, the mortgage being usufructuary, and it is suggested that by the time when they cease to be mortgagees, when s. 99 would cease to operate, their decree for money might be barred by limitation.

There may be in such cases individual hardships, but the law must have regard to the benefit of the greater number, and not to the particular benefit of persons in individual cases seldom occurring. There was nothing to prevent the respondents executing their decree of the 30th of January 1889, against property of their judgment-debtors other than the property the subject of the mortgage of the 19th of June 1883. We need not

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(1895) 116.

decide whether the plaintiffs have now a remedy against the property of their judgment-debtors other than the mortgaged property.

This suit in fact was brought not in accordance with the intention of the Legislature as announced in s. 99 of Act No. IV of 1882, but in contravention of the provisions of that section. We are supported in the view which we take by the decision of this Court in *Azim-ullah v. Najm-un-nissa* (1) and the decision in *Jadub Lall Shaw Chowdhry v. Madub Lall Shaw Chowdhry* (2).

We dismiss this appeal with costs.

Appeal dismissed.

17 A. 523 = 15 A.W.N. (1895) 117.

[523] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

SHEOBARAT KUARI AND ANOTHER (*Defendants*) v. BHAGWATI
PRASAD AND ANOTHER (*Plaintiffs*).^{*}
[18th April, 1895.]

Hindu law—Hindu widow—Suit to set aside alienation by Hindu widow—Reversioners—Grandsons of daughters of alienor's late husband.

Held. in a suit to set aside an alienation made by a Hindu widow of property which had been her deceased husband's in his lifetime, that the sons of the son of a daughter of the alienor's late husband were, their father and grandmother being dead, reversioners and as such entitled to sue to set aside the alienation made by the widow *Krishnayya v. Pichamma* (3) and *Babu Lal v. Nauka Ram* (4) referred to.

THIS was a suit to set aside an alienation made by a Hindu widow under the following circumstances:—One Sheo Charan Lal was owner of the whole of mauza Nigori and of a 2-anna share in mauza Amtari. He died long anterior to this suit, leaving a widow, Sheobarat Kuari, one of the defendants to the suit, and the son of a daughter, Gokul Prasad. The widow took possession of the estate. On the 26th of May 1874, the widow executed a deed in favour of Gokul Prasad and his half-brother, Ganesh Prasad, whereby a four-anna share in Nagori was at once transferred to them, while it was also declared that they were entitled to succeed to the residue of the estate on the death of the widow. In May 1891, Gokul Prasad died, and subsequently on the 23rd November 1891, Sheobarat Kuari by a duly executed and registered deed of gift made over a 12-anna share of mauza Nigori and the 2-anna share of Amtari to Nand Kishore, the second defendant. The plaintiffs were sons of Gokul Prasad. They sued to set aside the alienation to Nand Kishore, on the grounds, first, that the transfer was void as against them, because they were, under the Hindu law, *bandhus* of Sheo Charan Lal, and therefore his reversionary heirs, and, secondly, that by reason of the deed of gift of the 26th May 1874, the widow had no transferable right in the property.

The defendants resisted the suit on the grounds that the plaintiffs were not under the Hindu law *bandhus* of Sheo Charan Lal; [524] that under the deed of 26th May 1874, the widow still had power to dispose

^{*} First Appeal, No. 27 of 1894, from a decree of Babu Mohan Lal, Additional Subordinate Judge of Gorakhpur, dated the 17th November 1893.

(1) 16 A. 415.

(2) 21 C. 34.

(3) 11 M. 287.

(4) 22 C. 339.

of the property in question, excepting only the 4 annas of mauza Nigori; and that in any case the claim for possession could not be maintained in the lifetime of the widow.

The Court of first instance (Subordinate Judge of Gorakhpur) decreed the plaintiffs' claim for a declaration that the alienation in question would not affect their interests in the property after the widow's death.

The defendants thereupon appealed to the High Court.

Munshi Gobind Prasad for the appellants.

Mr. T. Conlan and Mr. Abdul Majid for the respondents.

1895

APRIL 18.

APPEL-
LATE
CIVIL.

17 A. 523 =

15 A.W.N.

(1895) 117.

JUDGMENT.

EDGE, C. J., and BANERJI, J.—The only question in this case is whether the plaintiffs were reversioners. If they were reversioners, they were entitled to maintain the suit. The last owner of the property was one Sheo Charan. He died leaving a widow, who made a deed of gift in favour of Nand Kishore, one of the appellants here, and one of the defendants to the suit. The plaintiffs are the sons of the son of a daughter of Sheo Charan. Their father and his mother died before suit. This case is governed by the decision in *Krishnayya v. Pichamma* (1), and is within the principle of the decision of the Calcutta High Court in *Babu Lal v. Nanku Ram* (2). We hold that these plaintiffs were *bandhus*, being *bhinna gotra sapindas* of Sheo Charan, and, there being no one nearer, they were reversioners and entitled to maintain the suit.

We dismiss the appeal with costs.

Appeal dismissed.

17 A. 524 = 15 A.W.N. (1895) 111.

APPELLATE CRIMINAL.

*Before Sir John Edge, Kt., Chief Justice, and
Mr. Justice Aikman.*

QUEEN-EMPRESS v. PIRBHU AND OTHERS.*
[27th April, 1895.]

Act No. I of 1872 (Indian Evidence Act), s. 30—Joint trial—Statement of co-accused who pleaded guilty—Evidence.

Where two out of several persons on their trial in a Court of Session on a joint charge pleaded guilty and made certain statements to the Court, it was held that [525] such statements could not be taken into consideration as evidence against the other accused persons, inasmuch as after pleading guilty the persons making those statements were no longer on their trial.

[F., 22 M. 491 (493); R., 23 A. 53 (54) = 20 A.W.N. 192; 3 Bom. L.R. 437 (438).]

THE facts of this case sufficiently appear from the judgment of the Court.

The Officiating Public Prosecutor (Mr. A. H. S. Reid) for the Crown.

JUDGMENT.

EDGE, C. J., and AIKMAN, J.—Pirbhu and seven other men, who were convicted of the offence punishable under s. 396 of the Indian Penal

* Criminal Appeals, Nos. 307 and 343 of 1895.

(1) 11 M. 287.

(2) 22 C. 339.

1895 Code, have appealed. One of them, Gobind, was convicted of abetting.
 APRIL 27. The dacoity in question was one which was carried out by some 22 or 25
 — men. They came under different leaders and from different districts of the
 APPEL- country, and those who were not armed with carbines or blunderbusses
 LATE or swords carried *lathis*. The villagers showed great pluck; they assem-
 CRIMINAL, bled and boldly attacked the dacoits; one of them was killed by the dacoits,
 — and several were more or less severely wounded.

17 A. 524= As to two of these appellants, Pirbhu and Kishan, they pleaded guilty
 15 A.W.N. in the Court of Session: and indeed it would have been useless for them
 (1895) 111. to have attempted a defence, for, when the body of dacoits escaped, these
 two men were locked into the room in which they were, and were kept
 there until the police came. Pirbhu was armed with a blunderbuss,
 which, in firing, burst. He has been sentenced to death, and most
 rightly sentenced. We dismiss his appeal, and, confirming the convic-
 tion and the sentence of death, direct that the sentence be carried into
 effect.

As to the other men, the evidence clearly shows that they took part
 in the commission of this dacoity. It appears to us that Nathu Singh,
 the informer, gave a true account of what took place and spoke truly as
 to these appellants. His evidence is corroborated as to each of the
 appellants by one or more witnesses whose truthfulness and accuracy we
 have no reason to doubt. There is one witness for the prosecution who
 was called in the Court of Session, on whose evidence we do not rely, and
 that is Dalla, who identified all the accused at the Sessions trial. All
 these men, except Pirbhu, [526] Gobind and Khimmi, were sentenced to
 transportation for life. We think the Sessions Judge adopted a very
 lenient course in merely passing a sentence of transportation on these
 men. It was a most daring dacoity, and the dacoits were determined to
 carry it out regardless of life. Gobind and Khimmi have been sentenced
 to ten years' rigorous imprisonment. As to Gobind, if the case had been
 tried by us, he would assuredly have been sentenced to transportation for
 life. There may be a good reason in the case of Khimmi, in view of his
 youth, why a sentence of ten years was sufficient. We may mention
 that in arriving at our conclusion we have not relied on the statements of
 Pirbhu and Kishan, as they, having pleaded guilty, were not on their
 trial. Nor have we placed any reliance on the dying statement of Kirat
 Singh. It is not necessary to go into the matter, but we may say that
 we consider that his statement was not admissible in evidence.

Some of the appellants plead that their witnesses were not examined.
 So far as we can judge from the English record, they did not call any
 witnesses at their trial. As, however, it is a frequent ground of appeal
 that the Court of Session has refused or omitted to examine witnesses for
 the defence, it would be advisable for Sessions Judges to state specifically
 in their record whether or not the accused had present witnesses, and
 whether or not the accused refused to call witnesses or elected to call
 some, and whether the witnesses whom he elected to call were examined.
 We dismiss these appeals.

[See also *Queen-Empress v. Pahuji* (1)—ED.]

17 A. 526 = 15 A.W.N. (1895) 106.

APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.*NARAINI KUAR (*Plaintiff*) v. MAKHAN LAL AND OTHERS (*Defendants*).
[25th April, 1895.]*Civil Procedure Code, ss 403, 409—Application for leave to sue in forma pauperis—
Refusal of application—Institution of regular suit—Limitation.*

When an application for leave to sue as a pauper is refused and the applicant subsequently brings a suit in the same matter on a full court-fee, such suit dates, [527] for the purposes of limitation, from the time of filing the plaint and not from the date of the application for leave to sue as a pauper. *Aliter* when, leave to sue as a pauper having been granted, the applicant is dispaupered.

[F., 24 C. 889 (891); R., 18 A. 206 (210); 159 P.L.R. (1901) 609.]

THE facts of this case are fully stated in the judgment of the Court.
Pandit *Baldeo Ram Dave* for the appellant.
Mr. *T. Conlan* and Pandit *Moti Lal* for the respondents.

JUDGMENT.

EDGE, C. J., and BANERJI, J.—This was a suit for possession, and the plaintiff claimed by right of inheritance to her father. Her father died on the 18th of October 1879, and on the 21st of September 1891 the plaintiff presented an application, under s. 403 of the Code of Civil Procedure, for permission to sue as a pauper. On the 21st of November 1891, the Court made an order, under s. 409 of the same Code, refusing the plaintiff's application to sue as a pauper. The same Court gave the plaintiff one week within which to pay into Court the full stamps for a non-pauper's suit. Neither the Code of Civil Procedure nor the Court-Fees Act seems to have authorized that latter order of the Court below giving a week's time. The order could not have been made under s. 28 of the Court Fees Act, inasmuch as the application to sue as a pauper was sufficiently stamped and there was no insufficiently stamped document before the Court on that application. On the 28th of November 1891 the plaintiff filed in Court the stamps necessary for a non-pauper's suit. The Subordinate Judge dismissed the suit on ground of limitation. He was of opinion that the suit could not be considered as instituted until the necessary stamps required by the Court-Fees Act had been filed along with the plaint. He also found that twelve years prior to the payment of those stamps into Court adverse possession had been taken, and consequently twelve years' limitation had expired before the 28th of November, 1891. Pandit *Baldeo Ram*, on the question of the construction of Act No. XIV of 1882, has relied on the decision of the Privy Council in *Skinner v. Orde* (1).

[528] The Subordinate Judge thought that that case did not apply, as in that case, before any adverse order had been made on the application for leave to sue as a pauper, the requisite stamp had been filed, whereas in the present case the stamps requisite for a fully stamped suit had not been filed in Court until after the order of refusal under s. 409 of the present Code of Civil Procedure had been made.

* First Appeal, No. 47 of 1894, from a decree of Maulvi Muhammad Mazhar Husain Khan, Subordinate Judge of Mainpuri, dated the 23rd December 1893.

(1) 2 A. 241.

1895
APRIL 25.
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17 A. 526 =
15 A.W.N.
(1895) 106.

1895

APRIL 25

APPEL-

LATE

CIVIL.

17 A. 526=

15 A.W.N.

(1895) 106.

It appears to us that the present Code of Civil Procedure makes a distinction between what is to happen in the case of an order being made under s. 409, refusing permission to the applicant to sue as a pauper, and the case of an order dispauperising a person already having permission to sue as a pauper. In the case of an order dispauperising a plaintiff, the Court, under s. 412, must make an order on the plaintiff to pay the Court fees which would have been paid if he had not been permitted to sue as a pauper, and the presumption is that on payment of those Court fees the dispauperised plaintiff could continue his suit as of the date on which it was first instituted. It is obvious from s. 413 that when an order of refusal under s. 409 is made, the suit cannot be continued as of its original institution. When an order under s. 409 is made there is a bar to any further application to sue as a pauper, but the plaintiff, having first paid the costs, if any, incurred by Government in opposing his application for leave to sue as a pauper, is allowed by that section the liberty of instituting a suit in the ordinary manner in respect of such right as he may have. That section satisfies us that under this Code, upon an order of refusal under s. 409, the proceedings instituted under s. 403 come to an end, and if the applicant for leave to sue as a pauper wishes to proceed with the vindication of his rights, he must sue in the ordinary course, and of course the date of the institution of that suit would not be the date of the presentation of the application for leave to sue as a pauper but would be the date on which the suit was instituted. We are bound to hold that this suit was instituted for the purposes of limitation on the 28th of November 1891, and not before.

The plaintiff had endeavoured to show that Makhan Lal and Ram Dyal did not take possession of any kind, much less adverse [529] possession, until Magh or Phagun following the death of the plaintiff's father in October 1879. Magh and Phagun were respectively the January and February following the death. We must look to what was the position of affairs when Jagan Nath died. Jagan Nath had been carrying on an extensive business, he likewise had a zamindari, and the kharif rents would fall due in November and December, and it is not pretended on behalf of the plaintiff that she, or anyone on her behalf, took possession on the death of her father. At the time when her father died Ram Dyal was living with him and Makhan Lal was living next-door. In our opinion the probabilities are that Ram Dyal and Makhan Lal immediately on the death of Jagan Nath took possession of his mercantile business and entered into occupation of his lands, shops and zamindari. One of the witnesses relied on by the plaintiff says that Makhan Lal and Ram Dyal took possession of the houses and shops immediately on the death of Jagan Nath.

We think the circumstances make it probable that they did take possession, and the evidence on the part of the defendants that possession was so taken is more reliable than the evidence on behalf of the plaintiff.

We hold the suit time-barred at the time when it was instituted and we dismiss this appeal with costs.

Appeal dismissed.

17 A. 529 = 15 A.W.N. (1895) 119.

APPELLATE CIVIL.

Before Mr. Justice Burkitt.

JHABBU SINGH (*Applicant*) v. GANGA BISHAN (*Objector*).
[1st May, 1895.]

Act No. VIII of 1890 (*Guardian and Wards Act*)—Joint Hindu family—Appointment of guardian of property of minor.

It is not competent to a Court under Act No. VIII of 1890 to appoint a guardian of the property of a minor who is a member of a joint Hindu family. *Virupakshappa v. Nilgangava* (1) and *Sham Kuar v. Mohanunda Sahoy* (2) referred to.

[*Appr.*, 20 A. 400; *R.*, 6 C L.J. 383; *D.*, 21 M. 402 (403).]

[530] THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Roshan Lal* and Mr. *Hudson*, for the appellant.

Munshi *Madho Prasad*, for the respondent.

JUDGMENT.

BURKITT, J.—In this case it is admitted that the appellant and the father of the minor were the sons of one father, though by different mothers. I do not comprehend what the learned Judge of the Court below means when he describes them as "foster brothers." The status of the family at present is that of a joint Hindu family possessed of property as such. The presumption of law to that effect is particularly strong in the case of brothers. No allegation of severance or partition between the brothers was made by the respondent. The only thing he said was that they were not on good terms with one another, and occupied separate houses, a matter which is quite consistent with their constituting a joint and undivided family. The minor having taken his father's position in the family, and there being no allegation of any partition or severance after the death of the minor's father, it is clear that the minor and his uncle, the appellant, are members of a joint undivided family possessed of property as such.

It is not alleged that the minor possesses any property or any interest in any property other than his interest in the joint property of the family. That being the case, I am of opinion that under the Guardian and Wards Act (VIII of 1890) the Court below had no power to appoint a guardian of the minor's property. It was so held by a Full Bench of the Bombay High Court in the case of *Virupakshappa v. Nilgangava* (1) and by the Calcutta High Court in the case of *Sham Kuar v. Mohanunda Sahoy* (2).

In the rule of law laid down by those Courts, and in the reasons given for it, I fully and without reserve concur. Adopting that rule, I, as far as the present appeal is concerned, allow the appeal and discharge the order appointing the respondent, Ganga Bishan, to be guardian of the property of the minor. But at the same [531] time I see no reason for varying that part of the order which appoints Ganga Bishan to be the guardian of the person of the minor. That portion of the order of the lower Court will stand. As appellants have partly succeeded and partly failed, I make no order as to costs.

Order modified.

* First Appeal No. 9 of 1895, from an order of H. F. D. Pennington, E.q., District Judge of Fatehgarh, dated the 9th January 1895.

(1) 19 B. 309.

(2) 19 C. 301.

1895

MAY 1.

APPEL-

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CIVIL.

17 A. 529 =

15 A.W.N.

(1895) 119.

1895

MAY 2.

APPEL-
LATE
CIVIL.

17 A. 531 = 15 A.W.N. (1895) 126.

APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.*KALAVATI (*Plaintiff*) v. CHEDI LAL AND OTHERS (*Defendants*).^{*}
[2nd May, 1895.]

17 A. 531 =

15 A.W.N.

(1895) 126.

Civil Procedure Code, s. 462 Minor—Circumstances necessary to make a compromise by a guardian or next friend on behalf of a minor binding on the minor.

In order to make an agreement or compromise to which s. 462 of the Code of Civil Procedure applies a lawful agreement or compromise, it is necessary that the next friend or guardian should ask the Court to consider the proposed terms of the agreement or compromise, and before making the agreement or entering into the compromise should obtain permission from the Court to enter into the agreement or compromise proposed. The Court should record the fact that such application was made to it; that the terms of the proposed agreement or compromise were considered by the Court; and that, having regard to the interests of the minor, the Court granted leave to the making of the agreement or compromise.

From the mere fact that the Court passed the decree in accordance with the compromise it cannot be inferred that any of those steps preliminary and necessary to the making of the decree have been taken by the Court.

[R, 20 A. 370 (373); 31 C. 111 (119) = 7 C.W.N. 688; 29 M. 104; 3 C.L.J. 119 (127); 17 C.P.L.R. 158; 7 C.W.N. 90 (93); 1 O.C. 50 (51); D., 20 A. 98 (99); 8 C.L.J. 266 (270); 8 C.L.J. 274 = 13 C.W.N. 163 = 4 Ind. Cas. 467 (469); 11 Ind. Cas. 105 (110).]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. D. N. Banerji, Munshi Ram Prasad and Babu Durga Charan Banerji, for the appellant.

Babu Jogindro Nath Chaudhri, for the respondents.

JUDGMENT.

EDGE, C. J., and BANERJI, J.—This is an appeal from the decree of the Subordinate Judge of Aligarh. The plaintiff, who is a minor, is, through her guardian, the appellant. The respondents are defendants in the suit. The parties, after the suit had been instituted, agreed to a compromise. They filed the compromise in the [532] Court, and the compromise having been verified, the Subordinate Judge made a decree in the terms of compromise and thus disposed of the suit. It is no doubt the duty of the Court under s. 375 of the Code of Civil Procedure to pass a decree in accordance with any lawful compromise which may be made by the parties, so far as that compromise relates to the suit. But in order to see what a lawful compromise is, where a minor is concerned, we must turn to s. 462 of that Code. That section was enacted for the protection of minors, and it positively forbids any next friend or guardian for a suit from entering into any agreement or compromise on behalf of a minor in reference to a suit in which such friend or guardian acts as such friend or guardian without the leave of the Court. The section would be entirely inoperative to afford any protection for minors in such cases if it meant that the Court was not to exercise, and was not bound to exercise, a judicial discretion as to the

* First Appeal No. 126 of 1894, from a decree of Babu Ganga Saran, Subordinate Judge of Aligarh, dated the 28th February 1894.

propriety, in the interests of the minor, of the agreement or compromise. In order to make an agreement or compromise to which s. 462 applies a lawful agreement or compromise, it is necessary that the next friend or guardian should ask the Court to consider the proposed terms of the agreement or compromise, and before making the agreement or entering into the compromise should obtain permission from the Court to enter into the agreement or compromise proposed. Further, the Court should record the fact that such application was made to it; that the terms of the proposed agreement or compromise were considered by the Court; and that having regard to the interests of the minor, the Court granted leave to the making of the agreement or compromise. From the mere fact that the Court passed the decree in accordance with the compromise, it cannot be inferred that any of those steps preliminary and necessary to the making of the decree had been taken by the Court. Indeed, looking at the proceedings in this case and the orders passed, it is obvious that the Court never considered the question as to whether the compromise was a proper one in the interests of the minor, and the only point to which the Court directed its attention was the acknowledgment by the parties that the agreement had been made.

[533] We allow this appeal, and, setting aside the decree of the Court below, remand the suit under s. 562 of the Code of Civil Procedure to the Court below, to be decided on the merits. It will be competent for the guardian to apply to the Court for permission to compromise the suit, and if the Court grants leave, after considering the question of the interests of the minor, and the parties agree to the compromise, it will then be the duty of the Court to make a decree in accordance with s. 375 of the Code of Civil Procedure. If the suit is tried out, the Court must take special care to see that justice is done to the minor, if she has any title. The costs of this appeal will abide the event.

Appeal decreed and cause remanded.

17 A. 533 = 15 A.W.N. (1895) 121.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

MEWA KUAR (*Defendant*) v. BANARSI PRASAD (*Plaintiff*).^{*}
[8th May, 1895.]

Civil Procedure Code, ss. 43, 44—Claim for possession and for mesne profits arising out of one cause of action—Suit for possession—Subsequent suit for mesne profits barred.

Where a plaintiff sued for possession of immoveable property upon a forfeiture and for rent in respect of the said property up to the date of the alleged forfeiture, and, having obtained a decree, subsequently brought a separate suit for mesne profits including the period from the date of the forfeiture to the date of the institution of the former suit. *Held* that the claim for mesne profits for the period above mentioned was barred by s. 43 of the Code of Civil Procedure. *Lalji Mal v. Hulasi* (1) and *Venkoba v. Subbanna* (2), referred to.

[**Affirmed**, 23 A. 227 (P.C.) = 5 C.W.N. 193 = 11 M.L.J. 56 = 3 Bom. L.R. 154 = 7 Sar. 825; **Not F.**, 32 M. 330 (333) = 5 M.L.T. 105 = 2 Ind. Cas. 313 (314); **Appr.**, U.B.R. 1904, 1st Qr., C.P.C. 42 (43); **R.**, 18 A. 131 = 16 A.W.N. 2; 20 A. 430 (432); 3 L.B.R. 56 (57); 9 O.C. 224 (226); 9 O.C. 322 (324).]

* First Appeal No. 63 of 1894, from a decree of Munshi Mata Prasad, Subordinate Judge of Bareilly, dated the 1st December 1890.

(1) 3 A. 660.

(2) 11 M. 151.

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THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Madho Prasad*, for the appellant.

Mr. *D. N. Banerji* and Pandit *Sundar Lal*, for the respondent.

JUDGMENT.

EDGE, C. J., and BANERJI, J.—In this suit the plaintiff claimed *mesne* profits. Part of the period for which the *mesne* profits were claimed was from the 31st of January 1889 to the 23rd of December 1889. The plaintiff got a decree and the decree gave him interest on the *mesne* profits at the rate of Rs. 12 per cent. per annum. The defendant has appealed from that decree.

The first point taken on behalf of the defendant was as to the plaintiff's title. That point is not open to the defendant. She is bound by the decree in the previous suit, which established against her the title of the plaintiff to the land in question from the 31st of January 1889.

The second point was as to the amount of interest allowed on the *mesne* profits. Twelve per cent. per annum is a little high, but not an unreasonable nor an unusual rate of interest in these provinces. On the question of interest we see no reason for interfering with the discretion of the Courts below.

The next point raised for the appellant is as to the plaintiff's right to claim *mesne* profits for the period between the 31st of January 1889 and the 23rd of December 1889. In the previous suit, which was a suit for ejectment on a forfeiture, rent was claimed up to the 31st of January 1889. That was the date on which the forfeiture was alleged to have taken place, the date on which the plaintiff's right to possession was disputed, and from which he alleged that this defendant and the other defendant wrongfully held possession against him. It has been contended on behalf of the defendant that the plaintiff's claim for *mesne* profits between the 31st of January 1889 and the 23rd of December 1889 is barred by s. 43 of Act No. XIV of 1882. In support of that contention a Full Bench ruling of this Court—*Lalji Mal v. Hulasi* (1)—has been cited. On the other hand, on behalf of the plaintiff-respondent it is contended that the effect of clause (a) of s. 44 of Act No. XIV of 1882 is to differentiate the cause of action for the recovery of land from the cause of action for the recovery of *mesne* profits in respect of that land, and the decision of the Calcutta High Court in *Lalessor Babui v. Janki Bibi* (2) following a Full Bench [535] ruling of that Court was relied upon. The wording of ss. 43 and 44 of Act No. XIV of 1882 is not happy and suggests confusion. In s. 43 the word "claim" is treated as something arising out of a "cause of action" and as distinct from the term "cause of action." When we come to s. 44 we find that "cause of action" and "claim" are treated as synonymous. Whether it was intended by s. 44, which provides a rule of procedure, to enact that a claim for *mesne* profits and a claim to recover the land in respect of which the *mesne* profits are claimed, cannot arise out of the same cause of action, we do not know. It is possible that there may be a case in which a party would be entitled to claim recovery of immovable property and to claim *mesne* profits in respect of that property in which the cause of action might not be the same, and it may have been to provide for such a case as that that clause (a) of s. 44 was inserted in that section. Such a case does not present itself to our minds. We

(1) 3 A. 660.

(2) 19 C. 615.

cannot say that such a case has not arisen. What the first paragraph of s. 43 enacts, so far as it is necessary to refer to it, is that—
 "Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action." In the former suit the cause of action in respect of which the claim for possession was made was, so far as the present defendant was concerned, the forfeiture entitling the plaintiff to possession and the wrongful keeping of the plaintiff out of the possession and enjoyment of the property. Now what was the cause of action for the *mesne* profits claimed from the defendant-appellant? It was stated briefly that, the plaintiff being entitled by reason of the forfeiture to possession, this defendant wrongfully withheld possession from the plaintiff and deprived him of the profits of the land. It appears to us that there were here not two causes of action, but one and the same cause of action, and that the same cause of action which supported the plaintiff's claim for possession in the previous suit supports his claim for *mesne* profits in the present suit, so far as the period between the 31st of January 1889 and the 23rd of December 1889 is concerned. The claim for possession and the claim for *mesne* profits in respect of the period between the [536] 31st of January and the 23rd of December 1889 were claims which the plaintiff was in our opinion entitled to make in the former suit against the defendant in respect of the cause of action on which he sued in the former suit within the meaning of s. 43. The previous suit was instituted on the 23rd of December 1889. Consequently in respect of the cause of action upon which the present plaintiff succeeded in obtaining a decree for possession in that suit he was in that suit entitled, if he had made it, to support his claim for *mesne* profits between the date of the wrongful withholding of possession, namely, the 31st of January 1889, and the date when he brought that suit, namely, the 23rd of December 1889. This view is supported by the Full Bench decision of this Court referred to above, and by a decision of the Madras High Court in *Venkoba v. Subbanna* (1).

We hold that the plaintiff is, by reason of s. 43 of Act No. XIV of 1882 and the previous suit, disentitled to claim *mesne* profits between the 31st of January 1889 and the 23rd of December 1889 in this suit. As the parties cannot agree as to the amount of *mesne* profits to be deducted from the decree of the Court below as the result of our judgment, we remand this case to the Court below under the provisions of s. 506 of the Code of Civil Procedure to find what are the *mesne* profits to which the plaintiff is entitled after excluding the *mesne* profits for the period between the 31st of January 1889 and the 23rd of December 1889. Ten days will be allowed for filing objections on the return to our order. The Court below may take such further evidence as may be necessary.

Cause remanded.

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[537] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burkitt, and Mr. Justice Aikman.

BHAWANI PRASAD (*Defendant*) v. KALLU AND OTHERS (*Plaintiffs*).^{*}
[17th June, 1895.]

Act No. IV of 1882 (Transfer of Property Act), s. 85—Mortgage—Suit for sale on mortgage—Non-joinder of parties—Joint Hindu family—Suit for sale on mortgage by father without joining sons.

When a plaintiff mortgagee institutes a suit for sale under s. 88 of Act No. IV of 1882 against his mortgagor, who is the father of sons in an undivided Hindu family governed by the Mitakshara, without joining as parties to the suit the sons of the mortgagor, of whose interests he has notice, and obtains a decree and an order absolute for sale against the father only, the sons can successfully sue for a declaration that the mortgagee decree-holder is not entitled to sell in execution of his decree for sale the interests of the sons in the property comprised in the mortgage given by the father, although the sole ground of their suit is that they were not parties to the suit by the mortgagee. So held by EDGE, C. J., KNOX, BLAIR, BURKITT and AIKMAN, JJ. (*Dissentiente BANERJI, J.*)

Held, by BANERJI, J., that where, under the circumstances above described, a decree has been obtained against the father alone without joining the sons, the sons cannot, in the suit brought by them, plead against the operation of the decree on their interests any pleas other than those which they could have urged against the claim of the mortgagee in order to relieve them from liability for their father's debt had they been made parties to the mortgagee's suit.

[Diss. 27 C. 724; 21 M. 222 = 8 M.L.J. 126; 22 M. 207; 1 O.C. 53; F., 21 A. 301; R., 18 A. 109 (111); 18 A. 320 (322); 20 A. 110 (F.B.); 21 A. 193 = 19 A.W.N. 27 (28); 21 A. 356 (359); 22 A. 307 (309); 22 A. 408 (410); 24 A. 211 = A.W.N. (1902) 21; 29 A. 544 = 4 A.L.J. 424 = A.W.N. (1907) 159; 30 A. 256 = 5 A.L.J. 267 = A.W.N. (1909) 106; 33 A. 7 (9) = 7 A.L.J. 852 (855) = 7 Ind. Cas. 112; 34 A. 549 (563) = 9 A.L.J. 819 (820) = 15 Ind. Cas. 126; 33 C. 676 = 3 C.L.J. 131; 12 Bom.L.R. 811 (817) = 7 Ind. Cas. 990 (991); 14 C.L.J. 530 (534); 16 C.L.J. 116 (118) = 17 Ind. Cas. 99 (100); 11 Ind. Cas. 8; 12 Ind. Cas. 155 (157); 18 Ind. Cas. 848 (850); 2 N.L.R. 90; 7 N.L.R. 67 (68); 9 N.L.R. 1 (7); 7 O.C. 137 (140); 61 P.R. 137 (140); 64 P.R. 1903 = 132 P.W.R. 1908; D., 22 A. 394 (396); 25 A. 214 (F.B.) = 23 A.W.N. 21; 23 C. 517 = 5 C.W.N. 640; 21 M. 167.]

THE facts of this case are as follows:—

One Pemi, with his five sons, formed a joint Hindu family, which owned as ancestral property a share in a certain grove. Pemi, without the assent or knowledge of his sons, mortgaged the said share to Bhawani Prasad. The mortgagee brought a suit against Pemi upon the mortgage executed by him, to which suit the sons were not made parties, and obtained a decree against Pemi for sale of the property. Thereupon three of the sons of Pemi, Kallu, Zorawar and Khiali, sued for a declaration that the decree obtained by Bhawani Prasad did not affect their interests in the property covered by it, alleging that they were no parties to the suit, and had received no benefit from the loan in respect of which the mortgage was executed. The Court of first instance (Munsif of Bareilly) [538] dismissed the plaintiffs' suit. The plaintiffs appealed, and the lower appellate Court (Subordinate Judge of Bareilly), holding that the effect of section 85 of the Transfer of Property Act was to render the

* Second Appeal No. 776 of 1893, from a decree of Maulvi Jafar Husain, Subordinate Judge of Bareilly, dated the 27th April 1893, reversing a decree of Maulvi Ahmad Ali Khan, Munsif of Bareilly, dated the 15th December 1892.

decree ineffectual as against the shares of the sons, decreed the appeal, and gave the plaintiffs the declaration claimed. The defendant, mortgagee, appealed to the High Court.

The appeal came on for hearing before a Bench consisting of Knox and Blair, JJ., and it was argued that the point in issue was concluded by the judgment of the Court in the case of *Badri Prasad v. Madan Lal* (1). But as it was contended on behalf of the appellant that the ruling referred to above was not necessarily decisive of the particular point, and that the passages relied upon by the respondents might possibly be considered as *obiter*, the appeal was referred to the Chief Justice for the appointment of a Bench of three or more Judges for its decision. Upon this reference a Bench consisting of Blair, Banerji and Burkitt, JJ., was constituted, which Bench in its turn made the following order of reference to the Full Bench of the whole Court :—

“ We refer the following question for decision to a Full Bench of the whole Court :—

“ When a plaintiff mortgagee institutes a suit for sale under s. 88 of Act No. IV of 1882 against his mortgagor, who is the father of sons in an undivided Hindu family governed by the Mitakshara, without joining as parties to the suit the sons of the mortgagor, of whose interests in the mortgaged property he has notice, and obtains a decree and an order absolute for sale against the father only, can the sons successfully sue for a declaration that the mortgagee decree-holder is not entitled to sell their interests in the mortgaged property in execution of that decree, the sole ground of their suit being that they were not parties to the suit of the mortgagor ? ”

Babu *Jogindro Nath Chaudhri*, for the appellant.

Pandit *Sundar Lal*, for the respondents.

On this reference the following judgments were delivered by the Full Bench :—

JUDGMENT.

[539] BANERJI, J.—The circumstances which have given rise to the suit in this case are these. One Pemi, with his five sons, formed a joint Hindu family governed by the Mitakshara law, owning a share in a grove which has been found to be the ancestral property of the joint family. He and his brother, since deceased, borrowed some money from Bhawani Prasad, the appellant, and for the amount so borrowed they executed a simple mortgage of the grove in favour of Bhawani Prasad. Bhawani Prasad brought a suit on his mortgage, making Pemi and the legal representative of his brother the only defendants to the suit, and on the 23rd of February 1892 he obtained a decree for the sale of the mortgaged property under s. 88 of the Transfer of Property Act, 1882. On his applying under s. 89 of the Act for an order absolute for sale, three of the sons of Pemi, the respondents to this appeal, objected to the making of the order. Their objection having been disallowed, they brought the present suit claiming a declaration that their interests in the mortgaged property were exempt from liability for the decree. The main ground of their claim was that they were not parties to the suit in which the decree was passed. They did not deny the fact of the debt, and they did not allege that the debt was incurred by Pemi for immoral or impious purposes. The Court of first instance dismissed the

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suit, on the ground that the plaintiffs had not even asserted, much less proved, that the debt of their father was tainted with immorality. On appeal, the lower appellate Court set aside the decree of the Munsif and decreed the claim, holding that, as the plaintiffs were not joined as parties to Bhawani Prasad's suit, the decree obtained by him was not capable of execution as against their interests in the mortgaged property.

The correctness of this decision has been assailed in this second appeal, and the question which we have to consider upon this reference to the Full Bench is substantially this :—Whether the plaintiffs can succeed in their suit on the solitary ground that they were not parties to Bhawani Prasad's suit against their father, or they must also establish, either that their father did not incur any debt, or that the debt was one which by reason of their pious obligation as Hindu sons they were not legally bound to pay.

[540] The question is one of difficulty, and my difficulty in considering it has been enhanced by reason of certain observations contained in the judgment of the learned Chief Justice in the case of *Badri Prasad v. Madan Lal* (1) which, it is said, have practically decided it. At page 83 the learned Chief Justice is reported to have said :—"If the plaintiffs in this suit, which was commenced after the Transfer of Property Act, 1882, came into force, having notice that the sons had an interest in the property had omitted to join them, they could have obtained a decree against the father's interest only and could not have obtained a decree for sale which would have affected the interests of the sons in the mortgaged property." These observations are not in my judgment conclusive of the question which we have to decide upon this reference. This particular question did not arise nor was it involved in the case of *Badri Prasad v. Madan Lal*, and could not consequently be determined in that case. The questions which were considered and decided in that case were, first, whether "the sons in a joint Hindu family could be sued along with their father upon a mortgage bond given by the father alone," and, secondly, what was the nature of the decree to which the mortgagee was entitled. In dealing with the second question, the learned Chief Justice made the observations to which I have referred above, and it seems to me that they were only some of the reasons which induced him to make the decree which was passed in that case. As such, they can only be treated as expressions of opinion and not as a judicial determination of the question now under consideration. My learned brothers Knox and Blair, or either of them, apparently held this opinion when they referred the case to a Bench of three Judges, and had probably some hesitation in accepting the *dictum* of the learned Chief Justice, otherwise there was evidently no reason for their making that reference. At the hearing of the case before my brothers Blair and Burkitt and myself, I understood those learned Judges to be of the opinion that the present question was not concluded by the authority of the Full Bench ruling referred to above. The question is therefore *res integra* and must be decided on its own merits. I [541] may add that in the view which I take of this case, the observations of the learned Chief Justice leave the present question wholly untouched.

There can be no doubt that as the plaintiffs to this suit had an interest in the property comprised in the mortgage made in favour of Bhawani Prasad, they were, under s. 85 of Act No. IV of 1882, necessary

parties to the suit brought by Bhawani Prasad to enforce that mortgage. It seems that, by reason of the omission to implead them, Bhawani Prasad's suit was, according to the ruling of the majority of the Full Bench in *Matadin Kasodhan v. Kazim Husain* (1), liable to dismissal. It may also be that if he could at all obtain a decree for sale in that suit, that decree should have been confined to the interests of the father only. He has, however, obtained a decree for the sale of the whole of the mortgaged property; and the question we have to consider is—what was the effect of the omission to join as parties the sons of the mortgagor upon the decree so obtained and upon the interests of the sons in the mortgaged property?

Ordinarily every person who has the right to redeem a mortgage should be allowed an opportunity to exercise that right, and, if such opportunity is not afforded to him, he continues to retain that right until it becomes barred by the operation of the law of limitation. If a sale be held before he is foreclosed of his right of redemption, the sale cannot pass to the purchaser his interests in the property. The consequence therefore of an omission to join in the mortgagee's suit for sale persons who were necessary parties to it is, that the right of redemption of those persons is preserved to them, and that they are entitled to exercise that right until it has been foreclosed by suit or has become barred by efflux of time.

A Hindu son governed by the Mitakshara law, however, stands on a somewhat different footing. It has been established by the decisions of their Lordships of the Privy Council that it is the pious duty of the son to pay his father's debts not incurred for purposes of immorality out of the ancestral estate in which the son has an interest, and the obligation attaches to the son equally whether [542] the debts are or are not secured by a mortgage of the whole of the ancestral estate. It is also an established proposition that an alienation of the ancestral estate made by the father in consideration of such debts is binding on the interests of the son, and that an auction sale of the ancestral estate effected at the instance of a creditor of the father for the realisation of such debts passes to the purchaser the interests of the son also. In *Nanomi Babuasini v. Modhun Mohun* (2) their Lordships said:—"The decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an ancestral debt or against the creditor's remedies for their debts if not tainted with immorality." And it was held by the Full Bench of this Court in *Badri Prasad v. Madan Lal* (3) that they cannot do so even in the lifetime of the father. The only grounds on which a son can escape liability for debts incurred by his father, or can claim that a sale of the ancestral estate effected for the realisation of the debts of the father did not affect the son's interests in the estate, are that the debts were not, as a matter of fact, incurred by the father, or that they were not subsisting debts, or that they were such as by reason of his pious obligation as a Hindu son he was not liable to pay. These being the only grounds on which a son can be relieved of his liability for his father's debts, he may set them up in answer to the creditor's suit, if he be made a party to that suit, or he may bring a suit of his own, if he was not impleaded in the suit of the creditor. But in either case those are the only grounds available to him, and they are available to him, both before sale or after a sale has taken place at the

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(1) 13 A. 432.

(2) 13 C. 21.

(3) 15 A. 75.

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instance of the creditor. Their Lordships of the Privy Council said in *Nanomi Babuasin v. Modhun Mohun* (1):—"It appears to their Lordships that sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable to answer the father's debt and the question how far the sons can be precluded by proceedings taken by or against the father alone from disputing the liability. If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor [543] might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own."

Now, has the Transfer of Property Act, 1882, in any way superseded or modified the principles of Hindu law thus enunciated by their Lordships of the Privy Council? Unless there are clear and unmistakable indications in the Act itself of the intentions of the Legislature on the subject, one should hesitate to answer that question in the affirmative. Such indications are, in my judgment, not afforded by the provisions of s. 85. In *Namdar Chaudhri v. Karam Raji* (2) Mr. Justice Straight said, with reference to that section, with the concurrence of Mr. Justice Tyrrell:—"Section 85 of the Transfer of Property Act which is now in force only applies a principle which was long before recognised by the Courts of this country, and is a principle to which, in justice, equity and good conscience, it seems to me those Courts were bound to give effect." In this view I also fully concur, and this seems to me to be the inference which arises from the following observations of the learned Chief Justice in *Matadin Kasodhan v. Kazim Husain* (3). At page 453 he said:—"The decisions to which I have referred show, and I think rightly, that, as well before as since Act IV of 1882 came into force, a mortgagee had no right to bring mortgaged property to sale under his mortgage without redeeming the prior mortgage, if any, or affording the subsequent mortgagee, if any, an opportunity to redeem, and that in a suit by a mortgagee for sale on his mortgage the other mortgagees, whether prior or subsequent, were necessary parties." The same inference arises from most of the cases collected in the judgment of the learned Chief Justice in that case. In my opinion s. 85 only formulates what has always been the rule of procedure, namely, that "all persons whose interests are sought to be prejudicially affected by a suit should be made parties, unless their interests are sufficiently represented and protected by other parties to the suit. (Mitford on Pleadings, pp. 163 and 164.) And it is because that rule was not strictly observed by [544] the Courts, especially in these provinces, and endless litigation was the consequence, that the Legislature seems to have enacted s. 85 to emphasize and enforce the rule. That section does not, in my judgment, lay down any rule of substantive law. There is therefore no warrant for the contention that a decree obtained in violation of the provisions of that section is a void decree. Such a decree is only voidable at the instance of the persons who were not parties to the suit in which it was passed. As s. 85 does not enunciate a new rule of procedure, the enactment of that section cannot and does not affect the rule laid down by their Lordships of the Privy Council, and that rule applies as much to decrees obtained against a father after the passing of Act No. IV of 1882, as to those obtained before the passing of that Act. As I have said above, a

(1) 13 C. 21.

(2) 13 A. 315.

(3) 13 A. 432.

Hindu son to whom the Mitakshara law applies cannot, according to the decisions of the Privy Council, avoid the effect of a decree obtained against his father except on the grounds that the debt in respect of which the decree was passed was not in fact incurred by the father, or, if it was incurred by him and was a subsisting debt, that it was incurred for an immoral and impious purpose. There is no other ground under the Hindu law on which he can avoid liability for the obligation which that law casts on him in respect of his father's debts. Those are the only grounds on which he could have resisted the creditor's suit had he been made a party to it, and as the effect of the omission to make him a party to the creditor's suit was not to render the decree passed in that suit absolutely null and void, but only to relegate the son back to the position in which he was before the suit was brought, I fail to see how he can, after a decree has been passed, urge any plea in respect of the debt which he could not have put forward before the decree. It has been contended that a decree for sale in respect of a mortgage debt stands on a different footing from the debt itself, and that, although a son may be bound to pay a debt to which he was not a party, he can claim exemption from liability for the decree passed in respect of that debt on the sole ground that he was not a party to the suit in which the decree was passed. Assuming this contention to be correct, it must, to be consistent, apply, in the case of a Hindu [545] son governed by the Mitakshara, as much to a simple decree for money as to a decree for the sale of mortgaged property. Both these descriptions of decrees are, it is true, not alike in all their incidents, but their effect as judgment-debts due by the father on the interests of the son in joint ancestral property is, according to their Lordships of the Privy Council, the same. In the case of persons other than Hindus governed by the Mitakshara, a sale held in execution of a simple decree for money obtained against the father alone cannot pass the interest of the son in property owned jointly by the father and the son, but, in the case of a son to whom the Mitakshara law applies, it cannot, in the face of the decisions of the Privy Council, be contended for a moment that the son can avoid the effect of a sale held in execution of such a decree on his own interests in the ancestral property on the ground that he was not a party to the suit and the execution proceedings. If he cannot do so in respect of a sale held in execution of a simple money decree, he is equally disentitled to do so in respect of a sale held in execution of a decree for sale under a mortgage. It has been held by a Full Bench of this Court in *Fateh Chand v. Muhammad Bakhsh* (1) that a decree for sale under s. 88 of Act No. IV of 1882 is "one form of a decree for payment of a debt" (at page 268). Where such a decree has been passed against the father of Hindu sons governed by the Mitakshara law it is a decree for the payment of a debt of the father, and the obligation which attaches to a son in respect of all debts of the father not tainted with immorality attaches to this debt also. A son cannot therefore be in a better position in respect of a decree for sale than he would be in respect of any other debt of the father. The son's obligation has, as held by their Lordships of the Privy Council, reference only to the nature of the debt, and is unaffected by the procedure resorted to by the creditor for the enforcement of the debt. It is imposed on him by law by reason of his being the son of his father, and not by reason of a decree having been passed against the father; and, if the debt to which the decree obtained against the father relates is a debt which is

(1) 16 A. 259.

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binding on the son by reason of his pious obligation as a Hindu son, the [546] decree so obtained is binding on the interests of the son also. I am not aware of any authority, nor has any been cited to us, for the contention that during the lifetime of the father it is necessary for a creditor of the father to establish the son's obligation by a suit against the son. The ruling in *Lachmi Narain v. Kunji Lal* (1) which was not cited at the hearing, but which is supposed to have a bearing on the present question, is not inconsistent with what I have said above. That was a case in which a simple decree for money had been obtained against the father, and after the death of the father execution of the decree was sought against the sons under s. 234 of Act No. XIV of 1882, as his legal representatives, by attachment of joint ancestral property which had not been attached in the lifetime of the father. It was held that as the property had passed to the son by right of survivorship it was not assets of the deceased father in the hands of the sons as his heirs or legal representatives, and could not be attached as such. It was further held that the liability of a legal representative under s. 234 of Act No. XIV of 1882, to the extent of the assets of the deceased judgment-debtor which had come into his hands and had not been duly disposed of, stood on a principle different from that of the pious obligation of a Hindu son to pay his father's debts not tainted with immorality, and that the question of such pious obligation could not be raised in and determined by the Court executing the decree against the sons as the legal representatives of their father. That case was decided upon a principle perfectly distinct from that which is applicable to this case, and there is not the remotest analogy between that case and this. The fact seems to have been overlooked that in the case before us the question of the liability of the interest of the plaintiffs in joint ancestral property for the debt of their father, in respect of which Bhawani Prasad has obtained his decree, has been raised not in execution of that decree, but in a suit brought by the sons. Such a suit must, like every other suit, stand or fall with the strength or weakness of the title of the plaintiffs themselves, and, as the sons of a Hindu father governed by the Mitakshara law are not entitled to claim exemption from liability [547] for their father's debts on any grounds other than those laid down by the Privy Council, they cannot succeed in their suit simply on the ground that they were not parties to the suit of the creditor. Section 99 of Act No. IV of 1882 also cannot help the plaintiffs. All that s. 99 provides is that a mortgagee cannot bring to sale the property mortgaged to him otherwise than by instituting a suit for sale under s. 67, and that he cannot sell up a bare equity of redemption. A suit under s. 67 was brought by Bhawani Prasad the appellant, and he has obtained a decree for the sale of the mortgaged property. The circumstances of the plaintiffs not having been joined in that suit only leaves it open to them to try the fact or the nature of the debt in a suit of their own, as held by the Privy Council, or to exercise their right of redemption. In the case of a subsequent incumbrancer it was held in *Namdar Chaudri v. Karam Raji* (2), which was a case under Act No. IV of 1882, that the result of the subsequent incumbrancer having been left out of the suit of a prior mortgagee, would be that his right to redeem the prior mortgage would remain unaffected. The rule in England as regards subsequent incumbrancers is thus stated in Coote on Mortgages, Vol. II, p. 1094:—"A mortgagee who brings an action of foreclosure or sale, whether

(1) 16 A. 449.

(2) 13 A. 315.

he is first or any subsequent incumbrancer, and whether of a legal or equitable estate, must make every incumbrancer subsequent to himself a party to his suit, notwithstanding. With respect to incumbrances subsequent to the mortgage, but prior to the commencement of the action, the rule appears to be that the decree of foreclosure will bind all those who are parties to the action, but not the rest, and it is a general rule to make all such incumbrancers parties, and it seems indeed that they are necessary parties to the suit. And, consequently, a second mortgagee or other subsequent incumbrancer who is not a party to the action may, on payment of the first mortgage debt and costs, redeem the first mortgagee after the decree obtained, although the first mortgagee had no notice of the other incumbrances at the time of the decree." It was conceded by Mr. *Sundar Lal* that, except in *Janki Prasad v. Kishen Dat* (1) no Court has held since the [548] Transfer of Property Act, 1882, came into force in July 1882, that the consequence of the omission to join a subsequent incumbrancer in a prior mortgagee's suit is to confer on the subsequent incumbrancer any higher right than that of redeeming the prior mortgage. It is, however, not necessary to go into that question for the purpose of the present suit. In my judgment when a decree has been obtained against the father, whether in respect of a simple money debt or in respect of a mortgage of the ancestral property, his sons cannot by a suit of their own claim exemption of their interests in the property from liability for the decree on any ground other than that of the immoral nature of the debt, or the non-existence of the debt, or the operation of the law of limitation, and they cannot claim such exemption merely on the ground that they were not parties to the creditor's suit. In the case of a mortgage, if they were not parties to the creditor's suit for sale and they do not impeach the validity of the mortgage, they can only claim to be afforded an opportunity to redeem the mortgage, and thereby to discharge the father's debt, and this they are entitled to do both before sale and after a sale has taken place. Similarly, in the case of foreclosure of a mortgage by conditional sale to which Mr. *Sundar Lal* referred in his argument, if the sons were not parties to the mortgagee's suit, they can equally claim to redeem the mortgage; so that a Hindu son would not in respect of the right of redemption be in any case in a worse position than any of the persons mentioned in s. 91 of Act No. IV of 1882. Any other conclusion will lead to serious anomalies. In the case of an unsecured debt of the father not tainted with immorality, his creditor may bring to sale the whole of the ancestral estate, and such sale will pass the entirety of the estate to the purchaser, even when the sons were not parties to the creditor's suit; but, according to Mr. *Sundar Lal's* contention, in the case of a debt secured by a mortgage, if a decree be obtained without making the sons parties to the creditor's suit, the creditor will not be competent to sell up the interests of the sons and will be in a worse position than an unsecured creditor. Again, if the father chose to sell the ancestral estate in lieu of the amount of a mortgage of that estate effected by him for purposes which were not immoral or impious, there can be no [549] doubt that such sale would convey the interests of his sons also. But, according to Mr. *Sundar Lal's* contention, if the mortgagee, whose rights under the mortgage are not certainly inferior to those of the mortgagor, procured a sale of the mortgaged property by suit, without joining the sons in the suit, the sale would be limited to the interests of the

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father only. Further, if the mortgagee relinquished his rights as such and took a simple decree for money against the father alone, he would be entitled to sell up the interests of the sons also; but if he took a decree upon his mortgage he would not, according to the contention of the respondents, be entitled to obtain a sale of those interests. It is difficult to believe that the Legislature in enacting s. 85 of the Transfer of Property Act, 1882, intended to create such anomalies. It is said that the creditor will not be without his remedy, and that he will still be able to bring a suit against the sons to enforce his mortgage against their interests in the ancestral estate on the ground of their pious obligation to pay their father's debts. It cannot possibly be held that no remedy will be open to the creditor, as such a decision will render the rulings of their Lordships of the Privy Council on the question of the liability of Hindu sons in respect of their father's debts wholly nugatory. But, even assuming that a remedy will, as it must, be still open to the creditor, the result will be to foster and bring about an increase of litigation, which it was undoubtedly the object of s. 85 to prevent. Every son whom a creditor of his father may have omitted to join in his suit against the father would be able to avoid and delay the sale of his interests in the ancestral estate by bringing a suit on the ground of such omission, although he might have nothing to urge in respect of his father's debts. If the father happened to have several sons, each of them might bring a separate suit of this kind. In such cases the creditor would have to bring suits against the sons to which the sons may have no answer. The result would be the institution of numerous suits which would otherwise have been wholly unnecessary. No doubt a mortgagee bringing a suit for the sale of ancestral property against the father should join as parties to his suit the sons of the mortgagor of whose interests he has notice, in order that the decree passed in the suit may be [550] binding on the sons as a decree for the payment of their father's debt and future litigation may thus be avoided. If such a mortgagee violates the provisions of s. 85 of Act No. IV of 1882 by not impleading the sons, he may thereby run the risk of his suit being dismissed with costs for non-joinder of necessary parties. He may also run the risk of the decree for sale being confined to the interest of the father only. He undoubtedly runs the risk of the question of the fact and the nature of the debt being subsequently raised and reopened by the sons in a suit of their own. But where, as in this case, a decree has been obtained against the father alone without joining the sons, the sons cannot, in my judgment, plead against the operation of the decree on their interest any pleas other than those which they could have urged against the claim of the mortgagee in order to relieve themselves from liability for their father's debt had they been made parties to the mortgagee's suit. I fail to see how the conclusion at which I have arrived can have the effect of rendering s. 85 practically inapplicable to Hindus governed by the Mitakshara law. On the contrary, the opposite view will, as I have shown above, not only militate against the rules of Hindu law, neutralise the effect of the several rulings of the Judicial Committee of the Privy Council, and create anomalies which the Legislature certainly never contemplated, but will also promote, in many cases, needless litigation contrary to the avowed object of s. 85 of Act No. IV of 1882. For the above reasons I would answer in the negative the question referred to the Full Bench, and I extremely regret that this conclusion is not, as I understand, in accordance with the views of my learned and honourable colleagues.

EDGE, C.J.—The plaintiffs, who are respondents to this appeal,

were and are, with their father Pemi, members of a joint Hindu family, and, as such, were and are, with their father, co-parceners in certain ancestral property of the joint family. The defendant Bhawani Prasad, who is the appellant in this appeal, brought, upon a mortgage of the family property which had been made in his favour by Pemi, a suit, in 1892, for sale under chapter IV of the Transfer of Property Act, 1882 (Act No. IV of 1882). Although Bhawani Prasad had, when he brought this suit for sale, notice that the sons [551] of Pemi were interested in the property comprised in his mortgage, he did not make them parties to the suit. Notwithstanding that the sons of Pemi were not parties to that suit, Bhawani Prasad obtained a decree under s. 88 of the Transfer of Property Act, 1882, for sale of the joint family property, and attempted to execute that decree by sale of not only Pemi's interest in the joint family property, but the interests of the sons in that property. The sons of Pemi thereupon brought the suit in which this appeal has arisen, praying that their share in the joint family property might be exempted from sale in execution of Bhawani Prasad's decree. The sons did not allege, and in my opinion there was no necessity for them to allege in this suit, that the debt in respect of which Bhawani Prasad had obtained his decree had been tainted with immorality. I am further of opinion, for reasons which will appear later on, that an issue as to whether the debt upon which Bhawani Prasad obtained his decree for sale was or was not tainted with immorality would have been an irrelevant issue in this suit, in which the simple question is not—was that debt one which, owing to the pious duty of a Hindu son to pay his father's debts which are not tainted with immorality, the sons were under a legal obligation to pay? but is,—can that legal obligation be enforced by a suit for sale brought under chapter IV of Act IV of 1882, to which suit the sons were not parties? A simple decree for money can be made under the Code of Civil Procedure; it gives no priority to the decree-holder over other judgment-creditors of the judgment-debtor, and confers no right on a purchaser under it against mortgagees, except such right as the judgment-debtor had, namely, a right to redeem the mortgaged property. A decree for sale, on the other hand, can be made only under chapter IV of Act No. IV of 1882. It creates a lien, and gives priority over all holders of simple decrees for money, and settles the amount on payment of which a co-parcener or other person mentioned in s. 91 of that Act may redeem the mortgaged property, and if there are other mortgagees of the property, the priorities of redemption, and orders that if such amount be not paid by the defendant or defendants on or before a day to be fixed within a limited period by the Court, the property [552] shall be sold. The purchaser under a decree for sale takes the property freed from all rights, mortgages and charges of parties to the suit for sale, and the parties to that suit must be all those persons having an interest in the property of whose interest the plaintiff in such suit has notice. It is obvious that the title which passes on a sale under a decree for sale is more certain, and consequently more valuable, than is the title which passes on a sale in execution of a simple decree for money, and that a decree for sale is a more valuable security to the creditor than is a simple decree for money. In order to prevent the recurrence of cases of gross hardship, and so far as possible to remove all grounds for endless and exhausting litigation theretofore the rule, the Legislature, in s. 99 of Act No. IV of 1882, enacted that no mortgagee should be entitled to bring the mortgaged property to sale except by a suit under s. 67 of that Act. One of the suits which may be brought under s. 67 is a suit for sale.

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Section 67 and s. 85 are two of the sections included in chapter IV of that Act. Section 85 is as follows :—

“Subject to the provisions of the Code of Civil Procedure, s. 437, all persons having an interest in the property comprised in a mortgage *must* be joined as parties to any suit under the chapter relating to such mortgage: Provided that the plaintiff has notice of such interests.” Section 437 of the Code of Civil Procedure enacts that :— “In all suits concerning property vested in a trustee, executor or administrator, when the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not be necessary to make them parties to the suit. But the Court may, if it thinks fit, order them or any of them to be made such parties.” The reference in s. 85 of Act No. IV of 1882 to s. 437 of the Code of Civil Procedure is instructive as showing the cases, and those cases only, in which, for the purposes of a suit under chapter IV of Act No. IV of 1882, a party to a suit under that chapter may be treated as representing a person interested in the mortgaged property who is not a party to the suit. I have not yet heard any one suggest even in the wildest arguments that the father in a joint Hindu family is, as such, a trustee [553] executor or administrator, within the meaning of s. 437 of the Code of Civil Procedure, of his son, particularly if that son is alive and *sui juris*. Consequently we may dismiss from the consideration of this case the suggestion that Pemi in Bhawani Prasad's suit for sale of the interests of the sons in the family property represented his sons or could have been treated by Bhawani Prasad or by the Court in that suit as representing them for the purposes of s. 85 of Act No. IV of 1882. This will clear away one fog which at the hearing to some extent obscured the question of law before us.

As I understand ss. 99, 67 and 85 of Act No. IV of 1882, the Legislature intended that no mortgagee should bring the mortgaged property to sale except by a suit for sale under s. 67, and in that suit all persons interested in the mortgaged property of whose interest the plaintiff had notice must be parties, except when the title to the property is vested in a trustee, executor or administrator, in which case the trustee, executor or administrator must be a party to the suit, and may, as such trustee, executor or administrator, represent for the purposes of the suit and of any decree which may be passed in it the persons beneficially entitled to the property. The word “must” is one of the strongest words of compulsion which a Legislature can employ, and Courts are, in my opinion, bound to give effect to it, and not to ignore it and its significance. The less significantly imperative word “shall” of s. 541 of the Code of Civil Procedure has been held by all the Judges of this Court to be so imperative as to preclude a Court from accepting a memorandum of appeal which is not accompanied by a copy of the decree appealed against, and from treating the presentation of a memorandum of appeal which is not accompanied by a copy of the decree as a valid presentation of an appeal.

In order to prevent the point of law which we have to determine being obscured and to prevent confusion of thought and of legal principles, I propose now to state concisely what the point of law is: it is this—does the pious duty which makes it incumbent on a Hindu son to pay out of his share in the joint family property the debts of his father which are not tainted with immorality render the son's share in the family property liable to be sold in execution of a [554] decree for sale passed against his father in a suit for sale under chapter IV of the Transfer of Property Act, 1882,

brought in violation and contravention of the Statute, and to which suit the son was not a party, unless the son pleads that the debt in respect of which the suit was brought was tainted with immorality? In other words, does the pious duty estop the son from showing that the decree as against the property and his father creating the judgment-debt was obtained by the decree-holder in contravention and violation of the law?

There are some points upon which we all are agreed. They are these:—It has not been disputed at the Bar or on the Bench, and we all are agreed, that it is the pious duty of a Hindu son to pay such debts of his father as are not tainted with immorality. That pious duty creates a legal obligation in the son which can be enforced by a suit against the son for sale under Chapter IV of Act No. IV of 1882, or by a suit for a simple decree for money to the extent of the family property in his hands, and can also be enforced in execution of a simple decree for money obtained in a suit brought in accordance with law against the father, although the son was not a party to the suit, provided that attachment of the family property was obtained in the father's lifetime. It would seem unnecessary to state that the Judges of this Court are agreed upon what is now firmly established law. I make that statement, however, now once and for all in this case, as experience has taught me that, if I did not make it, it might be assumed that I was ignorant of what the law on that point is, and because experience has also taught me that the reiteration of an admitted principle of law distracts attention from the point in issue and may cancel the fact that the admitted principle of law is being wrongly applied or that an unsound deduction is being drawn from it.

I believe we all are agreed that the legal obligation of a Hindu son in a joint family to pay those debts of his father which are not tainted with immorality cannot be enforced except by a suit under Chapter IV of Act No. IV of 1882, if the enforcement is sought against joint family property mortgaged by the father to the creditor, or by execution of simple decree for money obtained in a suit authorized by the Code of Civil Procedure, if the enforcement [555] be not sought against property mortgaged by the father to the creditor, and that in no case does the law allow the creditor to enforce that legal obligation except by due process of a Court of law.

We all are agreed that s. 85 of Act No. IV of 1882 applied equally to Hindus as to Muhammadans or Christians, and that there is nothing in Act No. IV of 1882 to indicate that the Legislature did not intend that section to apply as fully to Hindus as to Muhammadans and Christians. We all are agreed that s. 85 is highly imperative, and that it is the duty of a Court to dismiss a suit brought and attempted to be maintained by the plaintiff in contravention of that section, whether the suit be brought by a Hindu, Muhammadan or a Christian; but that the Court, if it sees fit to so do, may add necessary parties under section 32 of Act No. XIV of 1882. We all are agreed that the sons in a joint Hindu family are persons having an interest in the property comprised in a mortgage of the family property within the meaning of s. 85 of Act No. IV of 1882, and thus they must be joined as parties to a suit under Chapter IV of Act No. IV of 1882 relating to such mortgage, provided that the plaintiff in such suit has notice of such interest, and seeks a decree for sale of the interests of the sons, and not merely a decree for sale of the interests of the mortgagor, their father.

We all are agreed that s. 85 applies as fully to the case of a Hindu son who has an interest in the property comprised in a mortgage as it does to any prior or subsequent mortgagee of the property or to any

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person mentioned in section 91 of Act No. IV of 1882. We all are agreed that it has been found by the Court of first appeal in this suit that when Bhawani Prasad, the defendant-appellant, brought his suit for sale under Chapter IV of 1882 upon his mortgage, he had notice that these plaintiffs-respondents were interested as members of a joint Hindu family in the property comprised in the mortgage. We all are agreed that, if it had been brought to the attention of the Judge in Bhawani Prasad's suit for sale that these plaintiffs-respondents were interested in the property and that Bhawani Prasad was aware of that fact when he instituted [556] his suit, it would have been the duty of the Judge to have dismissed that suit, and not to have made a decree for sale of the family property, unless the Judge thought fit to exercise the discretion vested in him by s. 32 of the Code of Civil Procedure.

We all are agreed that, notwithstanding the pious duty of a Hindu son to pay his father's debt not tainted with immorality, the law does not impose upon him any obligation to discharge those debts in any way if a suit to recover them happens to be barred by limitation.

We all are agreed that it is the duty of a Court under s. 4 of Act No. XV of 1877, subject to the other provisions of that Act, to dismiss every suit which is instituted after the period prescribed therefor by the second schedule annexed to that Act, although limitation has not been set up as a defence.

It was conceded at the Bar, and we are agreed, that if a creditor of a Hindu father obtains a decree against the father for sale of the family property, or simply a decree for money, in a suit against the father alone which was barred by limitation and seeks to enforce the decree against the share of a son in the family property, the son is entitled to show that the suit, was, when brought, barred by limitation, and that the suit and the decree were in contravention of the Indian Limitation Act, 1877; and that in such a case, even if the son admitted that the debt in respect of which the creditor had brought his suit was one which he, the son, was under a pious obligation to pay, and even if the creditor's decree had become final against the father, that decree could not be enforced against any interest of the son in the family property.

We all are agreed that the sons in a joint Hindu family can defeat the right of a decree-holder to execute against their interests in the family property a decree which he has obtained against their father in a suit against the father alone, notwithstanding that such decree has become final, upon proving that at the time when the suit against their father was brought the debt of their father had been discharged, as, for example, by payment.

We all are agreed that my brother Banerji and I rightly held in our carefully considered judgment in *Lachmi Narain v. Kunji Lal* (1), that a creditor, who, in order to obtain payment of a debt due to him by a Hindu father, obtained in a suit against that father alone a decree for money, cannot, after the father's death, bring any part of the family property to sale in execution of that decree unless he had obtained attachment of the property in the father's lifetime; and that in such case the only remedy which is open to the creditor is such suit as he can maintain against the son, and that in such suit by the creditor, and not in the execution proceedings, the question as to whether the father's debt was

tainted with immorality could be inquired into. If we are to hold here that Bhawani Prasad's decree for sale can be enforced in this case, there would be startling anomaly in the law or rather in judicial decisions.

In the present case it is not suggested by any one that Bhawani Prasad's decree was obtained otherwise than in contravention of the imperative provision of s. 85 of Act No. IV of 1882, and yet it is said that he is entitled to execute that decree by sale of the shares of the Hindu sons in the family property, because in fact, although contrary to law, Bhawani Prasad had obtained that decree, and it has become final as against the father, and because there is a pious obligation upon the sons to pay their father's debt unless they can show that the debt was tainted with immorality. On the other hand, in *Lachmi Narain v. Kunji Lal* (1), a creditor who had in fact obtained in due course of law and procedure a decree against a Hindu father which had become final, but who had not obtained attachment in the father's lifetime was held not to be entitled to execute that decree against any part of the family property, and not even against what had been the father's share, whether or not the debt was one which it was the pious duty of the son to pay. Further, we all are agreed that if Bhawani Prasad's suit for sale had been barred by limitation at the time when it was brought, these plaintiffs-respondents would be entitled to a decree in their suit declaring that Bhawani Prasad's decree could not be enforced against their interests in the family property upon proving that Bhawani Prasad's suit had been in fact barred by limitation, notwithstanding that it was not dismissed and that he got his decree, which had [558] become final against the father, and that the sons would be entitled to such declaratory decree without either alleging or proving that the original debt of their father was tainted with immorality. The decision in *Lachmi Narain v. Kunji Lal* (1) and the admittedly correct proposition of law to which I have last referred show that the sole test as to the right of a judgment-creditor of a father in a joint Hindu family to sell the interests of the sons in the family property in execution of his decree is not the issue whether or not the debt of the father was tainted with immorality; that admittedly true proposition of law and the admittedly true proposition of law that a son in a joint Hindu family can successfully resist the execution against his interests in the family property of a decree obtained against his father, and which has become final, by simply proving that the debt of his father had been discharged, as, for example, by payment, before the suit against the father was brought, show that the finality of the decree so far as the father is concerned is not the test of the liability or non-liability of the sons' interest in the family property to be brought to sale in execution of a decree against the father. It appears to me that these considerations must dissipate two other fogs which during the argument were to some extent obstructing a clear view of the question of law upon which this appeal depends.

I had great difficulty in understanding at the hearing what the contention in favour of Bhawani Prasad really was. At one time it was argued that Bhawani Prasad was entitled to execute the decree for sale by a sale of the sons' interest in the family property because the sons had not in their suit pleaded and proved that their father's debt in respect of which the suit for sale was brought was tainted with immorality. At another time it was argued that Bhawani Prasad was entitled to execute his

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decree by sale of the son's interest in the family property because, rightly or wrongly, Bhawani Prasad had obtained that decree and it was the pious duty of the sons to discharge the judgment-debt. It appears to me that there has been some confusion of ideas and of legal principles. What the sons say is :—We do not deny that there is a legal obligation upon us to pay [559] our father's debts which are not tainted with immorality ; it will be time enough for us to raise the question as to immorality when a suit is brought against us which is in compliance with s. 85 of Act No. IV of 1882, and by reason of s. 99 of Act No. IV of 1882, it is only in execution of a decree obtained in a suit against us under Chapter IV of that Act that our interests in the family property can be sold by this mortgagee ; up to the present no such suit has been brought, and this suit of ours is not brought in aid of the decree which Bhawani Prasad obtained, but is brought to obtain a declaration that the decree which Bhawani Prasad got in his suit under Chapter IV of Act No. IV of 1882, to which we were not parties, cannot be enforced against our interests in the family property. We entirely dispute the proposition that there is under the Hindu law any pious duty to pay a judgment-debt, as such, of our father, obtained in a suit to which we were not parties if that judgment was obtained in contravention of the Indian Limitation Act, 1877, or in contravention of Chapter IV of the Transfer of Property Act, 1882, or if the debt, if it ever was incurred, had been discharged by payment before suit ; in none of those cases would there be any pious duty or legal obligation upon us to pay the judgment-debt, as such.

The legal obligation arising upon the pious duty of a Hindu son to pay his father's debts which are not tainted with immorality can only be enforced in a properly constituted suit and in due process of law. No one would suggest that a creditor of a Hindu father could, except in the execution of a decree, seize and sell the family property.

Prior to the passing of the Transfer of Property Act, 1882, the procedure allowed by, and the law as administered by, most Courts had caused great hardship to the people and gross scandal to the administration of justice. The only class of people who had benefited in that state of things were the legal practitioners. In those days a mortgagee was allowed by the Courts to bring a suit for sale on his mortgage and to get a decree for sale, and to execute it, without making any person interested in the mortgaged property except the mortgagor a party to his suit, whether the mortgagor [560] happened to be a Hindu father who had mortgaged the joint family property of himself and his sons, and whether there were two or a dozen other mortgagees, prior or subsequent, holding separate mortgages over the same property. After the sale the prior or subsequent mortgagees and the Hindu sons brought separate suits against the purchaser, against the mortgagor, and against each other, to the ruin of some, if not all, of them, and the mortgaged property in too many cases finally disappeared in court-fees and the charges of legal practitioners. It was to remedy such a state of things and prevent its recurrence that s. 85 of Act No. IV of 1882 was enacted. The Legislature was not at all concerned, nor am I, with the fact that the enforcement by Courts of Justice of the provisions of Chapter IV of Act No. IV of 1882, and particularly of those contained in ss. 99 and 85, would interfere with the means of livelihood of those who adopt the profession of the law in this country. What the Legislature was concerned about, and what it desired to protect, was the interests of those persons in this country who have an interest in property sought to be affected by a

suit for sale, or by a suit for foreclosure, or by a suit for redemption, interests which theretofore had been neglected.

The Legislature advisedly used the word "must" in s. 85. That there was necessity for the use of the word "must" by the Legislature to carry its meaning is amply proved by the persistent attempts which have been made to evade compliance with that section and to recur to the former harassing procedure which had been tolerated by the Courts. In enacting s. 85 the Legislature made no exception in respect of joint Hindu families, their contracts, or their property, or the remedy of the creditor of the father in a joint Hindu family. The Legislature in enacting the Transfer of Property Act, 1882, did not overlook the fact that Hindus, Muhammadans and Buddhists had peculiar laws of their own. By s. 2 of the Act it is enacted that "nothing in the second chapter of this Act shall be deemed to affect any rule of Hindu, Muhammadan or Buddhist law." Section 85 is in Chapter IV of the Act. Had the Legislature intended that the provisions of s. 85 should not apply to Hindus, it would have expressly exempted them from its operation, as it has excluded them by s. 69 from the exercise of a power of sale in a mortgage without the intervention of a Court. I infer that the Legislature intended s. 85 to be applied to all alike, no matter what might be their peculiar rule of their law.

So far as I am aware, no case arising on s. 85 of Act No. IV of 1882 has yet come before their Lordships of the Privy Council, and unless and until I am told by the Privy Council or by the Legislature to apply s. 85 as Bhawani Prasad would have us apply it, I shall not be a party to driving a coach and six through the beneficent provision of that section and to opening the door to a recurrence of the state of things which existed before that section was passed and to bringing ruin and harassing litigation upon the members of Hindu joint families, and for no other purpose than to assist a creditor out of a difficulty which by his wilful disregard of s. 85 he has got himself into.

I am confident that by applying firmly the rulings of this Court in *Mata Din Kasodhan v. Kazim Husain* (1) and *Janki Prasad v. Kishan Dat* (2) and the rule which is, I think, the true rule, and which is enunciated in *Badri Prasad v. Madhan Lal* at pages 82 and 83 of I. L. R., 15 All., litigation on mortgages will, so far from increasing, decrease. We shall have before the Courts in suits on mortgages all the parties who are known to the plaintiff to be interested in the property, and their respective rights will be determined in one suit and not in a dozen. It is better to follow the law and insist upon its being obeyed than to act loosely in the administration of the law and perpetuate an evil. If Bhawani Prasad had joined the sons as defendants in his suit for sale there could have been but one suit, and, if he had succeeded, but one set of costs to be paid out of the property under the decree passed under s. 88 of Act No. IV of 1882. If the view of the law contended for on behalf of Bhawani Prasad be correct, Bhawani Prasad, by bringing the suit which he brought in contravention of s. 85, and by concealing from the Court in that suit the fact that his suit was in contravention of the Statute, obtained a decree to which he was not entitled, and yet that decree is to be executed by a sale of the [562] interests of the sons in the family property, unless the sons bring a suit against Bhawani Prasad and prove in it that the original debt was tainted with immorality, was barred by limitation, was never incurred, or

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(2) 16 A. 478.

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BENCH. I was much struck by one illustration, given by Pandit *Sundar Lal*, when arguing this case, of the legitimate result of our accepting the view of the law contended for on behalf of Bhawani Prasad. It was this:—
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17 A. 537 (F.B.)=
15 A.W.N. (1895) 212. If it be the law that these Hindu sons cannot resist the execution of this decree for sale except by bringing a suit in which they prove that the debt was tainted with immorality, the same rule must be applied in the case of a suit for foreclosure of a mortgage by way of a conditional sale. In such a suit the decree under s. 86 of Act No. IV of 1882 may declare what is the amount due to the plaintiff for principal and interest on the mortgage and for his costs of suit, if any, awarded to him, and may order that upon the defendant paying to the plaintiff or into Court the amount so due on a day within six months from the date of declaring in Court the amount due to be fixed by the Court, the plaintiff shall deliver up to the defendant all documents, &c., and shall transfer the mortgaged property to the defendant, but that if the payment is not made on or before the day to be fixed by the Court the defendant shall be absolutely debarred of all right to redeem. According to the view of the law contended for on behalf of Bhawani Prasad not one of the persons mentioned in s. 91 of Act No. IV of 1882 would be in any way bound by a decree passed under s. 86 unless he was a party to the suit, or unless, although not a party to the suit, he happened to be a son in a Hindu joint family and his father happened to be the defendant to the suit. Any other person mentioned in s. 91 who was not a party to the suit for foreclosure or for sale could, notwithstanding such decree, bring his suit to redeem at any time within sixty years from the time when the right to redeem accrued, and yet the unhappy Hindu son, whether he knew or did not know of the suit or of the decree, would be precluded from all right of redemption unless he paid the amount decreed on or before the day [563] fixed by the Court, which, in the case of the decree in the suit for foreclosure to which I have referred, would be a day within six months of the date of the decree. The unhappy Hindu son could not dispute the validity of that decree and its binding effect upon his interest in the family property unless he could succeed in a suit brought by him against the mortgagee decree-holder in proving that the mortgage-debt had been tainted by immorality. According to the proposition contended for as law on behalf of Bhawani Prasad, it would in such case be sufficient that the mortgagee had got a decree under s. 86 against the father, and it would be absolutely immaterial that the Hindu son had no knowledge of the suit or of the decree until after the period fixed by the decree for redemption had expired and the rights to redeem of the members of the joint Hindu family had been for ever barred. That would indeed be another startling anomaly in the law. I have heard no attempt made to meet that illustration of Pandit *Sundar Lal*, yet, if we hold that Bhawani Prasad's decree can be executed by sale of the interests of these Hindu sons in the joint family property, we must, if we are to be consistent in our construction of s. 85 of Act No. IV of 1882, and in the application of the law, hold, should the case arise, that the rights of the sons in a Hindu joint family to redeem the family property are for ever barred by a decree of foreclosure obtained in their absence, and of which they have had no notice, on the expiration of the time fixed by the Court for redemption, if the original debt was not tainted with immorality. I have not heard any one suggest what is the principle of law, of equity, of justice, or of good conscience by which the period of

sixty years allowed to any one else who is within s. 91 of Act No. IV of 1882 is, in the case of a son in a joint Hindu family, to be cut down by a decree under s. 86 (to which he is not a party and of which he had had no notice) to a period within six months from the date of the decree.

The pious duty of a Hindu son to pay his father's debts which are not tainted with immorality is a fact beyond dispute; the corollary sought to be applied here on behalf of Bhawani Prasad, if it be a legitimate inference from the preceding proposition, reduces, in my opinion, that proposition to an absurdity.

[564] The decree in Bhawani Prasad's suit for sale decreed the sale of the property unless the amount due for principal and interest on the mortgage and the costs of that suit awarded to Bhawani Prasad were paid within six months. In the course of the arguments, I asked on what possible principle, or on what rule of Hindu or other law, there was any obligation, legal, pious or otherwise, on the sons to pay Bhawani Prasad's costs of the suit for sale which was brought in contravention of s. 85 of Act No. IV of 1882 to which the sons were no parties. To that question no one ventured to offer an answer. In truth, no answer except one could have been given, and that was that neither the sons nor their interests in the family property could on any principle or rule of any law be made liable for these costs; and yet we are asked to hold that their interests may be sold to satisfy the amount decreed, which includes those costs.

Before concluding, I may say that in my opinion that part of my judgment in *Badri Prasad v. Madan Lal* (1) which is contained in the paragraph which commences at page 82 and concludes at page 83, was all strictly relevant to one of the questions which the Full Bench had in that case to decide, namely, what was the decree which we should make in the case? Every word of my judgment in that case was carefully considered in consultation with the other five Judges of the Court as it was then constituted, and as the result of that consultation the judgment as reported was delivered and was concurred in by all the then Judges of the Court. It has not been suggested that the following passage in that judgment was *obiter*:—"In that suit, as they sought a decree for sale against not only Madan Lal's interest in the mortgaged property, but against the interests of his sons, they, having notice that the sons had an interest in the mortgaged property, properly and in accordance with s. 85 of that Act, joined the sons as parties to the suit." That was the opinion which we expressed as to the construction of s. 85 of Act No. IV of 1882. It is said, however, that the following opinion was *obiter*:—"If the plaintiffs in this suit, which was commenced after the Transfer of Property Act, 1882,

[565] came into force, having notice that the sons had an interest in the property had omitted to join them, they could have obtained a decree against the father's interest only, and could not have obtained a decree for sale which would have affected the interests of the sons in the mortgaged property." It appears to me that the latter proposition was necessarily involved in the former. When this case was called on for argument it was pointed out by Pandit *Sundar Lal* that, so far as this Court was concerned, the question of law was concluded by the judgment from which I have quoted. As, however, my brother Banerji was of opinion that the question was still open, and as two other Judges on the Bench thought it arguable whether the passage which I have last quoted was not *obiter*, we decided to hear the arguments in the case. I have already to some

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extent indicated what in some respects is the difference between a simple decree for money and a decree for sale, and as that subject has been also dealt with in the judgment of my brother Burkitt, which I have had an opportunity of reading, it is not necessary that I should go further into that question. No doubt each is a decree for payment of a debt, but the effect of each decree upon the rights of persons not parties to the suit is totally dissimilar, and the procedure under which each is obtained is different.

I would reply to the question sent to the Full Bench by saying that, under the circumstances stated in that question, the sons can successfully sue for a declaration that the mortgagee decree-holder is not entitled to sell in execution of his decree for sale the interests of the sons in the property comprised in the mortgage given by Pemi, although the sole ground of their suit is that they were not parties to the suit by Bhawani Prasad.

BURKITT, J.—The question referred to the Full Bench is as follows:—

“When a plaintiff-mortgagee institutes a suit for sale under section 88 of Act No. IV of 1882 against his mortgagor, who is the father of sons in an undivided Hindu family governed by the Mitakshara, without joining as parties to the suit the sons of the mortgagor, of whose interest in the mortgaged property he has [566] notice, and obtains a decree and an order absolute for sale against the father only, can the sons successfully sue for a declaration that the mortgagee decree-holder is not entitled to sell their interests in the mortgaged property in execution of that decree, the sole ground of their suit being that they were not parties to the suit of the mortgagee?”

The facts on which it has arisen are very simple. One Pemi and his sons constituted a joint undivided Hindu family possessed as such of certain ancestral property. Pemi mortgaged a share in a grove, being a portion of the ancestral joint property, to the defendant-appellant Bhawani Prasad. The latter instituted a suit under the Transfer of Property Act against Pemi to recover the debt by sale of the mortgaged property and obtained a decree for sale. In that suit Pemi's sons were not impleaded. When Bhawani Prasad applied under s. 89 of the Transfer of Property Act for an order absolute for sale some of Pemi's sons intervened and objected to the order being made. Their objections were overruled. Accordingly in the present suit Kallu, Zorawar and Khiali, three out of the five sons of Pemi, ask for a declaration that their interest in the joint property, of which they declare themselves to be in possession, is not liable to be taken and sold in execution of *the decree* against their father. In their plaint many matters were alleged, but they have all fallen to the ground, excepting the plea that as the plaintiffs, though being “persons having an interest in the property comprised in the mortgage,” of which interest Bhawani Prasad had notice, were not joined as parties to the suit, they are not bound by the *decree* against their father and that their interest in the joint property could not be sold to satisfy that decree. The first Court dismissed the suit on the ground that the plaintiffs, the sons, had not attempted to prove that their father's debt was contracted for immoral purposes. The lower appellate Court held that the plea as to non-joinder of the sons was fatal and gave a decree in favor of the sons. Hence this appeal by the mortgagee decree-holder.

The question for our consideration and decision is—can the interests of the sons, the respondents, be sold under the circum- [567]

stances mentioned above in execution of the decree against the father? Now, s. 85 of the Transfer of Property Act lays down in very comprehensive and imperative language that "all persons having an interest in the property comprised in a mortgage *must be joined* as parties to any suit under this chapter (*i. e.*, chapter IV) relating to such mortgage." The suit by the appellant on his mortgage against his mortgagor, Pemi, was a suit under Chapter IV of the Transfer of Property Act. It is clear also that, as Pemi had sons, and as the mortgaged property being ancestral was the joint undivided property of Pemi and of his sons, the latter were persons who had an interest in the property comprised in the mortgage. They therefore, under the provisions of s. 85, should have been made parties to the suit. They were not so impleaded. No question has been raised as to appellant having notice of the son's interest. He has not denied that he had such notice, and the suit and this reference proceeded on the assumption that he had notice. What then is the result of the appellant's failure to implead Pemi's sons? That question is answered in very distinct and unmistakeable language by the Full Bench of this Court in the case of *Badri Prasad v. Madon Lal* (1). That was a case in which a person who held a mortgage executed by the father in a Hindu joint family sued not only the father but also the sons on the mortgage. It was held that the sons were properly impleaded in their father's lifetime under s. 85 of the Transfer of Property Act, and the Full Bench added:—"If the plaintiffs in this suit, which was commenced after the Transfer of Property Act, 1882, came into force, having notice that the sons had an interest in the property, had omitted to join them, they could have obtained a decree against the father's interest only, and could not have obtained a decree for sale which would have affected the interests of the sons in the mortgaged property." I was one of the Judges who concurred in that dictum, and I see no reason whatever for dissenting from it now. It is contended however that the dictum is merely "*obiter*," and that possibly is so, as it was not strictly necessary for the decision of the case. But even so, it is a dictum of the learned Chief [568] Justice, in which the five other Judges of the Court after consultation unanimously concurred.

The effect of the non-joinder of Pemi's sons in the suit on the mortgage of the joint property, in my opinion, is that those sons are not bound by the decree in that suit nor are their interests affected by it. It was faintly contended for the appellants that the sons were not persons "having an interest" in the mortgaged property. In my opinion there is no force in that contention. Each of the sons at his birth acquired an interest in the ancestral joint property of the family into which he was born, and I have no doubt that such an interest is "an interest in the property" within the meaning of s. 85 of the Transfer of Property Act, 1882. It was further contended that the omission to implead the sons did not vitiate the decree obtained against Pemi. That proposition is, I think, correct as far as Pemi is concerned; the decree having now become final is a perfectly good decree, though, had a plea of nonjoinder of necessary parties been taken before decree, either the suit would necessarily have been dismissed or the sons would have been added as parties under section 32 of the Code of Civil Procedure. But I cannot accede to the further proposition that the decree is a good decree against, and is one which affects the interests of, the sons, unless they can show either that there

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(1) 15 A. 75 = 13 A.W.N. (1893) 52.

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was no debt of the father or that the debt was contracted for immoral purposes. To affirm such a proposition would, in my opinion, have the effect of repealing *pro tanto* s. 85 of Act No. IV of 1882, inasmuch as it would relieve a plaintiff instituting a suit under Chapter IV of Act No. IV of 1882 from the necessity of complying with the imperative requirements of that section in the matter of the joinder of the parties jointly interested in the mortgaged property as members of an undivided Hindu family of whose interest the plaintiff has notice.

It was argued that under the "pious duty" incumbent on sons in a Hindu family of paying their father's debts when not tainted with immorality the respondents in this case could not resist the appellant's claim to take their interests in the joint property to satisfy their father's debt. Such no doubt might have been the [569] case if the decree against the father had been a simple money decree. In that case, the ancestral property of the family might have been sold in execution of that decree. But if the mortgagee in the present case had been content to ask for and obtain such a decree he would have subjected himself to the risks attaching to the holder of a simple money decree, such for instance, as that he would not be entitled under clause (c) of section 295 of the Code of Civil Procedure to have the proceeds of the sale applied (after payment of expenses) to the discharge of the principal and interest due on his incumbrance *in priority* to other holders of decrees for money. That is one of the risks he would incur, and I may also mention another and a very serious risk which he would be subject to as holder of an ordinary money decree against the father only in a joint Hindu family, there being in existence sons who were not parties to the decree. Unless the holder of such a decree takes steps during the father's lifetime to enforce his decree by attachment of the joint ancestral property, he cannot after the father's death have execution of his decree against the joint ancestral property, and must institute a suit against the sons if he desire to enforce against them the "pious duty" of paying the debt of their deceased father. This rule is very fully and clearly laid down in the recent case of *Lachmi Narain v. Kunji Lal* (1) in which, after an elaborate examination of the authorities bearing on the question it was held that a "creditor of a father in a joint Hindu family governed by the law of the Mitakshara, who has obtained a simple decree for money in a suit against the father alone, cannot obtain execution of that decree against the joint family property or any part of it in the hands of the son in execution of that decree instituted after the death of the father and not being a proceeding in continuation of an attachment of the property affected during the lifetime of the father." In such a case it was further held that "if the creditor desire to obtain a remedy against the ancestral property or any part of it in the hands of the son he must seek that remedy in a suit against the son," in answer to which the son will be entitled to prove any [570] matter which would be a defence to the suit. It is impossible to entertain any doubt as to the correctness of the rule of law propounded in that case. To my mind it goes very far towards minimising the "anomaly" on which so much stress was laid at the hearing of this appeal. That anomaly consisted in this, that the holder of a simple money decree against the father alone in a joint Hindu family might have execution of that decree against the joint ancestral property of the whole family (the debt not being one tainted with immorality), while the holder

(1) 16 A. 449.

of a decree for sale under the Transfer of Property Act against the father alone could sell in execution of that decree the interest of the father alone, if the view of the law for which the respondents contend is correct. But the force, if any, of that anomaly is much lessened by the consideration I have adverted to above, and further I would add that if the appellant had obeyed the law laid down in s. 85 of the Transfer of Property Act, and on impleading the respondents had obtained a decree for sale against them also, he would have been entitled to have execution of that decree against the whole joint ancestral property, whether or not other persons held simple money decrees against the father or against any of the sons or against all of them, and also whether or not the father had died before process of execution had commenced. Clearly, if a plaintiff, when instituting a suit under chapter IV of the Transfer of Property Act, complies with the provisions of s. 85 of that Act, he, on obtaining a decree for sale, occupies an immeasurably stronger position than the holder of a simple decree for money, despite of the length to which the rights of the latter have been recently extended by the Privy Council.

In my opinion, in a suit under Act No. IV of 1882, the "pious liability" of a son to pay his father's mortgage-debt can be enforced only in a suit for sale properly framed for that purpose, and with a proper array of parties, as was the case in *Badri Prasad v. Madan Lal*, where the sons were impleaded. It must be enforced by a suit for sale which complies with the provisions of s. 85 of the Transfer of Property Act, and not by a suit in which those provisions are entirely disregarded.

[571] I hold that the present is not the stage at which any question of a son's "pious duty" can be raised. The respondents here are not directly questioning the fact that such a "pious duty" is incumbent on them. They ask for no more than a declaration that the decree for sale obtained in a suit for sale under Act No. IV of 1882, to which they were not parties, does not affect their interests in the joint property mortgaged by their father. They do not, by this suit, say that they are not liable to pay the debt if there be a subsisting debt enforceable against them by virtue of a "pious duty," but they do say that the procedure by which it is sought to enforce that liability on them, that is to say in execution of a decree for sale to which they ought to have been, but were not, made parties, is not one permitted by the Transfer of Property Act. In my opinion that contention ought to be allowed, as I hold that here the liability arising out of the "pious duty" incumbent on the respondents cannot be fixed on them in execution of a decree for sale under the Transfer of Property Act obtained against their father alone. Recently in the case of a prior mortgagee who had instituted a suit for sale without joining a puisne incumbrancer of whose interest he had notice,—*Janki Prasad v. Kishen Dat* (1) a similar rule was laid down. And in the case of *Mutadin Kasodhan v. Kazim Husain* (2) the object of s. 85 of the Transfer of Property Act is stated to be to "enable parties to protect their own interests and to prevent litigation."

The present case is a very apt illustration of the mischief which s. 85 was intended to prevent; for, had the mortgagee-appellant, Bhawani Prasad, obeyed the directions of that section by impleading Pemi's sons, this suit would have been unnecessary and impossible. The present litigation is due solely to the appellants having disobeyed the plain provisions of the law and not to any fault of the respondents.

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(1) 16 A. 478 (479).

(2) 13 A. 432.

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I cannot possibly assume that, when framing Act No. IV of 1882 the members of the Legislature lost sight of so well-known and so widespread a tenure as that of land held in co-parcenary by a joint undivided Hindu family. When therefore s. 85 of that Act imposes on a plaintiff instituting a suit under chapter IV [572] of the Act the obligation of joining all parties who possess an interest in the mortgaged property, and of whose interest he has notice, I am unable, without making the impossible assumption mentioned above, to see my way to inferring that the Legislature intended to exempt from that obligation a plaintiff who institutes a suit for sale of the joint property of an undivided Hindu family. The wording of s. 85 is most imperative. It contains no hint that it is not to be applied to all suits under chapter IV of the Transfer of Property Act, and, that being so, I am of opinion that the obligation imposed by it should, like other positive obligations created by law, be enforced by a Court of Justice.

For the above reasons I would reply in the affirmative to the question referred to the Full Bench.

KNOX, J.—I concur with what the learned Chief Justice has just said. Personally, I never had any doubt but that the question set out in the reference could only be decided in favour of the respondents. There seemed no room for a dispute upon the point. The imperative provisions of s. 85 of Act No. IV of 1882, the interpretation placed upon that section by the Court in *Matadin Kasodhan v. Kazim Husain* (1) and the subsequent decision in *Badri Prasad v. Madan Lal* (2) in my mind pointed irresistibly to the conclusion that the decree which Bhawani Prasad obtained was one which conveyed the father's interests only. Still, as it was earnestly pressed upon us by a leading vakil of this Court that the question was not concluded, and it was a question which in the interests of the public should be placed beyond all possible doubt, I consented to make the reference. Moreover, in order to avoid a misconception which may arise from what has been said in another judgment of the Court in this case, I think it well to point out that the decrees for sale to which their Lordships of the Privy Council referred were decrees passed before the Transfer of Property Act, 1882, came into force.

My answer to the reference is in the affirmative.

BLAIR, J.—I also would unhesitatingly answer this question in the affirmative, for the adequate and, as it seems to me, conclusive [573] reasons urged by the Chief Justice and my brother Burkitt. I have no doubt whatever that the language of s. 85 of the Transfer of Property Act is absolutely imperative. I see, neither in that section nor in the chapter which contains it, any hint of limitation or exception; and it is to me quite inconceivable that in a territory peopled by Hindus, an immense number of whom hold their property under the Hindu family system, they could have been intended by the Legislature to be exempted from the action of s. 85, unless there had been, which there are not, words to indicate such exemption. I agree with my brother Burkitt that this is one of the cases which indicates the object of the section and the necessity for its enforcement. I also would answer the question referred in the affirmative.

AIKMAN, J.—I concur in the judgments of the learned Chief Justice and my brother Burkitt, and would answer the question referred in the affirmative.

(1) 13 A. 432.

(2) 15 A. 75.

17 A. 573 = 15 A.W.N. (1895) 135.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Burkitt and Mr. Justice Aikman.

HUSAINI BEGAM (*Petitioner*) v. HUSAINI BEGAM AND OTHERS
(*Opposite parties*).^{*} [30th May, 1895.]

Act No. X of 1870 (*Land Acquisition Act*), s. 39 — *Apportionment of compensation referred to Judge — Denial by one party of right of another to share in compensation — Appeal.*

Under s. 39 of Act No. X of 1870 the fact that one of the persons concerned denies altogether the right of another of such persons to share in the compensation awarded will not prevent an appeal lying from the order of a District Judge apportioning compensation. *Kishan Lal v. Shankar Singh* (1) overruled.

[*Appr.*, 5 C.L.J. 301.]

THIS was a reference to the Full Bench in an appeal from an order of the District Judge of Bareilly under s. 39 of the Land Acquisition Act, 1870.

The order of reference was as follows :—

EDGE, C. J., and BANERJI, J.—This is an appeal from a decision of the District Judge of Bareilly deciding the proportions in which certain persons claiming an interest in compensation made on [574] account of the acquisition of a house and land under Act No. X of 1870 were entitled to share in the amount of compensation which had been settled by the District Judge. The rival claimants deny each other's title to the share in the amount of compensation. The preliminary question is, does an appeal lie, under s. 39 of Act No. X of 1870, from the decision of the District Judge to this Court? We refer this question to a Full Bench of this Court. Our reason for making this reference is that Straight and Mahmood, JJ., in *Kishan Lal v. Shankar Singh* (1) held that where the titles of rival claimants were mutually denied no appeal lay under s. 39. The soundness of that ruling appears questionable, having regard to the wording of ss. 14, 37, 39, and particularly of the definition of "person interested" in s. 3 of that Act. It would appear that those learned Judges omitted to notice that definition.

The facts of the case are sufficiently stated in the order of the Full Bench.

Moti Lal, for the appellant.

Sundar Lal and *Gobind Prasad*, for the respondents.

The judgment of the Full Bench (EDGE, C.J., KNOX, BLAIR, BANERJI, BURKITT and AIKMAN, JJ.) was delivered by Edge, C. J :—

JUDGMENT.

In this case land was taken under the compulsory provisions of Act No. X of 1870. The parties could not agree as to the amount of compensation, nor could they agree as to the apportionment, of the compensation, and accordingly the Collector of Pilibhit referred the matter, under s. 15 of the Act, to the Court of the District Judge of Bareilly for determination. The District Judge settled the amount of the compensation, and he also

^{*}First Appeal, No. 293 of 1893, from an order of T. R. Redfern, Esq., District Judge of Bareilly, dated the 30th June 1893.

(1) 8 A.W.N. (1888) 170.

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decided the proportions in which the parties interested, within the meaning of s. 39 of the Act, were entitled to share in such amount. One of the claimants, namely, Musammat Husaini Begam, claimed to be entitled to the whole of the compensation awarded. The District Judge awarded her only a portion of the compensation. From that decision of the District Judge, Musammat Husaini Begam appealed to this Court. When the appeal was called on for hearing before a Division Bench, the learned vakil for the respondents, relying upon the decision of [575] this Court in *Kishan Lal v. Shankar Singh* (1) raised an objection to the hearing of this appeal on the ground that the appeal did not lie, as Husaini Begam's right to share in the compensation was not only not admitted, but was disputed. The Division Bench doubting the correctness of the decision in *Kishan Lal v. Shankar Singh* referred to the Full Bench the question whether the appeal lay. The learned Judges who decided in *Kishan Lal v. Shankar Singh* that the appeal in that case did not lie were under the impression that no appeal lay under s. 39 of Act No. X of 1870, as to the apportionment, if the title of the appellant to share in the amount awarded was disputed and not admitted. Those learned Judges overlooked the definition of s. 3 of Act No. X of 1870. By that section a "person interested" is thus defined:—"The expression 'person interested' includes all persons claiming an interest in compensation to be made on account of the acquisition of land under this Act." What the Judge has to do under s. 39, so far as the apportionment is concerned, is to "decide the proportions in which the persons interested are entitled to share in such amount." Such amount is the amount of compensation which has been settled. There is nothing in the section to suggest that the Judge should not decide, as between rival claimants to compensation, whether those claimants respectively claim the whole amount or a proportionate part only, all questions of title upon which their right to share in the amount and the proportion to be awarded to them respectively, would depend. The definition clause shows that the words "person interested" are not confined to persons whose title to share in the amount awarded has been admitted. In our opinion the judgment of the Court in *Kishan Lal v. Shankar Singh* was wrong. The High Court at Bombay has held in *Kashim valad Kamal Naik v. Aminbi kom Garasumiya and the Collector of Belgaum* (2) that an appeal lay in a case under such circumstances, the case before that Court being one in which each of the claimants laid claim to the entire amount of the compensation, consequently denying the title of the other to any share in the compensation. It is also clear from the judgment of their Lordships of the Privy Council in *Rajah [576] Nilmoni Singh v. Ram Bundhoo Roy* (3) that, subject to the appeal given by s. 39 of Act No. X of 1870, the decision of the Judge under that section is final and cannot be questioned by a suit, and that the proviso to s. 40 only applies to the cases of persons whose rights have not been determined under the earlier clauses of the Act, such as minors or persons under disability who did not appear at the inquiry as to the amount to be awarded as compensation. This is a further reason, if further reason were required, why we should interpret s. 39 as giving a right of appeal in such a case as this, and our opinion is that the appeal in this case lay. With this answer to the question submitted to the Full Bench the appeal will go back for disposal to the Bench which referred the case.

(1) 8 A. W. N. (1888) 170.

(2) 16 B. 525.

(3) 8 I. A. 90.

17 A. 576 = 15 A.W.N. (1895) 226.

APPELLATE CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

QUEEN-EMPRESS v. GOBINDA AND ANOTHER.*

[31st May, 1895.]

Act No. XLV of 1860 (Indian Penal Code), s. 411—Evidence—Pointing out stolen property concealed in a place not under the accused's control.

Where the sole evidence against a person charged with an offence under s. 411 of the Indian Penal Code consisted of the fact that the accused had pointed out the place where some of the stolen property was concealed in the field of another person: *held* that this was not in itself sufficient evidence to support a conviction under the abovementioned section.

., 13 Cr.L.J. 127 (128) = 16 C.W.N. 238 = 13 Ind. Cas. 783 (784) ; 155 P.L.R. 1908 = 21 P.W.R. 1908 (Cr.) ; 92 P.L.R. (1902) ; R., 51 P.L.R. 1905 = 2 Cr. L.J. 230 ; 29 P.W.R. 1912 (Cr.) = 46 P.L.R. 1912 = 13 Ind. Cas. 220 = 13 Cr.L.J. 28.]

THIS case was referred to a Division Bench by Aikman, J., for the reasons expressed in the following order:—

"I refer this appeal for hearing to a Division Bench. The conviction of the appellant is based merely on evidence that he pointed out a spot in a field, not his own, where certain stolen property was found, and dug up the property therefrom. The conviction could not according to the ruling of Tyrrell, J., in the case of *Empress v. Kinhar* (*Weekly Notes*, 1881, p. 94), and the ruling of Duthoit, J., in an unreported case, *Empress v. Binda* (Criminal Appeal, No. 742, decided on the 12th of January, 1885), be supported on the evidence. But it appears to me that the rule laid down in the cases just referred to is somewhat too broadly stated. I [577] think it right that the point, which is an important one, should be considered by two Judges and order accordingly."

The Government Pleader (Munshi Ram Prasad), for the Crown.

JUDGMENT.

EDGE, C. J., and BANERJI, J.—Some articles were stolen on the 23rd of December 1894. Some of these were found in the house of Dhankua and some in his field. He gave no reasonable explanation how he came to be in possession of the articles found in his house. He was rightly convicted under s. 411 of the Indian Penal Code, and we dismiss his appeal.

Gobinda has been convicted of an offence made punishable under s. 411 of the Indian Penal Code. He pointed out a place in the field of another man in which some of the stolen articles were found. There is no other evidence against him. The mere fact that a person points out a place where stolen property is concealed, if that place is not in his own house or in his own field, but is in the field of another man, is not sufficient, in our opinion, to entitle the Court to find that the person who pointed out the stolen article had received it, or retained it, knowing it to be stolen. There must, to support a conviction in such a case, be some evidence which suggests that the accused himself concealed the article in the place where it was found. It is not sufficient for a conviction that the accused pointed out the stolen article, if it is left doubtful whether the accused or some other person concealed the stolen article, or that the

* Criminal Appeals, Nos. 352 and 353 of 1895.

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accused obtained in some other way information that the stolen property was in the place where it was found. In Gobinda's case we allow his appeal, and, setting aside his conviction and sentence, we acquit him of the charge of which he has been convicted and direct that he be at once released.

17 A. 576 =
15 A.W.N.
(1895) 226.

17 A. 578 = 15 A.W.N. (1895) 132.

[578] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

PATESHURI PARTAP NARAIN SINGH AND ANOTHER (*Defendants*) v.
BHAGWATI PRASAD (*Plaintiff*).^{*} [3rd June, 1895.]

Act No. VII of 1889 (Succession Certificate Act), s. 4—Joint Hindu family—Suit by survivor for debt due to joint family—Evidence—Presumption as to nature of debt where the family is joint.

Where a debt is advanced from the funds of a joint Hindu family and is due to that family, no certificate under Act No. VII of 1889 is necessary to enable the survivor of such family to recover the said debt.

Such debt as above being a bond-debt, it is not necessary that it should appear in the bond that the funds were those of a joint family.

Jagmohandas Kilabhai v. Allu Maria Duskal (1) followed.

[R., 7 C.L.J. 658 (664) = 12 C.W.N. 145.]

THIS was a suit for sale on a mortgage executed by the father of the defendants, the Raja of Basti and his brother, in favour of the plaintiff's father. With the Raja and his brother were joined as defendants several other persons who were purchasers or mortgagees of some of the villages mortgaged by the deed upon which the suit was brought. In the third paragraph of the plaint the plaintiff stated:—"That Babu Sarju Prasad, the father of the plaintiff, and the plaintiff, were the members of a joint Hindu family; and so long as the family was joint, he had no source of income. Babu Sarju Prasad, Mahajan, died on the 29th February, 1888, while the family was joint; and the plaintiff by right of survivorship obtained possession as owner of all the property of the joint family, including the bond sued on. He is therefore competent to maintain this suit."

The defendants, the Raja of Basti and his brother, pleaded *inter alia* that they and their father, the original mortgagor, had constituted a joint Hindu family; that the debt for which the mortgage had been given had been incurred for immoral purposes, and that therefore it was not chargeable on the ancestral property of the family. They also pleaded, in the fourth paragraph of their written statement, that "the plaintiff has not obtained a certificate of heirship, and his claim without doing so is inadmissible."

[579] The Court of first instance (Subordinate Judge of Gorakhpur) found that the debt was not tainted with immorality, and, disallowing the pleas of the various subsequent mortgagees and purchasers, passed a decree in favour of the plaintiff. The Subordinate Judge framed an issue

^{*}First Appeal, No. 51 of 1893, from a decree of Babu Brijpal Das, Subordinate Judge of Gorakhpur, dated the 29th November 1892.

(1) 19 B. 338.

on the question whether a certificate of succession was necessary, but came to no finding upon it.

The two principal defendants appealed to the High Court, and, the case coming on for hearing before Edge, C.J., and Banerji, J., the following order of reference was made :—"The defendants, who are appellants here, as their 4th plea in their written statement pleaded 'that the plaintiff has not obtained the certificate of heirship, and his claim without doing so is inadmissible.'" The Subordinate Judge framed an issue, viz., the 13th, on that plea. He did not try it. If the certificate was necessary, the plaintiff was not entitled to have a decree passed until he produced the certificate. Mr. Reid says that no certificate was necessary because it is alleged in paragraph 3 of the plaint that the father of the plaintiff and the plaintiff were members of a joint Hindu family, and that the plaintiff by right of survivorship obtained possession as owner of all the properties of the joint family including the bond sued on. If it be the law that the survivor of a joint Hindu family can, without producing a certificate under the Act, obtain a decree for a debt which on the face of it became due to a deceased member of the family, then paragraph 3 of the plaint was in effect put in issue by paragraph 4 of the written statement, and the issue ought to have been tried. We have been referred by Mr. Viddya Charan Singh to the case of *Venkataramanna v. Venkayya* (1) and to the case of *Vaidyanatha Ayyar v. Chinnasami Naik* (2). We express no opinion on either of those cases. We make an order under s. 566 of the Code of Civil Procedure, and direct the Subordinate Judge to try the 13th issue framed by the Subordinate Judge, Babu Brij Pal Das, and to return the finding to this Court. It appears that there is no evidence to the record on this issue one way or the other. The Subordinate Judge will permit the parties to produce evidence on this issue. Ten days will be allowed for filing objections on the return."

[580] On this order the Subordinate Judge found "that the debt was due to the plaintiff and his father as members of a joint Hindu family."

The appeal being again put up with certain objections filed by the respondent.

Mr. T. Conlan and Munshi Gobind Prasad, for the appellants.

The Hon'ble W. M. Colvin, Mr. A. H. S. Reid, Munshi Jwala Prasad, Munshi Ram Prasad and Munshi Madho Prasad, for the respondent.

The following judgment was delivered :—

JUDGMENT.

EDGE, C.J., and BANERJI, J.—In first appeal No. 14 of 1893, in which the judgment was delivered on the 18th of December, 1894, we fully considered the question of the alleged immorality and the question of the alleged gift. It is not suggested that there is any feature in this case which would make us alter the view of the facts which we then took.

On the question of there being any necessity for a certificate under the Act No. VII of 1889, the findings on remand show that the debt was advanced from the funds of a joint Hindu family and is due to that family. There was consequently no necessity for a certificate in the suit by the survivors.

(1) 14 M. 377.

(2) 17 M. 108.

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(1895) 132.

In our opinion it is not necessary in such a case that it should appear in the bond that the funds were those of a joint Hindu family, and we agree with the case of *Jagmohandas Kilabhai v. Allu Maria Duskal* (1). The other grounds were not pressed. We dismiss this appeal with costs. We have given effect to the objections filed to the findings on remand.

Appeal dismissed.

17 A. 581 (F.B.) = 15 A.W.N (1895) 128.

[581] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burkitt and Mr. Justice Aikman.

NARINDRA BAHADUR PAL (*Defendant*) v. KHADIM HUSAIN AND OTHERS (*Plaintiffs*).^{*} [7th June, 1895.]

Act No. XXXII of 1839—Act No. IV of 1882 (*Transfer of Property Act*), ss. 88, 89—*Mortgage—Non-contractual post diem interest—Such interest not part of the mortgage money—Act No. XV of 1877 (Indian Limitation Act), Sch. ii, Art. 116—Limitation.*

When in a suit for sale under ss. 88 and 89 of Act No. IV of 1882 a Court allows under Act No. XXXII of 1839 interest *post diem*, its decree so far as such *post diem* interest is concerned is not a decree for sale under section 88, but is a decree for money which can be executed in the manner provided for the execution of simple money decrees. *Bikramjit Tewari v. Durga Dyal Tewari* (2) dissented from.

Article 116 of sch. ii of Act No. XV of 1877 applies to a claim to have interest allowed under Act No. XXXII of 1839 in respect of the non-payment on the due date of the money due under a registered mortgage deed, if the suit is not brought within six years of the breach of contract.

[*Diss.*, 19 A. 39 (P.C.) = 1 C.W.N. 52 = 6 M.L.J. 214 = 7 Sar. 88 ; R., 18 A. 316 (319) ; 24 C. 699 (F.B.) = 1 C.W.N. 437 ; 12 C.P.L.R. 18 ; D., 22 B. 107 (109).]

THE facts of this case are fully stated in the judgment of the Court. Babu Jogindro Nath Chaudhri, for the appellant. Mr. D. N. Banerji, for the respondents.

JUDGMENT.

EDGE, C.J., KNOX, BLAIR, BANERJI, BURKITT and AIKMAN, JJ.—On the 23rd of April, 1892, the plaintiffs, who are the respondents in this appeal, brought a suit in the Court of the Subordinate Judge of Gorakhpur praying for a decree for sale under s. 88 of Act No. IV of 1882 of the villages Birari and Bhadwa on a mortgage dated the 28th of April, 1879, and also praying that in the event of the sale proceeds of the two villages not being sufficient for the satisfaction of the demand of the plaintiffs, an order might be entered in the decree for recovery of the balance of the amount which might be decreed from the other movable and immoveable property of the defendants. The amount claimed was Rs. 17,906, of which Rs. 7,000 was claimed as principal and Rs. 10,906 as interest.

The only pleas raised in the written statement which are relied upon in the grounds of this appeal were that there was no condition [582] in the mortgage-deed for the payment of interest after the due date,

* First appeal No. 11 of 1893.

and that by reason of limitation the plaintiffs were not entitled to interest as damages.

The mortgage-deed was one not presenting any difficulties of construction. The principal money was Rs. 7,000, upon which interest at the rate of one rupee per centum per mensem was agreed to be paid. The condition as to the repayment of the principal and the payment of the interest was, as correctly translated, as follows:—

"I therefore covenant and execute this bond that the aforesaid sum (Rs. 7,000) with interest at the rate of one per centum per mensem from to-day's date until the date of realisation within one year I shall pay and satisfy." The other subsequent material clauses in the mortgage-deed were as follows:—

"In lieu of the said sum of money I mortgage and hypothecate the entire mauzas Birari and Bhadwa, tuppā Jhar Kola, pargana Mahawli, belonging exclusively to myself, and which are in no way alienated, and in my, this executant's, possession and occupation; and until I pay in full the whole of the amount of principal and interest at the aforesaid rate I shall not transfer the aforesaid shares to any one by sale or mortgage. When I pay off the principal with interest I shall obtain a registered receipt from the said Shaikhs. If I, from any reason whatsoever, pay the money into the Treasury of the Court, I shall not claim any costs incurred by me. * * * * If I fail to pay the money with interest on the due date, the said Shaikhs shall have power to recover the said sum of money together with interest at the rate of one per centum per mensem and costs from the mortgaged property and other properties movable and immoveable belonging to me. * * * The money which I shall pay shall first be credited towards interest and the balance towards the principal. If during the currency of the stipulated term the said mahajans should have any cause of uneasiness on account of any act on my part, the said mahajans shall have power to realise the principal and interest due to them from the person or property of this executant, the details of which are given above, and shall not wait for the expiry of the stipulated period."

[583] The Subordinate Judge, who, through negligence or otherwise, apparently mistranslated the mortgage-deed, stated that on a perusal of the deed he was of opinion that the parties intended that interest should continue to run until payment, and that it was not intended that the payment of interest should be restricted to one year, and he gave the plaintiffs a decree for Rs. 17,906 with costs and future interest at the rate of 8 annas per centum per mensem, and ordered that if the amount decreed should not be paid within four months the property should be sold. The principal defendant appealed from that decree. In consequence of a recent ruling of the High Court at Calcutta in *Bikramjit Tewari v. Durga Dyal Tewari* (1) the appeal was referred to a Full Bench.

For the defendant-appellant it was contended that by the deed interest ran from the date of the deed (the 28th of April, 1879) until payment within one year from that date, and if payment were not made within the year then that interest ran for one year from the date of deed and not longer, and that the other conditions of the deed binding the mortgagor not to transfer the mortgaged property and giving the mortgagees power in case payment was not made to recover the principal with

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interest were common form conditions which are inserted in nearly all mortgage-deeds in these provinces, whether the mortgage-deeds confine the mortgagee's liability for the payment of interest to interest during the term of the mortgage, or provide for the payment of interest not only during the fixed term of the mortgage but after the due date of the mortgage. It was also contended on behalf of the appellant that interest which might be allowed by a Judge under Act No. XXXII, 1839, upon a mortgage was of the nature of damages and was not of the nature of contractual interest, and in any event that it was not "interest on the mortgage" within the meaning of s. 86 of Act No. IV of 1882, and that in this case the claim in respect of interest, either as called interest or as damages, after the expiration of the year from the date of the mortgage was barred by the Indian Limitation Act, 1877. For the appellant the following authorities were relied upon : *Cooke v. Fowler* (1), *Bishen Dayal [584] v. Udit Narain* (2), *Mansab Ali v. Gulab Chand* (3), *Bhaqwant Singh v. Daryao Singh* (4), *Sri Niwas Ram Pande v. Udit Narain Misr* (5), and *Gudri Koer v. Bhuboneswari Coomar Singh* (6).

For the plaintiffs-respondents it was contended that, according to the mortgage-deed, interest as such was payable, not only for the term of the mortgage but after the due date, and in any event that the Court could allow interest after the due date under Act No. XXXII of 1839, and that interest so allowed was not to be considered as damages but as interest which the parties had within their contemplation when the mortgage-deed was made, as they must be presumed to have known the provisions of Act No. XXXII of 1839, and that that Act might be applied if the principal and interest due under the mortgage were not paid on the due date. It was also contended on behalf of the respondents that interest allowed by a Court under Act No. XXXII of 1839 on the non-payment of the principal and interest on the due date of a mortgage was "interest on the mortgage" within the meaning of s. 86 of Act No. IV of 1882. For that proposition the judgment in *Bikramjit Tewari v. Durga Dyal Tewari* (7) was relied upon. It was also contended that a Court could decree interest under Act No. XXXII of 1839 notwithstanding that the period of limitation prescribed by art. 116 of the second schedule of the Indian Limitation Act, 1877, had expired before the suit had been brought. It was contended that this was the legitimate conclusion to be deduced from the case reported. The other cases relied upon on behalf of the respondent were the following :—The anonymous case in 4 Taunton 876, *Price v. The Great Western Railway Co.* (8) and *London, Chatham and Dover Railway Co. v. South-Eastern Railway Co.* (9).

In our opinion the construction of the mortgage-deed admits of no doubt. The term was one year from the 28th of April, 1879. The mortgagees could on the expiration of that year sue for and [585] recover the principal moneys remaining due at the expiration of that year ; in certain events the mortgagees could, before the expiration of that year, sue for and recover the principal and interest due at the date of their suit. On the other hand, the mortgagor could, by payment to the mortgagees or into the Treasury of the Court of the principal and interest due, redeem the mortgage even before the expiration of the year. The payment of *post diem* interest was not provided for by the mortgage-deed, and certainly, according to the ordinary construction of such deeds in

(1) L.R. 7 F. L. 27.

(4) 11 A. 416.

(7) 21 C. 274.

(2) 8 A. 486.

(5) 13 A. 330.

(8) 16 M. and W. 244.

(3) 10 A. 85.

(6) 19 C. 19.

(9) L. R. 1 Ch. Div. 120.

these provinces, which we believe to be correct, was not contemplated by the mortgagor. The conditions in the mortgage-deed binding the mortgagor not to transfer the mortgaged property, and giving the mortgagee power to recover the principal money with interest if the mortgagor failed to pay the principal with interest on the due date, are ordinary conditions commonly inserted in mortgage-deeds in these provinces, whether it is intended that interest shall run only to the due date or shall run not only to the due date but after due date and until the principal sum shall have been paid. Such conditions are never construed in this Court as indicating that interest shall continue to run after the due date.

It may be said that if the mortgagees had not construed the mortgage-deed as providing that interest should continue to run after the expiration of the year which began on the 28th of April, 1879, why did they not bring their suit within the period prescribed by art. 116 of the second schedule of the Indian Limitation Act, 1877? It is possible that the mortgagees may have misconstrued the mortgage-deed, and it is also possible that they may have taken the same view of the law as was taken in *Bikramjit Tewari v. Durga Dyal Tewari* (1) and have been unaware of the application of art. 116 of the second schedule of the Indian Limitation Act, 1877. It is useless to speculate as to the reasons which may have influenced the mortgagees. What we have to decide is, what was the mutual intention of the parties as evidenced by the mortgage-deed. We have said that in our opinion the construction of the mortgage-deed is not open to doubt. If the construction of the mortgage-deed were open [586] to doubt, we, sitting here to administer the law, would be bound in justice, equity and good conscience to construe the mortgage-deed in favor of the mortgagor and against the mortgagees on any doubtful point. It requires but little knowledge of borrowers and of money-lenders in these provinces to be aware that it rarely happens that a small zamindar or an agriculturist has legal assistance of any kind in the negotiation for a loan on mortgage or in the preparation or approval of a mortgage-deed. The borrower goes to the money-lender, and it is the money-lender who prepares the mortgage-deed and who is responsible in ninety-nine cases out of one hundred for the language used in it. The money-lender is a shrewd man of business; the needy zamindar or needy agriculturist may understand the cultivation of land and the value of crops and seeds, but, until taught by bitter experience he has but the most hazy conception of legal phraseology. It would be as reasonable to construe a doubtful contract between a spider and a fly against the fly as it would in these provinces be to construe a doubtful provision in a mortgage-deed against the mortgagor.

When by a mortgaged-deed it is provided that the principal and interest at an agreed rate shall be payable at a certain time, and the mortgagor fails to make payment on or before that date, it is, subject to the provisions of the Indian Limitation Act of 1877, competent to a Court in its discretion to allow interest after the date certain under Act No. XXXII of 1839, provided that the parties have not contracted themselves out of that Act. It is seldom that the provision in the Act enabling a Court to allow interest when a demand in writing has been made could apply in a transaction of mortgage.

It is quite clear that the interest which a Court may allow under Act No. XXXII of 1839 is not contractual interest. The allowance of such

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interest under Act No. XXXII of 1839 and the rate which may be allowed depend, not upon the agreement of the parties, but entirely on the discretion of the Court. It is allowed as compensation for the breach of contract, in the one case to pay at the time certain, and in the other case for non-compliance with demand in writing, and is damages, although the amount of such [587] damages is ascertained by allowing interest at a rate fixed by the Court in the particular case. There is on this point no difference in principle between Act No. XXXII of 1839 and s. 28 of the 3rd and 4th William IV, Chapter 42. In England interest allowed as damages under s. 28 of the 3rd and 4th William IV, Chapter 42 does not become a debt until judgment, when it becomes part of the judgment-debt.

It is obvious to our minds that article 116 of the second schedule of the Indian Limitation Act, 1877, would apply to any claim to have interest allowed under Act No. XXXII of 1839 in respect of the non-payment on the due date of the money due under a registered mortgage-deed, if the suit was not brought within six years of the breach of contract.

Turning now to Act No. IV of 1882, it seems to us to be clear, upon a comparison of the provisions of ss. 83, 84, 86, 88 and 92 of that Act, that the interest on payment of which in addition to the principal money a mortgagor may prevent foreclosure or sale or obtain redemption is the interest which he contracted to pay, and the payment of which was secured by the mortgage-deed. Those who were responsible for the drafting of the Transfer of Property Act, 1882 (Act No. IV of 1882) were not always careful to use the same terms to express the same meaning, yet it is not conceivable that it was intended that a mortgagor should be entitled to redeem under s. 92 upon payment of the principal money and the contractual interest due under the mortgage-deed, on the day fixed by the Court, plus the costs of suit, if any, awarded to the mortgagee, and that in order to avoid a sale under ss. 88 and 89 he should be obliged to pay, not only the principal moneys and the contractual interest due under the same mortgage-deed on the day fixed by the Court, plus the costs of suit, if any, awarded to the mortgagee, but in addition such interest as might be allowed by a Court under Act No. XXXII of 1839, and yet, if the decision in *Bikramjit Tewari v. Durga Dayal Tewari* (1) be correct, that is the result of ss. 88, 89, and 92 of Act No. IV of 1882. For example, it is agreed between the parties in this case, through their counsel and [588] vakils respectively, that the amount due for principal and interest up to the expiration of the year of the mortgage is Rs. 7,840, and that, if the decision first referred to of the Calcutta High Court is correct, the decree for principal and interest to the date of suit must be for Rs. 17,906. This suit was instituted on the 23rd of April, 1892. On the 22nd of April, 1892, the mortgagor might have deposited in Court under s. 83 of Act No. IV of 1882 the "amount remaining due on the mortgage," which was, if our construction of the mortgage be correct, Rs. 7,840, and then s. 84 would have applied: or the mortgagor might, on the 22nd of April 1892, have instituted a suit for redemption, and under s. 92 of Act No. IV of 1882 he would have been entitled to a decree for redemption conditional on his paying to the defendants or into Court the sum of Rs. 7,840 and the costs of suit, if any, awarded to the defendants. There is no question under s. 92 of interest which may be allowed under Act No. XXXII of 1839. The term "the mortgage money" of s. 92 is thus defined by s. 58 (a)—"the principal money and interest of which payment is secured for the time

(1) 21 C. 274.

being are called the mortgage money." We do not suppose that any one would suggest that interest which might be allowed by a Court under Act No. XXXII of 1839 could be brought within that definition, unless the parties had specially agreed in their deed that any interest which might be allowed by a Court under Act No. XXXII of 1839 should be deemed to be interest secured by the deed. We have never seen a deed containing such an agreement. Even without the light afforded by a consideration of ss. 83, 84, 90, 92 and 94 of Act No. IV of 1882, we should have had no doubt that the term "interest on the mortgage" of s. 86 must be interest due on the mortgage and not interest allowed by a Court under Act No. XXXII of 1839: the latter interest is neither due nor does it become due on the mortgage; it becomes due under the decree of the Court and under that decree alone, and consequently is not part of the amount on default of payment of which the mortgaged property as such may be sold under s. 89. When in a suit for sale under ss. 88 and 89 a Court allows under Act No. XXXII of 1839 interest *post diem*, its decree, so far as such *post diem* interest is [589] concerned is not a decree for sale under s. 88, but is a decree for money which can be executed in the manner provided for the execution, of simple money decrees. It is only under the Transfer of Property Act, 1882 (Act No. IV of 1882), that a Court can in a suit on a mortgage make a decree for sale of the mortgaged property as such, and a Court has not jurisdiction to extend those sections by decreeing a sale of mortgaged property if the interest which it allows under Act XXXII of 1839 be not paid.

The mortgage-deed in this case was made on the 28th of April, 1879. The only decree for sale of the mortgaged property which could be made in this suit was a decree under s. 88 of Act No. IV of 1882. It would work a grievous hardship on a second mortgagee who had advanced his money in 1883 on the same security, having taken the precaution to inform himself by a search in the office of the Registrar of Deeds as to the nature of the previous incumbrance, and who trusted to the provisions of Act No. IV of 1882, if his rights were postponed and the first mortgagee should under a decree under Act No. XXXII of 1839 be entitled to be paid out of the proceeds of a sale of the mortgaged property the interest allowed to him by the Court under Act No. XXXII of 1839 before any portion of the proceeds of such sale should be applied towards discharging the second mortgage. Such was not, in our opinion, the intention of the Legislature when passing Act No. IV of 1882 and enacting s. 295 of Act No. XIV of 1882.

The appellant has limited the relief which we can afford to him in this appeal by his prayer in his memorandum of appeal, which is:—"that the award of *post diem* interest to the amount mentioned in the valuation of this appeal be set aside and the suit to that extent be dismissed." The amount mentioned in the valuation of the appeal is Rs. 9,750. Deducting that sum of Rs. 9,750 from the amount decreed by the Court below, we give the plaintiffs a decree for the balance, and order that upon the defendant-appellant paying to the plaintiffs or into Court such balance on or before the 27th of November next, the plaintiffs should deliver up to the defendant-appellant or to such person as he may appoint all documents in the possession or power of the plaintiffs relating to [590] the mortgaged property and shall transfer the property to the defendant-appellant free from all incumbrances created by the plaintiffs, or any of them, or any

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15 A.W.N.
(1895) 128

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person claiming under them, or any of them ; but that, if such payment is not made on or before the 27th of November next, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale, after, defraying thereout the expenses of the sale, be paid into Court and applied in payment of the said amount found due by us to the plaintiffs and that the balance, if any, be paid to the defendant-appellant or other persons entitled to receive the same. We vary the decree below, and allow this appeal to the extent above mentioned with costs to the appellant in this Court, and otherwise dismiss the suit.

Decree modified.

I.L.R., 18 ALLAHABAD.

18 A. 1 = 15 A.W.N. (1895) 123.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

SAJJAD AHMAD KHAN (*Defendant*) v. KADRI BEGAM (*Plaintiff*).
[9th May, 1895.]

Muhammadian law—Gift—"Musha"—Validity of gift—Possession.

A deed, which was found in effect to be a deed of gift comprising zamindari and other property, was executed on the 22nd of May, 1890. It was registered on the 24th of May, and the donor died on the 26th. The deed recited—"I have placed the aforesaid vendees in proprietary possession of the aforesaid property as my representatives." Mutation of names was subsequently obtained by one of the donees in his favour on the basis of the same deed. Held that this was a valid and effectual gift under the Muhammadian law. *Mahomed Buksh Khan v. Hosseini Bibi* (1) and *Sheikh Muhammad Muntaz Ahmad v. Zubaida Jan* (2) referred to.

[F., 111 P.L.R. 1901.]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Abdul Majid*, for the appellant.

Mr. *T. Conlan* and *Maulvi Ghulam Muftaba*, for the respondent.

JUDGMENT.

EDGE, C. J., and BANERJI, J.—The property which is in question in this appeal originally belonged to one Ahmad Yar Khan and was claimed by the respondent, his widow, by right of inheritance to him. The appellant is one of the sons of Ahmad Yar Khan, and he resisted the claim on the allegation that by an instrument dated the 22nd of May, 1890, Ahmad Yar Khan had sold the property to him and his mother.

The Subordinate Judge has held the instrument of the 22nd of May, 1890, to be a deed of gift, although ostensibly it is a sale-deed, and he is of opinion that the gift is invalid by reason of [2] *musha*, and also because possession was not delivered by the donor. He has accordingly decreed the claim.

Mr. *Abdul Majid*, on behalf of the appellant, has not questioned the finding of the Subordinate Judge that the deed of the 22nd of May, 1890, is a deed of gift. He contends that the grounds on which the gift has been held to be invalid are untenable.

Upon the question of *musha* the ruling of their Lordships of the Privy Council in *Ameeroonisha Khatoon v. Abedoonissa Khatoon* (3) is conclusive so far as the zamindari property is concerned. It was held by their Lordships in that case that the rule of Muhammadian law that a gift of *musha* is invalid does not apply to definite shares of zamindaris. As regards property other than shares in zamindaris claimed in the suit, if possession was taken under the gift, it would have the effect of transferring

* First Appeal No. 28 of 1894, from a decree of Pandit Rajnath, Subordinate Judge of Moradabad, dated the 21st December 1893.

(1) 15 I.A. 81.

(2) 16 I.A. 205 = 11 A. 460.

(3) 2 I.A. 87.

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ownership, although the gift might be invalid on the ground of *musha*. This was held by the Privy Council in *Sheikh Muhammad Mumtaz Ahmad v. Zubaida Jan* (1). We may observe that Mr. Conlan, on behalf of the respondent, frankly conceded that he could not support the judgment of the Court below on the ground of *musha*.

As for possession, the case of the appellant in the Court below was that for about a year before the date of the gift he was in possession, and that the deed of the 22nd of May, 1890, only gave formal effect to the transfer which had already been made. The Subordinate Judge has held that this allegation has not been established, and Mr. *Abdul Majid* has not attempted in this Court to show that the finding is incorrect. His contention is that, having regard to the nature of the property, the authority to take possession followed by subsequent possession was sufficient to validate the gift, and he has relied on the rulings of the Privy Council in *Mahomed Buksh Khan v. Hosseini Bibi* (2) and *Sheikh Muhammad Mumtaz Ahmad v. Zubaida Jan* (1).

In the first of these cases their Lordships observed:—“The gift was attended with the utmost publicity, the *hibbanama* itself authorises the donees to take possession, and it appears that in fact [3] they did take possession. Their Lordships hold under these circumstances that there can be no objection to the gift on the ground that *Shahzadi* (the donor) had not possession, and that she herself did not give possession at the time” (p. 215). In the other case their Lordships held that where the donor “had merely proprietary, not actual, possession of the greater portion of the property, that is to say, she was merely in receipt of the rents and profits,” a declaration in the deed of gift that “she had made the donee possessor of all properties given by the deed; that she had abandoned all connection with them; and that the donee was to have complete control of every kind in respect thereof,” followed by actual possession, rendered the gift effectual (p. 215). Their Lordships further held that a declaration by the donor of the kind referred to above was an admission binding on the heirs of the donor.

We are of opinion that these rulings support Mr. *Abdul Majid's* contention. The deed of gift in this case was executed on the 22nd of May, 1890. It was registered on the 24th of that month, and Ahmad Yar Khan, the donor, died on the 25th. The deed recites:—“I have placed the aforesaid vendees in proprietary possession of the aforesaid property as my representatives.” This was an admission which, according to their Lordships of the Privy Council, was binding on the respondent, who is one of the heirs of Ahmad Yar Khan. The deed of gift is in the possession of the appellant. Mutation of names has been effected in his favour, and it is admitted in the 4th paragraph of the plaint that it was obtained on the basis of the alleged gift. He is admittedly in possession, and the greater portion of the property was property of which the donor was in receipt of rents and profits only. The rule laid down by the Privy Council in the cases referred to above fully applies to the facts of this case, and the gift in favour of the appellant was therefore a valid and effectual gift. We allow this appeal, and, setting aside the decree of the Court below, dismiss the respondent's claim as against the appellant with costs.

We dismiss the objections with costs.

Appeal decreed.

(1) 16 I.A. 205=11 A. 460.

(2) 15 I.A. 81.

18 A. 4 = 15 A.W.N. (1895) 124.

[4] REVISIONAL CIVIL.

Before Mr. Justice Knox and Mr. Justice Aikman.

ABDULLAH (*Petitioner*) v. SALARU AND OTHERS (*Opposite parties*).^{*}
[10th May, 1895.]

Civil Procedure Code, section, 622—Statute 24 and 25 Vic., Cap. 104, section 15—Powers of superintendence exercisable by the High Court.

Where a Subordinate Court had signally failed to do its duty, and there had been no patent neglect on the part of the petitioner. *Held*, on an application for revision, that it is competent for the High Court under the general powers of supervision vested in it by section 15 of 24 and 25 Vic., Cap. 104, to direct the Subordinate Court to do its duty, and complete the case according to law. *Muhamma Suleman Khan v. Fatima* (1) referred to.

[F., 19 M. 149 (150) N.; R., 11 C.P.L.R. 141.]

THE facts of this case are fully stated in the judgment of the Court.

Pandit *Sundar Lal* and Maulvi *Ghulam Muftaba*, for the applicant.

Messrs. *T. Conlan, Koshan Lal* and Pandit *Moti Lal*, for the opposite parties.

JUDGMENT.

KNOX, J., and AIKMAN, J.—This is an application made by one Abdullah praying this Court to exercise, in respect of an order passed by the Subordinate Judge of Cawnpore, dated the 14th of May, 1894, the powers of revision vested in it under s. 622 of the Code of Civil Procedure, or the powers of superintendence conferred upon this Court by section 15 of statute 24 and 25 Vic., Cap. 104. The circumstances of the case are extraordinary, and the manner in which it has been dealt with by the Subordinate Judge of Cawnpore is of a very exceptional character. In order to understand the position which the parties now occupy it would be necessary to state the exact nature of the case and the action which has been taken upon it. Abdullah, the petitioner before us, was plaintiff in a suit for dissolution of partnership. He framed his plaint upon the lines laid down in form No. 113 of schedule IV of the Code of Civil Procedure. He prayed the Court to decree a dissolution of the partnership, and that the accounts of the partnership be taken by the Court, the assets thereof realized, and each partner ordered to pay into Court any balance due from him upon the partnership account; [5] that the debts and liabilities of the partnership be paid and discharged costs of the suit be paid out of the assets, and any balance remaining of the assets after payment of the liabilities and of the costs be divided. In fact, as stated above, he prayed the Court to grant him all the reliefs to which he was entitled in a suit for dissolution of partnership. On the 25th of September, 1889, the Subordinate Judge of Cawnpore passed an order to the effect that the partnership should be considered dissolved from that day and that Manohar Das and Sheo Prasad be appointed commissioners to examine the accounts and find out the balance of each sharer. After this had been accomplished the case was to be brought up on the 3rd of December, 1889. An appeal was filed from this order to the Court of the District Judge of Cawnpore, with the result that the order

* Application No. 1 of 1895 under s. 622 of Civil Procedure Code,
(1) 9 A. 104.

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1895 dissolving the partnership was confirmed and a receiver was appointed. It
MAY 10. is worthy of notice that this order appointing a receiver was one to
 — which both the parties assented at the time it was passed. Apparently
REVI- at first the District Judge had some intention of preparing in his Court a
SIONAL decree which should determine the several matters for which relief had
CIVIL. been asked in the plaint and which had been left still unadjusted. Upon
 — the 6th of May, 1890, the District Judge directed that the decree should
18 A. 4= be prepared in the Court of the Subordinate Judge after the commissioners
15 A.W.N. appointed by the Subordinate Judge had adjusted the accounts. The case
(1895) 124. went back to the Court of the Subordinate Judge for adjustment of the
 accounts with a receiver appointed for realization of the assets found to
 be due upon those accounts. There was further a distinct order directing
 the Subordinate Judge to prepare a decree according to forms Nos. 132
 and 133 to be found in schedule IV of the Code of Civil Procedure. We
 may observe in passing that this order was the proper order to have been
 passed in the case, and if the Subordinate Judge had only done his duty
 in carrying out the provisions of that order upon the lines therein laid
 down, the case would not have become so complicated as it has become.
 The record appears to have reached the Subordinate Judge on the 7th of
 May, 1890, and, so far as we can ascertain, the terms of the order appear
 to have been lost sight of altogether. What did happen thereafter was
 that the commis-[6]sioners examined the accounts, objections were taken
 to their report, these objections were considered by the Subordinate
 Judge, and then an order was passed which ran as follows:—

"It is ordered and decreed that out of the assets of the joint firm the
 parties to this suit shall recover (*hasb zabita*) in due course, Rs. 30,107-7-3,
 the outstanding debt, and should divide the whole of the assets amount-
 ing to Rs. 37,974 as follows." The mode of division is then made out,
 and a further order is passed that until the plaintiff paid a certain sum
 due as Court-fees the decree should not be executed.

It is obvious that in passing this order the Subordinate Judge
 had never taken into consideration either the reliefs which had been
 asked for by the plaintiff or the standard forms provided by law accord-
 ing to which decrees in dissolution of partnership cases should be
 framed. Form No. 132 sets out a standard form in which an order
 granting dissolution of partnership and arranging all the necessities
 preliminary to a decree should run. Form No. 133 is the standard form
 in which a final decree in the same class of cases should run, with
 such variation as the circumstances of each case require. The Subordinate
 Judge had issued an order dissolving the partnership. He had under the
 further order of the District Judge a receiver appointed for getting in the
 outstandings of the estate. He had arranged for the taking of accounts. So
 far all has been done in due order; but he had not gone on to collect through
 the receiver the outstandings due. He had therefore no funds in Court out
 of which to arrange for the payment of debts due by the partnership, for
 payment of the costs, and for awarding to each partner his share, if any,
 of the assets. Had the Subordinate Judge been at the pains of studying
 the decree sent to him by the District Judge and the form provided by
 law, he could not have failed to see that there still remained for him on
 the 22nd of April 1891, much to do before he could attempt to pass a final
 decree in the case. These duties which he left undone he attempted
 to relegate to the parties; for it is difficult to understand in any
 other light the terms of the order whereby he directed the parties to
 recover *hasb "zabita"* the outstanding debts. There is no procedure

[7] appointed by the Cola such as the Subordinate Judge appears to have contemplated, and the result of the so-called decree passed by him on the 22nd of April, 1891, was that he put into the hands of the parties an order which has led to much litigation, and an order which Abdullah, when he tried to execute it, found to be an order pronounced by this Court to be an inoperative decree. After a vain attempt to execute this inoperative decree Abdullah went back to the Court of the Subordinate Judge of Cawnpore and asked that Court to grant him, either by way of amendment or review or in some shape, a decree which he could put into execution. The Subordinate Judge held that a final decree had been passed in the case; that he could not do anything further, and rejected the application. It is this order of rejection, dated the 14th of May, 1894, with which we are asked to interfere either under section 622 or under the powers of supervision given us by Statute.

The authorities upon which counsel for the petitioner relies are *Muhammad Suleman Khan v. Fatima* (1), *Gobind Coomar Chowdhry v. Kisto Coomar Chowdhry* (2), *In the matter of Omar Chand Mahta v. The Nawab Nazim of Bengal* (3), and *Munohur Paul v. J. P. Wise* (4).

Upon the authority of these precedents it was contended that this Court could call for the record and pass orders in the case, inasmuch as the Subordinate Judge failed to exercise the jurisdiction vested in him. If, however, it appeared to the Court that s. 622 only provided for cases in which no appeal lay to this Court, s. 15 of the Statute 24 and 25 Vic., Cap. 104, contained no such limitations and conferred a general power of superintendence upon the Court. The whole strength of the arguments upon the opposite side lay in the contention that a decree had been passed in the suit, a decree which had been treated as a decree by the petitioner, who had attempted to execute it, and that the remedy open to the petitioner was that of appeal.

It was contended that both s. 622 of the Code of Civil Procedure and the limit placed upon the use of the word "superintendence" [8] in s. 15 of the Statute 24 and 25 Vic., Cap. 104, by Mr. Justice Straight in *Muhammad Suleman Khan v. Fatima* (1) preclude this Court from interfering with the order of the 14th of May, 1894.

One matter is obvious, and that is, that the subordinate Court, *i. e.*, the Court of the Subordinate Judge, has in the suit between the parties signally failed to do its duty. There has not been any patent neglect on the part of the petitioner to enforce his rights. Ever since the ill-advised order of the 22nd of April, 1891, was passed, the petitioner has done his best to enforce his rights with the aid of the so-called decree given to him by the Subordinate Judge. As soon as he found that decree to be inoperative he has taken prompt action to try and get the defects remedied. Under these circumstances we are of opinion that we have the power by way of superintendence to direct the Subordinate Judge to do his duty, both in the way of obeying the decree sent to him by the District Court on the 6th of May, 1890, and to complete, as required by law, those acts which the Legislature requires him as a Court to do, and not to relegate them to the parties when he has a suit for dissolution of partnership before him. This is the interpretation placed by this Court upon the words used in s. 15 of the Charter Act in the case of *Muhammad Suleman Khan v. Fatima* (1). The learned Chief Justice and the Judges who concurred with him considered "that under s. 15 of the Charter Act it is

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(1895) 124.

(1) 9 A. 104.

(2) 7 W.R. 520.

(3) 11 W.R. 229.

(4) 15 W.R. 246.

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(1895) 124.

competent to the High Court in the exercise of its power of superintendence to direct a subordinate Court to do its duty or to abstain from taking action in matters of which it has no cognizance, but the High Court is not competent in the exercise of this authority to interfere with and set right the orders of a subordinate Court on the ground that the order of the subordinate Court has proceeded on an error of law or an error of fact." The words used by Mr. Justice Straight do not in any way conflict with what was laid down by the Chief Justice. All that was said by Mr. Justice Straight was to the effect that ordinarily under the guise of superintendence interference should not be made by the Court beyond the extent indicated in section 622 of the Code of Civil Procedure. In fact, that learned Judge [9] took a very wide view of the word 'superintendence,' holding it to include powers of a judicial and *quasi-judicial* character. Looking to the extraordinary nature of this case, we have no doubt that it is our duty under the circumstances to set aside the order of the 14th of May, 1894, and to direct the Subordinate Judge to do his duty and to complete the case in accordance with the forms contained in the Code of Civil Procedure. In doing this he must also be guided by the order of the District Judge sent to his predecessor on the 6th of May, 1890. Costs of the application to be costs in the cause.

Application allowed.

18 A. 9 = 15 A.W.N. (1895) 133.

APPELLATE CIVIL.

Before Mr. Justice Aikman.

HAR SARUP (*Decree-holder*) v. BALGOBIND AND ANOTHER (*Objectors*.)*
[8th June, 1895.]

Execution of decree—Limitation—Act No. XV of 1877 (Indian Limitation Act), Schedule (ii), Article 178—Application for execution of a different nature from preceding Application.

A decree-holder in execution of his decree applied, on the 11th January 1888, for arrest of the judgment-debtor. On the 25th February 1888, in consequence of the record of the case being required in the High Court, the Court executing the decree struck off that application *suo motu*. On the 23rd February 1892 the decree-holder again applied for execution of his decree, but this time by attachment and sale of the judgment-debtor's property. *Held* that the second application could not be regarded as a continuance of the former application, and that execution of the decree was time-barred. *Krishnaji Raghunath Kothavle v. Anandrav Ballal Kolhalkar* (1) followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Baboo Jogindro Nath Chaudhri and Munshi Madho Prasad, for the appellant.

Messrs. T. Conlan, Abdul Majid and W. K. Porter, for the respondents.

JUDGMENT.

[10] AIKMAN, J.—This is an appeal by a decree-holder from a decision of the District Judge of Moradabad holding that the execution of a

* Second Appeal No. 682 of 1894, from an order of H.F.D. Pennington, Esq., Additional Judge of Moradabad, dated the 2nd May 1894, modifying an order of Babu Gokul Prasad. Offg. Munsif of Moradabad, dated the 29th August 1892.

decree which had been passed in the appellant's favour had become time-barred. The decree bears date the 14th of September 1880, and was one against Sita Ram. The present application for execution with which we are concerned in this appeal was presented on the 23rd of February 1892. The last preceding application bears date the 11th of January 1888, i.e., upwards of three years before the date of the present application. Consequently the application which the decree-holder now seeks to enforce is time-barred, unless there is something to take it out of the provisions of Article 179 of Schedule (II) of the Indian Limitation Act, 1877.

It is contended on behalf of the decree holder appellant that circumstances do exist which render his decree still capable of execution. What those circumstances are must now be stated.

On the 11th of January 1888 an application was made for execution of the decree by arrest of the judgment-debtor, Sita Ram. In some previous proceedings in execution Sita Ram had objected that he was only liable to the extent of one-half of the amount decreed. This objection had been overruled, and an appeal had been filed by Sita Ram in the High Court. In consequence of this appeal to the High Court the record of the original suit had been called for from the Court of first instance (the Munsif of Moradabad). On the 25th of February 1888 the Munsif passed an order on the decree-holder's application of the 11th of January 1888 to the following effect:—“Let the record be sent to the District Judge and the application be struck off the list of pending applications.”

It may be said at once that this was an improper order to pass. The fact that the record of the original case had been called for was no reason whatever for striking off a lawfully-made application to execute. However, the Munsif passed this order on his own authority and the decree-holder took no objection to it. The appeal of the judgment-debtor was dismissed by this Court on the 9th of December 1891, and on the 23rd of February following the decree-holder presented the application which we are now concerned with. Had this application been one asking the Court to proceed with his previous application of the 11th of January 1888, I should have had no hesitation in following the principle of the decision in *Raghubans Gir v. Sheosaran Gir* (1) but, unfortunately for the decree-holder, he presented what must be held to be a fresh application for execution and not an application to continue the proceedings on the application which he had previously filed. The application of the 11th of January 1888 was for realization of the decretal amount by arrest of the judgment-debtor: the present application was one for the execution of the decree by attachment and sale of the judgment-debtor's property. In the case referred to the application was one asking that the case might be proceeded with according to the previous application. The learned Judges held that Article 171 applied, and that limitation ran from the date when the record was returned to the Munsif's Court on disposal of the proceedings in the appellate Court, but they said:—“We think a distinction may certainly be drawn between an application of this nature and one of the nature of a fresh application for the execution of the decree.” The case of *Krishnaji Raghunath Kothavle v. Anandrav Ballal Kolhalkar* (2), is also in the respondents' favour. In that case the first application had been to attach immoveable property: the second application was one for the arrest of the judgment-debtor. It was held there that the execution process last applied for was distinct in

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(2) 7 B. 293.

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its nature from the former one and was in no way connected with it, and that it could not be regarded as one in continuance of the former proceedings. The present case is similar, the only difference being that here the application for the arrest of the judgment-debtor was first made and that for attachment was made subsequently. Following these rulings I am compelled to hold that the learned District Judge was right in deciding that the appellant's decree was time-barred. Affirming the order of the lower appellate Court, I dismiss this appeal with costs.

Appeal dismissed.

18 A. 12 = 15 A.W.N. (1895) 136.

[12] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

D. CONNELL (*Opposite party*) v. THE HIMALAYA BANK, LD.,
IN LIQUIDATION (*Petitioner*).^{*} [16th June, 1895.]

Act No. VI of 1882 (Indian Companies Act) s. 214 — Company — Winding up — Auditor—Officer of the Company — Misfeasance—Damages—Remoteness of loss—Limitation—Act No. XV of 1877, Schedule II, Article 36.

An auditor of a Company to which Act No. VI of 1882 applies, who is duly appointed by a general meeting of the Company and not casually called in as occasion may require, is an officer of the Company within the meaning of s. 214 of the above mentioned Act. *In re the London and General Bank, Ltd.*, referred to (1).

The compensation which, under s. 214 of the Indian Companies Act, 1882, may be assessed against a defaulting director or other officer of a Company, is of the nature of damages: it is therefore necessary that the loss to the Company in respect of which compensation is asked for should be the direct, and not a remote and more or less speculative, consequence of the misfeasance or neglect of duty on the part of the director or other officer of the Company from whom such compensation is sought.

The special proceeding provided for by s. 214 of Act No. VI of 1882 is not subject to the limitation prescribed by Article 36 of Schedule II of the Indian Limitation Act, 1877.

THIS was an appeal from an order under s. 214 of the Indian Companies Act, 1882, passed by the District Judge of Saharanpur in the course of the winding up of the Himalaya Bank, Limited, calling upon the appellant, Connell, to repay a sum of Rs. 10,000 to the Official Liquidator of the said Company on behalf of the Company. The appellant had been Auditor to the Bank from 1889 to 1891, being elected to the office at the annual meetings of the Company, and remunerated by a fixed fee for each audit.

It appears that he had no special experience as an auditor and was by profession Secretary to a Brewery Company. Along with the auditor several of the directors of the Company were also proceeded against under s. 214 of the Companies Act, and the charge against the directors and the auditor practically was that the former had for a number of years continued to declare and pay dividends when there were no profits out of which dividends were payable and long after the bank had really become insolvent, [13] and that the latter, by his negligence or misfeasance in passing accounts and balance sheets which he knew or might have known

^{*} First Appeal No. 70 of 1894, from an order of H. B. J. Bateman, Esq., District Judge of Saharanpur, dated the 28th April 1894.

(1) L. R. (1895), 2 Ch. D. 673.

to be false and misleading, assisted the directors to perpetrate a series of frauds upon the shareholders.

The District Judge found that Connell "was aware of the state of the bank from the date of his first audit, and that he deliberately aided and abetted in the issue of half-yearly balance sheets which he knew to be false. He thereby abetted the illegal payment of dividends. The above is clearly a gross misfeasance and caused loss to the amount of the above dividends." Upon this finding, and upon the finding that Connell as an auditor was an officer of the Company within the meaning of s. 214 of the Indian Companies Act, the District Judge made an order against Connell as above described. Connell thereupon appealed to the High Court.

Mr. A. E. Ryres, for the appellant.

Messrs. T. Conlan and H. Vansittart, for the respondent.

JUDGMENT.

EDGE, C.J., and BANERJI, J. This is an appeal from an order of the District Judge of Saharanpur made in one of six several applications to him to proceed under s. 214 of Act No. VI of 1882. The appellant before us was the auditor of the Himalaya Bank from 1888 to 1891. He was appointed at the annual meeting in each year as the auditor of the bank. He received a fixed remuneration for each half-yearly audit, and he was bound to make an audit in conformity with Act No. VI of 1882. In the case of the particular bank no articles of association had been filed with the Registrar under the Act, and consequently table A of the Act applied. The bank had been constituted as a limited company under the prior Act, but for all necessary purposes connected with this case the later Act and the prior Act are to the same effect. The auditor was charged with misfeasance, and the order under appeal was an order directing him to contribute a large sum of money to the assets of the company by way of compensation in respect of the misfeasance found against him. The first application had reference to the dividend which was paid for the half-year ending the 30th of June 1888. The other applications related to the half-years [14] respectively succeeding that half-year and terminating on the 31st of December 1890.

The first ground taken in this appeal was that Connell, the appellant, was not an officer of the company within the meaning of s. 214 of the Act. It was contended that no one could be an officer of a company within the meaning of that section unless he had control of the business of the company and of the monetary dealings of the company. For that proposition the decision of Mr. Justice Cave and Mr. Justice Collins in *In re the Liberator Permanent Benefit Building Society* (1) was relied upon. In that case those learned Judges, or rather one of them, gave, as an instance of persons who are not officers of the company within the meaning of the corresponding section of the English statute, an auditor. It would appear that in that case the person before the Court was a solicitor. A solicitor, ordinarily speaking, would not be an officer of the company within the meaning of that section, but he might, by the position which he agreed to take up with regard to the company, become an officer of the company. It appears, however, that Mr. Justice Vaughan Williams in December last held that an auditor was an officer of a company within the meaning of the section of the English Statute; and since then one division of the Court of Appeal in England has held,

(1) 11 Times L. R. 406.

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on appeal in that case, that the auditor was an officer of the company within the meaning of s. 10 of 53 and 54 Victoria, Chapter 62. The last decision is very curtly reported in the *English Weekly Notes* for 1895, page 74. We have only had any report at length of the decision of the Court of Appeal in that case in the form in which it appears in "The Accountant" for May 4th, 1895. (*In re the London and General Bank, Limited*) (1). The appellant in this case was not an auditor merely called in to ascertain by way of an audit the position of the bank at any particular moment; he was not casually called in on an occasion arising for the services of an auditor, but he was the auditor appointed at the general meetings of the company in accordance with the provisions of Act No. VI of 1882. In our opinion he was an officer of the company within the [15] meaning of s. 214 of the Act; he was not a servant of the directors, but an officer of the company, and an officer who, although he had nothing to do with the management of the company, had most important duties to perform as a paid officer of the company.

The next point taken in the appeal was that the remedy against the appellant was barred by limitation. It was contended that Article 178 of Schedule II of the Indian Limitation Act, 1877, did not apply here. There was the authority of all the High Courts in India to show that that article was only applicable to applications made under the Code of Civil Procedure, of which this was not one, and it was contended that Article 36 of that schedule was the article which must be applied. That contention was based on the authority of a case in the *Weekly Reporter* in which it was said that a suit was any proceeding instituted in a Court of justice. It is not necessary to consider whether that proposition is correct or not. In our opinion the "suit" of the Indian Limitation Act, 1877, has a specific and limited meaning. It is, according to s. 3 of that Act, distinguished from an appeal and an application. In our opinion Article 36 does not apply to this case. It may well be that the Legislature intended not to provide any limitation in cases in which Courts proceeded to enforce the provisions of s. 214 of Act No. VI of 1882. The provisions of that section could seldom be put in force if Article 36 of Schedule II of Act No. XV of 1877 applied. The misapplication or misfeasance of that section might not be discovered by the Court until after the lapse of two years from the date of the misapplication or misfeasance. It appears to us that there is good reason why directors, managers and officers of companies registered under Act No. VI of 1882 should not be permitted to plead limitation so as to absolve them from making restitution of moneys misapplied or lost to the company through their misfeasance. It may be that this is not exactly the same view of the law as that entertained by some of the Courts in England in cases under 53 and 54 Vic., Cap. 62, s. 10. However, the Statute of Limitations which Judges in England have to apply to those cases is certainly wider in its wording than the articles of the Limitation [16] Act which we have to apply in this country. There they did not allow any plea of limitation where the person charged was in the position of a trustee of the company, such as a director; and the cases in which they allowed this plea of limitation to be raised were actions brought against an officer, and not proceedings under 53 and 54 Vic., Cap. 62, s. 10. We hold that the proceedings in this case against the appellant under s. 214 of Act No. VI of 1882 are not barred by limitation.

(1) Since reported in L. R. 1895, 2 Ch. D. 673.

The next question is—was Connell guilty of misfeasance within the meaning of the section? In order to decide that point it is necessary to consider what was the state of the bank as it would have appeared to any one making a careful audit, when he took over the duties of auditor. Its state was this. Its capital had been gone for years. Its reserve fund was pledged as security to another bank. It was keeping on its balance sheets as assets debts which were, some of them, barred by limitation, and others beyond all hope of recovery. As to these debts any auditor who understood and did his duty could have ascertained their nature from a cursory examination of books of the bank. There were debts to a large amount on which no interest had been paid for years, and still that interest kept appearing in the books of the bank as a realizable asset of the company. The debts which were hopelessly bad amounted to lakhs of rupees. The reserve fund, being in Government paper in the hands of another bank as security, had ceased for practical purposes to be a reserve fund. The capital of the bank was gone, and practically the working assets of the bank, and the only working assets which the bank had, consisted of the deposits of such people as had been foolish enough to deposit their money in the bank. What was done at the bank was this. The manager or accountant of the bank prepared a balance sheet which was not in accordance with the form of balance sheet required by Act No. VI of 1882. That balance sheet was submitted to the auditor, and, according to his statement, he checked apparently the totals in that balance sheet with the totals as they appeared in the books of the bank. He did not see that the debts owing to the bank were divided into three classes as required by the balance sheet of Act No. VI [17] of 1882. The inference which we draw is that this auditor practically did nothing except have before him the balance sheet which had been prepared and check off in a most cursory manner the totals of the balance sheet with the totals in the books of the bank. That he ever examined, as he certified, the books of accounts of the bank, as a proper auditor should and would have done, we do not believe. It is said on his behalf that he was not a skilled auditor. That, no doubt, is true. He was secretary and accountant to a Brewery Company. Probably he knew little or nothing about the duties of an auditor or the provisions of Act No. VI of 1882. His ignorance in our opinion would not excuse him in proceeding under s. 214 of Act No. VI of 1882. He accepted the office of auditor and the remuneration attached to that office, although it was small, and he undertook to perform duties which, not only in the interests of the company, but in the interests of the creditors of the company and in the interests of the investing public, it was necessary should be performed carefully and properly. His duties were defined by Act No. VI of 1882. In one sense, in our opinion, he never performed any part of those duties. It is true he signed a balance sheet, and he signed a certificate each half-year; but each half-year's balance sheet was false, as he must have discovered had he taken the slightest pains to perform the duties of an auditor. In our opinion this auditor was guilty of misfeasance, and grave misfeasance, within the meaning of s. 214 of Act No. VI of 1882. However, that is not sufficient to make him liable under s. 214. An auditor can only be made liable under s. 214, if he has been guilty of misfeasance in his office, and if the natural and proximate result of that misfeasance was that loss to the company ensued. Compensation under s. 214 is of the nature of damages, and in civil proceedings under that

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section to obtain compensation for misfeasance of an officer it must be shown in our opinion that in consequence of that misfeasance a particular loss or losses was or were suffered by the company. What happened in this case was that the dividend for each half-year was actually paid and distributed by the directors of the Company one, two or three months before the audit for that half-year, and [18] before any balance sheet had been signed or any certificate given in respect of that half-year by the auditor. It cannot be said, for example, that the dividend paid by the directors for the half-year ending the 30th of June, 1888, was paid in consequence of any audit or any balance sheet or any certificate of this auditor for that half-year. It is contended by Mr. *Conlan* that the bank suffered a loss in this way. He said that if the auditor had done his duty and had shown on a proper balance sheet that the bank was insolvent, the directors would have been obliged to close the doors of the bank, or to take steps for the reconstitution of the bank, and that they could not have paid any dividends for the succeeding half-years. He also contended that if a true balance sheet had been made by the auditor, that balance sheet would not have been passed by the shareholders at the general meeting and the dividends already paid would not have been confirmed. On the latter point, to take it first, all that need be said is that, if these dividends could not be recovered, they were already lost before the balance sheet for that half-year was certified by the auditor. If they could be recovered there would have been no loss. It is not shown here that any attempt has been made by the liquidator to recover the dividends paid to the shareholders during those years, and for all we know no loss may have been sustained. To deal with the other branch of the argument, it appears to us that it is based upon grounds far too speculative to be adopted by a Court of justice in awarding damages. We do not know what the result might have been on the action of the directors in future half-years if this auditor had done his duty and represented and certified that the bank was insolvent. If we were to speculate on that matter, looking at the proceedings of the directors and the way in which this bank was managed, we might possibly conclude that if the auditor presented a true statement of the affairs of the bank to the directors he would cease to be auditor and the bank would not close its doors. This, however, is merely a matter of speculation. The loss of dividends in succeeding half-years was not the immediate consequence of the breach of duty of the auditor in this case. It was also contended by Mr. *Conlan* that the bank [19] suffered a loss in this way. Mr. *Conlan* contended that the auditor had conspired with the directors to give these untrue certificates and to pass these false balance sheets, and, being a party to that conspiracy, which, Mr. *Conlan* argued, extended over several years, his misfeasance had in fact caused loss. Although we think that the auditor neglected every duty which he was bound to perform as auditor, we see no evidence in this case that he was a party to any conspiracy with the directors or any one. His remuneration was small. He was ignorant of his duties, and he did not perform them, and there we think the case ended so far as he was concerned.

We hold that it is not proved that any loss was suffered by this bank in consequence of the misfeasance of its auditor. We accordingly allow this appeal and set aside the order of the Court below, but without costs.

Appeal decreed.

18 A. 19 (F.B.) = 15 A.W.N. (1895), 134.

FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox,
Mr. Justice Blair, Mr. Justice Burkitt and Mr. Justice Aikman.*

SHEO NATH SINGH (*Judgment-debtor*) v. RAM DIN SINGH AND
OTHERS (*Decree-holders*).^{*} [19th June, 1895.]

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Civil Procedure Code, ss. 562, 588, 591—Order—Appeal—Conditions under which an order passed in the course of a suit may be questioned in appeal from the decree in the suit.

An order made under the Code of Civil Procedure from which an appeal is given under s. 588 of that Code may be questioned under s. 591 in an appeal from the decree in the suit if the ground of objection is stated in the memorandum of appeal, although no appeal from such order has been preferred under s. 588. So held by the Full Bench, following *Rameshar Singh v. Sheodin Singh* (1), *Saiyyid Muzhar Hossein v. Mussamat Bodha Bibi* (2) distinguished.

Held by Edge, C.J., and Aikman, J., that s. 591 of the Code of Civil Procedure does not enable an appellant to avoid limitation by coming up under s. 591 when the only ground of appeal is an order made under s. 562. S. 591 contemplates two things—there being a regular appeal about something else, and in that appeal the insertion of a ground of objection under s. 591.

[*Disb.*, 9 O.C. 80; N F., 36 C. 762 = 10 C.L.J. 113; F., 22 A. 366; R., 30 A. 479 = 5 A.L.J. 447 = A.W.N. (1908) 195 = 4 M.L.T. 162; 34 M. 228 (230) = 20 M.L.J. 805 = 8 M.L.T. 72 = (1910) M.W.N. 226 = 6 Ind. Cas. 239; 19 A.W.N. 136; 12 C.P.L.R. 119 (121); 1 Ind.Cas. 413 (414); 5 Ind.Cas. 667 (668); D., 22 A. 430 = 20 A.W.N. 136; 4 M.L.T. 400 = A.W.N. (1908) 242 = 5 A.L.J. 644.]

THE facts of this case are thus stated by the Court of first appeal :—
" Ram Din Singh and others obtained a decree for [20] Rs. 839 on the 26th of April 1887, directing the sale of the hypothecated property against Prithi Singh and others, the original debtors, and against Sheo Nath Singh, the subsequent purchaser of the hypothecated property. The decree was passed *ex parte* as against the original debtors, and against Sheo Nath Singh it was passed as contested. After the expiration of the period allowed for payment of the decretal debt, the decree was made absolute. Subsequently, on the application of the original debtors, the *ex parte* decree was set aside under s. 108 of the Civil Procedure Code, and the suit was restored to its former number. The Court reduced the amount of debt from Rs. 839 to Rs. 358 and passed a decree for the same amount on the 25th of March, 1890. The aforesaid decree provided that, with the exception of the mortgagors or the original debtors, the decree shall have no effect against the other defendant. The decree-holders put the decree dated the 26th of April, 1887 into execution, which was objected to by Sheo Nath Singh, one of the judgment-debtors, on the ground that the decree cannot be executed, inasmuch as it has been cancelled under s. 108 of the Civil Procedure Code, and that the decree-holders ought to have executed the decree dated the 25th of March, 1890. The Court executing the decree allowed the objections: but on appeal the Subordinate Judge reversed the order of the Munsif, holding that the decree dated the 25th of March 1890 has nothing to do with the decree dated the 26th of April 1887, so far as the respondent Sheo Nath is concerned. The decree-holders

* Appeal No. 17 of 1894 under s. 10 of the Letters Patent from a judgment of Mr. Justice Banerji, dated the 2nd February, 1894.

(1) 12 A. 510.

(2) 17 A. 112.

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have again put the decree dated the 26th of April 1887 into execution, and it was objected to on the same ground by Sheo Nath Singh. The Munsif, being of the same opinion, has allowed the objections. The decree-holders have appealed."

The Subordinate Judge held that the order of the appellate Court above mentioned, which was passed on the 23rd of March 1892, having become final, the decree-holders were entitled to execute the decree of the 26th of April 1887 as against Sheo Nath Singh.

Sheo Nath Singh appealed to the High Court, but did not in his sole ground of appeal attempt to question the propriety of the order of the 23rd of March 1892.

[21] This second appeal was dismissed on the 2nd of February 1894, on the finding that the order of the 23rd of March 1892 was final and binding on the appellant.

The appellant thereupon preferred this present appeal under s. 10 of the Letters Patent.

Mr. *Abdul Majid* and *Munshi Jwala Prasad*, for the appellant.

Mr. *Abdul Raoof*, for the respondents.

In the course of the appeal the following question was referred to the Full Bench other than the Judge from whose judgment the appeal was pending:—"Can an order made under the Code of Civil Procedure, and from which an appeal is given by s. 588 of that Code, be questioned under s. 591 in an appeal made from the decree in the suit if the ground of objection is stated in the memorandum of appeal?"

On this reference the following order was passed:—

ORDER OF THE FULL BENCH.

EDGE, C. J., KNOX, BLAIR, BURKITT and AIKMAN, JJ.—The question referred to the Full Bench in the case was:—"Can an order made under the Code of Civil Procedure, and from which an appeal is given by s. 588 of that Code, be questioned under s. 591 in an appeal made from the decree in the suit if the ground of objection is stated in the memorandum of appeal? The Full Bench of this Court in *Rameshur Singh v. Sheodin Singh* (1) decided that the legality of a remand order made under s. 562 of the Code of Civil Procedure could, under s. 591 of the Code, be questioned in the appeal from the decree in the suit, provided the objection was raised in the memorandum of appeal, although no appeal under s. 588 had been brought from the order of remand. The question which their Lordships of the Privy Council had before them in *Saiyid Muzhar Hossein v. Mussamat Bodha Bibi* (2), and in which their Lordships intimated that an order of remand made under s. 562 of the Code of Civil Procedure in the case was a final order, does not appear to affect the question which has been referred to the Full Bench.

Whether the Full Bench decision was right or wrong, we consider ourselves bound by a decision of a Full Bench of this Court, [22] and, as it does not appear from any subsequent legislative enactment or from any judgment of their Lordships of the Privy Council that the Full Bench decision was wrong in law, we, and the Bench which referred this question, are bound by that Full Bench decision.

The appeal will go back to the Bench which made the reference."

The appeal coming on for disposal before the Bench which had made the above reference, the following judgment was delivered:—

(1) 12 A. 510.

(2) 17 A. 112.

JUDGMENT OF THE DIVISION BENCH.

EDGE, C. J., and AIKMAN, J.—In the appeal to this Court the appellant wished to question an order of remand made in March 1892. The appeal in this Court was not under s. 588 of Act No. XIV of 1882 from that order. It was an appeal from an order of the 12th of April 1893, passed on appeal after the case had been heard on remand. The appellant had one ground in his memorandum of appeal. That ground complained of the decision of the 12th of April 1893, and did not allege any error, defect or irregularity in the order of 23rd of March 1892. It appears to us that the appeal must necessarily fail. The only question upon which the appellant proposes to support the appeal is the propriety of the order of the 23rd of March 1892. In the case of *Tilak Raj Singh v. Chakardhari Singh* (1) this Court held that in order to take advantage of the provisions of s. 591 of the Code of Civil Procedure the ground must be set out in the memorandum of appeal. It has not been set out in this memorandum of appeal. Further, it would appear that s. 591 does not enable a litigant to avoid limitation by coming up under s. 591 when the only ground of appeal is the order made under s. 562. S. 591 contemplates two things—there being a regular appeal about something else, and in that appeal the insertion of a ground of objection under s. 591. We dismiss the appeal with costs.

Appeal dismissed.

18 A. 23 = 15 A.W.N. (1895) 139.

[23] REVISIONAL CRIMINAL.

Before Mr. Justice Aikman.

QUEEN-EMPRESS v. BHAWANI.* [19th June, 1895.]

Act No. III of 1867 (*Gambling Act*), s. 6—"Instrument of gaming"—Cowries.

Held that cowries are not "instruments of gaming" within the meaning of s. 6 of Act No. III of 1867.

THE facts of this case sufficiently appear from the judgment of the Court.

JUDGMENT.

AIKMAN, J.—In this case, which has been reported for the orders of this Court under the provisions of s. 438 of the Code of Criminal Procedure by the learned Sessions Judge of Cawnpore, one Bhawani was convicted under s. 3 of Act No. III of 1867 of being the owner of a common gaming house, and four other men were convicted under s. 4 of the same Act of being present in the common gaming house for the purpose of gambling. It appears that the house occupied by Bhawani was searched under a warrant issued under the provisions of s. 5 of the Act. Bhawani and the four other accused were found in the house, but there is no evidence that they were actually engaged in gambling. There is evidence that some coins and cowries were found in the house when it was searched, and the Magistrate, regarding the cowries as instruments of gaming, applied s. 6 of the Act and convicted the accused. The question

* Criminal Revision No. 923 of 1895.

(1) 15 A. 119.

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which has to be considered is whether cowries come within the meaning of the words "other instruments of gaming." S. 6 runs as follows:—
"When any cards, dice, gaming tables, cloths, boards or other instruments of gaming are found in any house, walled enclosure, room or place entered or searched under the provisions of the last preceding section, or about the person of any of those who are found therein, it shall be evidence, until the contrary is made to appear, that such house, walled enclosure, room or place, is used as a common gaming house, and that the persons found therein were present for the purpose of gaming, although no play was actually seen by the Magistrate, or police officer, or any of his assistants."

[24] In the case of *Empress v. Vithal Bhaichand* (1) it was held that coins were not an instrument of gaming, and that an instrument of gaming meant an instrument devised and intended for that purpose. In the case of *Watson v. Martin* (2) it was held that a person on the high way playing at pitch and toss with half-pence was not liable to conviction under Statute 5, Geo. IV, Cap. 83, s. 4, as being a person "playing with an instrument of gaming." After that decision the statute was amended by 31 and 32 Vict., Cap. 52, and 36 and 37 Vic., Cap. 38. By these Acts, after the words "instrument of gaming" in the old Act, the words "or any coin, card, token, or other article used as an instrument or means of such wagering or gaming at any game or pretended game of chance" have been added. Similarly the Act in force at Bombay has been amended by Bombay Act I of 1890, so as to make the words "instrument of gaming" include any article used as a subject or means of gaming. But the Legislature has not yet seen fit to alter Act No. III of 1867 and, until it does so, I must hold that, although cowries can be used for the purpose of gambling, they are not "instruments of gaming" within the meaning of the Act as it at presents stands. The question as to whether the finding of cowries would be sufficient evidence under the Act was mooted in the case of *Empress v. Shaker Chand* (3) but was not then decided. I am of opinion that the learned Sessions Judge was right in considering that the offences of which the accused were convicted were not established. I quash the convictions, and direct that the fines, if paid, be refunded, and that the accused Kedar, who was sentenced to two months' imprisonment, be forthwith released.

18 A. 24 = 15 A.W.N. (1895) 141.

REVISIONAL CRIMINAL.

Before Mr. Justice Knox, Mr. Justice Banerji, and Mr. Justice Aikman.

QUEEN-EMPRESS v. CHANDA.* [26th June, 1895.]

Act XLV of 1860 (*Indian Penal Code*). s. 373—*Obtaining possession of minor for purposes of prostitution—Offences defined by above section explained.*

To constitute the offence provided for by s. 373 of the *Indian Penal Code* it is necessary, first, that a minor under sixteen years of age shall be bought, hired or otherwise obtained possession of, and, secondly, that the minor shall be bought, hired or otherwise obtained possession of with the intent that the same minor who still [25] under the age of sixteen years shall be employed for the purposes of prostitution, or with the knowledge that it is likely that the said

* Criminal Revision No. 764 of 1895.

(1) 6 B. 19.

(2) 10 Cox. Cr. Ca. 56.

(3) 2 A.W.N. (1882) 132.

minor while still under the age of sixteen years will be employed or used for an unlawful and immoral purpose.

The offence is complete so soon as the obtaining possession, with the requisite intention or knowledge, of the minor is accomplished, though the minor may not enter upon prostitution until years after she has attained maturity, or may never enter upon such a profession at all. *The Deputy Legal Remembrancer v. Karuna Baistobi* (1) approved.

[R., 14 Cr. L.J. 33 (35)=18 Ind. Cas. 257 (259)=24 M.L.J. 211 (223)=13 M.L.T. 131 (134)=1913 M.W.N. 207 (215).]

THIS was an application by one Musammat Chanda for revision of a conviction under s. 373 of the Indian Penal Code and a sentence of one year's rigorous imprisonment passed by a Magistrate of the first class of the Bijnor district and confirmed on appeal by the Sessions Judge of the Bijnor-Budaun Division. It appears that about the year 1889, Gopia, the father of the girl, Dhanni, in respect of whom the offence charged was alleged to have been committed, brought Dhanni from Almora, where she lived, and lodged her in the house of the accused, who was his sister. There was no special arrangement entered into at that time as to the girl's future, but evidence was given to prove that it was the custom amongst the Naik Rajputs that the girls learned singing and dancing when young, and when they arrived at maturity adopted prostitution as a profession, and that Gopia had left Dhanni with Chanda in order that she might be brought up according to the custom of the caste. The evidence as to the girl's age and as to the time when she commenced prostitution was not very precise, but it was not proved that she did in fact commence prostitution before the age of sixteen. On the other hand, Dhanni was undoubtedly much below the age of sixteen years when she was made over to the accused, and although some attempt was made to prove that the accused had dissuaded Dhanni from entering upon prostitution at too early an age for fear of soiling her voice, no evidence of any specific agreement that such event should not take place until after Dhanni had reached the age of sixteen was given.

Chanda, having been convicted as above described of the offence under s. 373 of the Indian Penal Code, applied to the High Court in revision.

Babu Durga Charan Banerji, for the applicant.

[26] The Officiating Public Prosecutor (Mr. A. H. S. Reid), for the Crown.

JUDGMENT.

KNOX, BANERJI and AIKMAN, JJ.—Musammat Chanda was convicted by Kamta Prasad, a Magistrate of the first class, of an offence under s. 373 of the Indian Penal Code, and sentenced to rigorous imprisonment for one year. On appeal to the Court of the Sessions Judge of Bijnor-Buddaun the conviction and sentence were maintained.

Application is now made to this Court that in exercise of its powers of revision it will reverse the finding and sentence on the ground that:—

(1) There has been no act on the part of Chanda amounting to buying, hiring or otherwise obtaining possession.

(2) There was no distinct arrangement between the petitioner and Gopia, the father of Musammat Dhanni, that Dhanni was to be brought up for prostitution.

(3) That no act of the petitioner has been proved which would bring her case within the purview of s. 373, Indian Penal Code.

(1) 22 C. 164.

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We may at once say that before an offence under s. 373 can be established it must be proved (1) that a minor under sixteen years of age was bought, hired or otherwise obtained possession of by the accused, and, (2) that the minor was bought, hired or otherwise obtained possession of by the accused with the intent that the same minor while under sixteen years of age shall be employed or used for the purposes of prostitution, or with the knowledge that it was likely that the said minor while still under the age of sixteen will be employed or used for an unlawful and immoral purpose.

The learned Public Prosecutor contended that such a construction would be unduly limiting the meaning of s. 373. But we cannot overlook the force of the expression "such minor" which is twice repeated in the section. The word "such" in our opinion refers back to the words "under the age of sixteen years," and must be interpreted wherever it occurs in the section as equivalent to those words. The construction we place upon the words is the construction placed upon them by the Calcutta High Court [27] in *The Deputy Legal Remembrancer v. Karuna Baistobi* (1). As was pointed out by the learned Judges in the case just cited, at p. 172,—"in order to constitute an offence under s. 373, Indian Penal Code, there must be the buying of a minor girl under the age of sixteen years with intent that such minor shall be employed for the purpose of prostitution or with the knowledge or likelihood that she shall be so employed while yet a minor under the age of sixteen. The offence will not be constituted if, notwithstanding the existence of such intention or guilty knowledge, the employment that is intended or known to be likely is to take place after the completion of the sixteenth year by the minor."

In the case before us the girl Dhanni, who describes herself as seventeen years of age, and who says that she developed into a woman two years ago, deposes that according to the universal practice among the caste to which she belongs (the *Naik* Rajputs of Kumaun) when a man marries a woman she lives in *pardah*, but the daughters of the man and woman sing and dance, and when they arrive at the age of puberty (*umr par pahunchtin hain*), prostitute. Dhanni's elder sister has followed this practice, and Dhanni's own father Gopi took her while still a girl from her home in the hills to the house of the accused (her aunt), who admitted that she too has followed the practice above described.

The evidence given by Dhanni is corroborated by Lali, the sister, and by Moti, an aunt of the girl and sister to the accused. Moti adds that Chanda, the accused, "retained Dhanni to make a prostitute of her. Dhanni's father left her here for the same purpose;" and Lali, in a supplementary deposition given on the 5th of September 1894, says that "all the girls that come from the hills first sing and dance, and when arrived at the age of puberty (*jab apni umr par atin hain*) prostitute. For this same object Dhanni's father left Dhanni with Chanda."

All that these witnesses say is corroborated by Chanda in the examinations which from time to time were addressed to her during the course of the trial. Thus on the 4th of September, she [28] said:—"If a daughter of the *Naik* Rajputs has no prostitute relation, she goes out of the house on coming to age and turns a prostitute. If she have a relation a prostitute in the plains or on the hills, her parents send her to that relation; she learns singing and playing, and when she grows up she

becomes a prostitute." Again, on the 5th of September, she said that "Dhanni's father left Dhanni with her that she might learn singing and playing, and when arriving at the age of maturity (*jawan*) follow the profession of prostitute."

The medical evidence in the case is to the effect that the Civil Surgeon thinks Dhanni about 16 years of age. Girls become of puberty at any age from 11 to 19, and there is no possible means of giving more than a guess of the actual age of the girl. She, the Civil Surgeon adds, is certainly not above 25.

We have it then established by the evidence that the accused did receive Dhanni from her father with the intent that she should follow the practice of the caste and be used as a prostitute as soon as she attained maturity. We have it in evidence that girls in India attain maturity at any time between the ages of 11 and 19, and Dhanni herself says that in her own case she attained maturity when she was 15 years of age.

It is, however, contended on her behalf that there is evidence to show that Dhanni did not as a fact commence prostitution until after she had reached upon the age of 16, and that even then she entered upon this course against the will and advice of the accused.

The exact age, however, at which Dhanni entered upon a course of prostitution is in our opinion immaterial. An offence under s. 373, Indian Penal Code, would be, and is, complete as soon as the buying, &c., by the accused and the guilty knowledge or intent on the part of the accused are proved, though the person bought may not enter upon prostitution until years after she has attained maturity, or may never enter upon such a profession at all.

The mere fact that the accused dissuaded or tried to dissuade the girl from entering upon prostitution while still so young for fear lest her voice as a singer should be spoiled will not remove Chanda's [29] act from the category of an offence under s. 373. The offence was complete and perfected when she took Dhanni over from her father years ago.

The accused does not prove that her intent or knowledge was other than would reasonably be presumed from the evidence given as to the practice prevalent among *Naik* Rajputs, and as to the object with which Dhanni, Lali and Moti all say the girl was left with the accused.

There was a feeble attempt made to contend that the expressions "*umr par ana*," "*jawan*," and "*baligh*" refer to an age far above sixteen. We know of no authority for any such construction. The natural meaning of the word is the arriving at what is known as the age of puberty, and we must take the words in their natural and ordinary sense.

None of the reasons advanced as grounds for interfering are established, and the sentence is certainly not too severe.

We accordingly dismiss the application and direct that the record be returned.

If Musammat Chanda is on bail she must surrender and undergo the remaining term of imprisonment to which she was sentenced.

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JULY 1.

APPELLATE CIVIL.

APPEL-
LATE*Before Mr. Justice Knox and Mr. Justice Aikman.*

CIVIL.

SUBHUDRA AND ANOTHER (*Defendants*) v. BASDEO DUBE (*Plaintiff*).^{*}
[1st July, 1895.]

18 A. 29 =

15 A.W.N.

(1895) 147.

Criminal Procedure Code, section 488—Order for maintenance of wife—Such order not affected by declaratory decree of Civil Court.

An order for the maintenance of a wife duly made under section 488 of the Code of Criminal Procedure cannot be superseded by a declaratory decree of a Civil Court to the effect that the wife in whose favour such order has been made has no right to maintenance. *Subad Domni v. Katiraur Dome* (1), referred to.

[F., 11 C.P.L.R. 72; R., L.B.R. (1893—1900) 662; D., 32 C. 479 = 13 C.W.N. 150 = 7 Cr. L.J. 235 = 2 Ind. Cas. 550 = 2 M.L.T. 344; 30 M. 400 = 17 M.L.J. 288 = 2 M.L.T. 360; 26 P.R. 1903 = 100 P.L.R. 1903.]

THE plaintiff in this case had had an order passed against him under section 488 of the Code of Criminal Procedure directing him to pay a certain sum for the maintenance of the first defendant and [30] her child, of whom he was found to be the father. That order was contested by the plaintiff but was finally confirmed by an order of the High Court dated the 29th July 1893.

In the suit out of which this appeal has arisen the plaintiff-appellant claimed a declaratory decree that the first defendant was a woman of loose character; that her son, the second defendant, was not his; and that defendant No. 1 was not entitled to maintenance.

The Court of first instance (Munsif of Mirzapur) dismissed the suit, holding that the relief sought thereby having already been refused by the High Court, the suit would not lie. The plaintiff appealed, and the lower appellate Court (Subordinate Judge of Mirzapur), taking a contrary view, remanded the suit under section 562 of the Code of Civil Procedure.

From this order of remand the plaintiff appealed to the High Court.
Munshi *Madho Prasad*, for the appellants.
Pandit *Sundar Lal*, for the respondent.

JUDGMENT.

KNOX and AIKMAN, JJ.—Musammatt Subhudra, the appellant in this case, is a Hindu woman, the wife of one Basdeo Dube, the respondent. She obtained from the Magistrate two orders, one dated the 14th of March 1893, and the other the 23rd of November 1893, declaring herself and a child entitled to maintenance from Basdeo Dube. That order in due course came before this Court sitting as a Court of Criminal Revision, and was upheld. The respondent after that brought a suit in the Civil Court setting out as his cause of action the orders of the Magistrate, and praying that it might be declared that the appellant was a woman of loose character and outcasted; that the child born of her was not begotten of the respondent; that Musammatt Subhudra be declared to have no right of maintenance; and lastly, that it be declared that there is now no relationship of husband and wife between the parties.

^{*} First Appeal No. 22 of 1895, from an order of Pandit Indar Narain, Subordinate Judge of Mirzapur, dated the 28th February 1895.

(1) 20 W.R.C.R. 58.

These reliefs are not reliefs which a Civil Court can grant, especially under the circumstances of the present case. What the respondent seeks to do is to set aside the maintenance orders passed by the Magistrate, who had full jurisdiction to pass them, and to declare that they are of no force.

[31] The matter is not one that has not been before the Courts. In *Subad Domni v. Katiraur Dome* (1) Pontifex, J., on a reference made by a Magistrate before whom a decree was produced of a Civil Court, to the effect that the woman in whose favour maintenance had been ordered, was not entitled to such maintenance, held as follows:—"Upon this reference, we are of opinion that the decree of the Civil Court cannot affect the order of the Magistrate, even if the Civil Court had jurisdiction, which it has not, to make a declaratory order as to the paternity of the child in question."

We decree the appeal, set aside the decree of the lower appellate Court, and, though we do not agree with the reasons given by the learned Munsif, we restore his decree dismissing the suit with costs.

The appellant will have her costs in all Courts.

Appeal decreed.

18 A. 31 = 15 A.W.N. (1895) 144.

APPELLATE CIVIL.

Before Mr. Justice Banerji.

MUHAMMAD HUSEN ALI KHAN (*Judgment-debtor*) v. THAKUR
DHARAM SINGH (*Decree-holder*).^{*} [10th July, 1895.]

Act No. IV of 1892 (Transfer of Property Act), section 88—Suit for sale on a mortgage—Purchase at auction sale by decree-holder—Further execution sought against other property comprised in the mortgage, Amount for which credit is to be given to the mortgagor.

A mortgagee decree-holder, in a suit for sale under section 88 of the Transfer of Property Act, 1892, brought part of the mortgaged property to sale, and, with the leave of the Court, purchased it himself. The amount realized by the sale being insufficient to satisfy the mortgage debt, the decree-holder applied for execution against the remainder of the property comprised in the mortgage. *Held* that the decree-holder was not bound to give credit to the mortgagor to the amount of the market value of the mortgaged property purchased by him, but only to the amount of the actual purchase-money. *Mahabir Parshad Singh v. Macnaghten* (2), *Sheonath Does v. Janki Prasad Singh* (3) and *Gunga Pershad v. Jawahir Singh* (4), referred to.

[R., 4 C.L.J. 246 (253).]

IN this case the respondent had obtained a decree against the appellant under section 88 of the Transfer of Property Act for sale of certain property which had been mortgaged to him by the appellant. In execution of that decree the appellant caused part of [32] the property mortgaged to be sold by auction and purchased it himself. The amount of purchase-money of the portion of the property so sold being insufficient to satisfy the decree, the decree-holder applied for further execution against the remainder of the property mortgaged. To this the judgment-debtor objected that the real value of the property brought to sale and purchased

* First Appeal No. 29 of 1894, from an order of Babu Ganga Saran, B.A., Subordinate Judge of Aligarh, dated the 18th November 1893.

(1) 20 W.R. C.R. 58.

(2) 16 C. 692.

(3) 16 C. 132.

(4) 19 C. 4.

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15 A.W.N.
(1895) 147.

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18 A. 31 =
15 A.W.N.
(1895) 144.

by the decree-holder was in excess of the decretal amount. The Court executing the decree (Subordinate Judge of Aligarh) found that only the price actually paid by the decree-holder was to be credited in satisfaction of the decree and disallowed the objection. The judgment-debtor thereupon appealed to the High Court.

Mr. *A. H. S. Reid*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondent.

JUDGMENT.

BANERJI, J.—This appeal arises out of proceedings in execution of a decree obtained by the respondent. It was a decree for the sale of mortgaged property, passed under section 88 of Act No. IV of 1882. A part of the property was sold by auction, and was purchased by the decree-holder himself with the leave of the Court granted under section 294 of Act No. XIV of 1882. The proceeds of the sale not having sufficed to satisfy the decree, the decree-holder has applied for the sale of the remainder of the mortgaged property, and the Court below has granted his application. It is contended, on behalf of the appellant, judgment-debtor, that the decree-holder is not entitled to bring the remainder of the mortgaged property to sale without taking into account the actual market value of the property sold, and showing that after deducting such value out of the decretal amount there was still a balance due to him. In support of his contention Mr. *Reid* has cited *Hart v. Tara Prasanna Mukherji* (1), *Ballam Das v. Amar Raj* (2), *Krishnasami Ayyar v. Janakiammal* (3), *Sumera Kuar v. Bhagwant Singh* (4).

I am of opinion that the contention is unsound, and that the cases cited are distinguishable from the present case.

Where a mortgagee purchases the mortgaged property subject to a mortgage held by himself, that is, where he purchases the bare [33] equity of redemption, he is undoubtedly liable to account for the actual value of the property when he seeks to recover his mortgage-money by sale of other property of the mortgagor. The reason for this is clear. A mortgagee who purchases only the equity of redemption pays for the property, not its actual value, but only the value of the equity of redemption. In other words, he pays for the property the difference between its actual value as unincumbered property and the amount of the mortgage. In such a case the mortgagee cannot equitably be allowed to throw the whole burden of the mortgage-debt on other property of the mortgagor, and he must account for the real value of the mortgaged property purchased by himself. But where the mortgaged property is sold in satisfaction of a decree obtained on the mortgage, and the mortgagee purchases the property with the leave of the Court, he stands on the same footing as any other purchaser, and acquires in the property the rights both of the mortgagor and the mortgagee. Such a purchase cannot prejudicially affect the mortgagor, and does not raise any equity in his favour. It has been held by their Lordships of the Privy Council in *Mahabir Pershad Singh v. Macnaghten* (5) that leave to bid puts a mortgagee in the same position as any independent purchaser, and in such a case the mortgagee by his purchase does not become a trustee for the mortgagor. A mortgagee, therefore, who purchases the mortgaged property with the leave of the Court in execution of a decree for sale

(1) 11 C. 718.

(2) 12 A. 537.

(3) 18 M. 153.

(4) 15 A.W.N (1895) 1.

(5) 16 C. 682.

passed in respect of his mortgage is only liable to give credit for the amount of the purchase-money, and is entitled to seek out execution for the balance of the decretal amount due to him. I am supported in this opinion by the rulings of the Calcutta High Court in *Sheonath Doss v. Janki Prosad Singh* (1), and *Gunga Pershad v. Jawahir Singh* (2). In *Sumera Kuar v. Bhagwant Singh* (3) the mortgagee had purchased a moiety of the mortgaged property in execution of a decree for money obtained by a third party after giving notice of his own mortgage, and he subsequently sued to enforce his mortgage against the other moiety of the mortgaged property. It was held that he [34] could not be permitted to throw the whole burden of the mortgage-debt on the other moiety of the mortgaged property.

In *Ballam Das v. Amar Raj* (4) the mortgagee obtained two decrees on separate bonds for the sale of the same property and purchased the property in execution of one of the decrees. His purchase was subject to liability for the amount of the decree. That case has therefore no bearing on the present question.

The other two cases cited by Mr. Reid are distinguishable, as in those cases the equity of redemption only was purchased by the mortgagee.

I am of opinion that the Court below has rightly held that the respondent decree-holder was entitled to take out execution for the balance which remained due to him after giving credit for the amount of the proceeds of the sale at which he had purchased a part of the mortgaged property, and I dismiss this appeal with costs.

Appeal dismissed.

18 A. 34 = 15 A.W.N. (1895) 148.

APPELLATE CIVIL.

Before Mr. Justice Burkitt.

KALIAN SINGH (*Judgment-debtor*) v. RAM CHARAN (*Decree-holder*).
[12th July, 1895.]

Act No. VII of 1889 (Succession Certificate Act), section 4 (b)—Execution of decree—Application for execution made before production of certificate.

In cases where a certificate of succession is required before execution of a decree can be taken out, all that is necessary is that the certificate should be produced before an order for execution can be made. It is not necessary that the certificate should be produced along with the application for execution. *Brojo Nath Surma v. Isswar Chundra Dutt* (5) and *Mangal Khan v. Salim-ullah* (6) referred to.

[R., 13 Bom.L.R. 22 (25) = 9 Ind. Cas. 349 (350).]

THE facts of this case sufficiently appear from the judgment of Burkitt, J.

Mr. *Roshan Lal*, for the appellant.

Maulvi *Ghulam Mujtaba* for the respondent.

BURKITT, J.—This is an appeal in an execution of decree case. In the memorandum of appeal three grounds were set forth. Of those three grounds the second and third were abandoned at the hearing ; the

* First Appeal No. 177 of 1894, from a decree of Maulvi Muhammad Unwar Husain Khan, Subordinate Judge of Fatehgarh, dated 30th June 1894.

(1) 16 C. 132.

(2) 19 C. 4.

(3) 15 A.W.N. (1895) 1.

(4) 12 A. 537.

(5) 19 C. 482.

(6) 13 A.W.N. (1893) 197.

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18 A. 31 =
15 A.W.N.
(1895) 144.

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18 A. 34=
15 A.W.N.
(1895) 148.

first only was pressed. That objection is to the effect [35] that the lower Court had no power to proceed with the execution of the decree until a certificate under section 4 (b) of Act No. VII of 1889 had been produced. On a perusal of the record it appears that the respondent decree-holder did apply for execution of the decree without putting in a certificate, and that he stoutly contended that for certain reasons given by him, which are now admitted to be unsound, he was not bound to take out a certificate. It also appears that the respondent decree-holder has since then taken the proper steps to obtain a certificate, and I am informed that he now holds the necessary certificate. The Court below, wrongly, I think, held that, as the respondent had now taken all steps necessary to obtain a certificate, execution could proceed without the production of that certificate. In that matter I have no doubt that the Court below was wrong, seeing that the words of clause (b) of section 4 of Act No. VII of 1889 expressly prohibit an execution Court from proceeding to execute a decree where a certificate is required unless such certificate be produced. But here, although the Court has been wrong in its ruling as to the non-production of the certificate, I still see no reason to interfere with the order under appeal. That order is not an order directing execution to issue, but is an order overruling the objections made by the judgment-debtor. If the Court had gone on to direct that execution should issue, notwithstanding the non-production of the certificate, this appeal must have been allowed; but, as matters now stand, the appeal is premature, as no order has as yet been made, or, at any rate, has been appealed against, by which the Court directs execution to proceed on the decree. It is still open to the respondent decree-holder, by production of the certificate, to cure the flaw which at present exists. It is not necessary that the certificate should be produced with the application for execution; it is sufficient if it be produced and tendered in Court at any time before the Court proceeds to pass an order for the execution of the decree. Such is the law laid down by the Calcutta High Court in *Brojo Nath Surma v. Isswar Chundra Dutt* (1) and by this Court in *Mangal Khan v. Salim-ullah* (2). I fully concur in the rule laid down in those cases and in the reasoning [36] by which it is supported. The object of the appellant here, as I understand it, is to have the application for execution rejected because it was not accompanied by a certificate. Although I do not agree with the ruling of the lower Court, as noted above, I still am of opinion that there are no grounds, for rejecting the application for execution. The respondent has a *locus pœnitentiæ* to put in the certificate before the Court proceeds to order execution, and if that be done, the only objection to the execution disappears.

I therefore dismiss this appeal, but I make no order as to costs.

Appeal dismissed.

(1) 19 C. 482.

(2) 13 A.W.N. (1893) 197.

18 A. 36 = 15 A.W.N. (1895) 149.

APPELLATE CIVIL.

Before Mr. Justice Banerji.

GHULAM SHABBIR (*Judgment-debtor*) v. DWARKA PRASAD
AND OTHERS (*Decree-holders*).^{*} [24th July, 1895.]

Civil Procedure Code, sections 244, 319—Execution of decree—Purchase by decree-holder at auction sale—Order for delivery of possession—Appeal.

Certain holders of a decree for sale upon a mortgage having brought the property ordered to be sold to sale purchased it themselves. Having taken out certificates of sale they applied to be put in possession of the property purchased by them, and obtained an order for possession. On appeal by the judgment-debtors against this order it was held that no appeal lay, the order objected to being one under section 319 and not under section 244 of the Code of Civil Procedure. *Sabhajit v. Sri Gopal* (1) referred to.

[N.F., 7 C.L.J. 436; F., 1 Ind. Cas. 416 (125); R., 23 A. 476; 31 A. 82 (102) = C. A. L.J. 71 (92) = 5 M.L.T. 185 (195) (F.B.); 1 C.W.N. 658; 1 S.L.R. 172.]

THE facts of this case sufficiently appear from the judgment of Banerji, J.

Munshi Madho Prasad and Maulvi Ghulam Muftaba, for the appellant.

Pandit Baldeo Ram, for the respondents.

JUDGMENT.

BANERJI, J.—A preliminary objection has been taken to the hearing of this appeal on the ground that no appeal lies. It appears that the respondents obtained a decree for sale against the appellant, and in execution of that decree purchased the mortgaged property. They have obtained certificates of sale and have applied under section 319 of the Code of Civil Procedure for delivery of possession. The Court below has ordered possession to be delivered, [37] and it is in respect of that order that this appeal has been brought. Section 588 of the Code of Civil Procedure does not allow an appeal from an order under section 319. Mr. Madho Prasad has contended that the order made by the Court below must be regarded as a decree under section 244, the parties being the decree-holders and the judgment-debtor. This contention is in my opinion unsound. The decree-holders, as such, were not entitled to obtain delivery of possession. It was only by reason of their having purchased the property of the judgment-debtor at auction that they could apply for possession, and it was only in their character as auction-purchasers that they did make their application for possession. Their status as auction-purchasers was distinct from their character as decree-holders and—as observed in the judgment of the Full Bench in *Sabhajit v. Sri Gopal* (1)—it was a pure accident that the decree-holders were also auction-purchasers. As I have said above, as decree-holders, the respondents could not claim possession, and therefore their application for delivery of possession was not, and could not be, one under section 244. It purported to have been made under section 319, and that was the only section under which it could have been made. As no appeal lies from an order under section 319, the preliminary objection must prevail and this appeal must be, and it is, dismissed with costs.

Appeal dismissed.

^{*} First Appeal No. 149 of 1894, from a decree of Pandit Bansidhar, Subordinate Judge of Meerut, dated the 12th May 1894.

(1) 17 A. 222.

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15 A.W.N.
(1895) 149.

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JULY 11.

18 A. 37=15 A.W.N. (1895) 154.

APPELLATE CIVIL.

APPEL-
LATE*Before Mr. Justice Knox, Officiating Chief Justice, and Mr. Justice Aikman.*

CIVIL.

JAGAN NATH (*Judgment-debtor*) v. MAKUND PRASAD (*Decree-holder*)
AND BALDEO PRASAD (*Auction-purchaser*).^{*} [11th July, 1895.]

18 A. 37=

15 A.W.N.

(1895) 154.

Civil Procedure Code, s. 311—Execution of decree—Application to set aside sale in execution—What applicant must prove.

It is not sufficient for an applicant under section 311 of the Code of Civil Procedure to show that there has been material irregularity in publishing or conducting a sale, and that a price below the market value has been realised; but he must go on to connect the one with the other, that is, the loss with the irregularity as effect and cause by means of direct evidence. *Tassaduk Rasul Khan v. Ahmad Husain* (1) referred to.

[Diss., 6 O.C. 61; R., 24 C. 291; 21 C. 815 (819)=8 C.W.N.-686; 1 O.C. 186.]

[38] THIS was an appeal from an order of the Subordinate Judge of Bareilly dismissing a judgment-debtor's application to set aside a sale in execution of a decree against him. The facts of the case are thus stated in the order of the lower Court:—"In execution of a decree held by Makund Prasad the whole of the village of Barkhana Harchandpur was put up for sale. During the progress of the sale proceedings one Musamat Sarsuti instituted a suit in this Court to establish her right to one-third of the village. An application was presented on her behalf for postponement of the sale on the ground that she had instituted the suit for declaration of her right to one-third of the village. Thereupon it was ultimately ordered that the sale should be postponed. On the 28th June, 1894, an application was made on behalf of the decree-holder to the effect that the order of postponement related to one-third of the village and not to the whole, but the officer conducting the sale would postpone the sale of the whole village, and praying that the officer be informed that the order related to only one-third of the village. Thereupon in the presence of the pleaders of both parties it was ordered that the sale of one-third of the village should be put off and not of the remaining two-thirds. The 20th July was fixed for the sale, and on that date the officer in charge of the sale proceeded to sell the two-thirds of the village, which was knocked down for Rs. 6,100 to Baldeo Prasad."

The judgment-debtor thereupon applied to have the sale set aside on the ground that, after the order for postponement, the sale could not legally have been held without the issue of a fresh proclamation of sale, and alleging that in consequence of this irregularity the property had fetched a price far below its proper value.

The lower Court found that, though there was an irregularity in holding the sale without issue of a fresh proclamation, and though the price fetched by the property was decidedly low, yet the judgment-debtor was bound to prove that the lowness of price was necessarily the result of the said irregularity, and that as he had failed to establish the connection between the two, he was not entitled to have the sale set aside. The Court therefore dismissed the application.

[39] The judgment-debtor appealed to the High Court.

* First Appeal No. 36 of 1895, from an order of Syed Muhammad Jafar Husain Khan, Subordinate Judge of Bareilly, dated the 5th January 1895.

(1) 20 I.A. 176.

Mr. *Roshan Lal*, for the appellant.

Mr. *D. N. Banerji* and Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

KNOX, OFFICIATING C.J.—This is a first appeal from an order passed by the Subordinate Judge of Bareilly. In that order the Subordinate Judge relying upon the precedent of *Tassaduk Rasul Khan v. Ahmad Husain* (1) declined to set aside a sale of immoveable property on the ground that the judgment-debtor, who was impugning the sale, had failed to prove that any substantial injury had been sustained by him by reason of an alleged material irregularity in the publication of the sale. The material irregularity alleged arose under the following circumstances. The property originally advertised for sale was 20 biswas of the village of Barkhana Harchandpur. The proclamation for sale of 20 biswas was duly made, and the 20th of July fixed as the date on which the sale was to be held. One Musammat Sarsuti instituted a suit laying claim to one-third of the property advertised for sale, and she followed up her suit by an application that the sale might be postponed pending the result of her suit. Her application was at first granted, and orders were issued for adjournment of the sale. Upon this, the decree-holder pointed out that the claim of Musammat Sarsuti extended only to one-third of the property advertised for sale and that there was no reason why the remaining two-thirds should not be sold. Upon this fresh orders were issued to the Collector, who was to hold the sale, directing him to proceed with the sale of two-thirds of the village. Two-thirds of the village were accordingly sold on the 20th of July, the date originally fixed on the first proclamation for sale, and purchased for Rs. 6,100 by one Baldeo Prasad. The period that intervened between the first order directing postponement of the sale and the second order directing the sale to proceed as to two-thirds was an interval of 14 days. The contention before us is that under the circumstances fresh proclamation should have been made. In support of this contention, the learned counsel for the appellant referred us to *Shib Prokash* [40] *Singh v. Sardar Doyal Singh* (2), it was there held that a fresh proclamation was a necessity and the omission to issue it a material irregularity. The question whether a fresh proclamation was or was not necessary need not be decided in the present case, as we are able to dispose of the appeal on other grounds, and in fact in the precedent just quoted the case before the Calcutta Court was remanded for evidence and decision upon what is the material point in all these cases, viz., whether, in the event of a material irregularity having taken place, substantial injury has or has not been sustained by reason of the occurrence of the irregularity complained of. In the present appeal one of the pleas raised is that the evidence on the record proves substantial injury, and some attempt was made to satisfy us that substantial injury to the judgment-debtor had been made out. There is a strong probability that the property was sold considerably below its ordinary market value, but there is not one word in the evidence which connects the low price, if it was a low price, realised with what is alleged as the material irregularity. The learned counsel for the appellant endeavours to get over this difficulty by asking us to follow the ruling in *Ganga Prasad v. Jag Lal Rai* (3). That was a ruling of a Divisional Bench of this Court in which the learned Judges who heard the case differed. There can now

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18 A. 37 =

15 A.W.N.

(1895) 154.

(1) 20 I.A. 176.

(2) 3 C. 544.

(3) 11 A. 333.

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18 A. 37 =
15 A.W.N.
(1895) 154.

be no question whatever as to what is the law, as the matter has been fully considered and decided by their Lordships of the Privy Council in *Tassaduk Rasul Khan v. Ahmad Husain* (1). It was contended on behalf of the respondents in that case that the non-compliance with the interval of 30 days between proclamation and sale made the sale a nullity. Their Lordships say in most distinct terms that they cannot accede to that contention. They allow there had been a material irregularity, but, following previous rulings of the Privy Council to the same effect, they laid down clearly that in all cases of irregularity under s. 311, evidence must be given of substantial injury having resulted, and that it was incumbent on the judgment-debtors, who were respondents, [41] to prove that they sustained substantial injury by reason of such irregularity. They further laid down that loss is not to be inferred from the mere fact that a sale was had without full compliance with s. 290, a section which, their Lordships pointed out, contemplates direct evidence on the subject.

AIKMAN, J.—I concur with the learned Officiating Chief Justice. I need not recapitulate the facts of the case, which have been clearly set forth in his judgment. Assuming for purposes of argument that there was in the case before us a material irregularity in the failure of the Court to issue a fresh proclamation of sale after it has exempted from sale part of the property originally advertised, I think it must be held that appellant has failed to prove that the low price which his property fetched at the auction was due to that irregularity. The judgment of their Lordships of the Privy Council in the case of *Tassaduk Rasul Khan v. Ahmad Husain* (2) makes it clear that it is not sufficient for an applicant under s. 311 to show that there had been material irregularity in publishing or conducting a sale and that a price below the market value has been realised, but he must go on to connect the one with the other, that is, the loss with the irregularity, as effect and cause by means of direct evidence. The contention of the learned counsel for the appellant that the sale was a nullity, a contention based on a decision of this Court, *Ganga Prasad v. Jag Lal Rai* (3), is deprived of any force by reason of the same ruling of their Lordships of the Privy Council, as in it their Lordships declined to accede to a similar contention.

Per Curiam. The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

18 A. 42 = 15 A.W.N. (1895) 150.

[42] APPELLATE CIVIL.

Before Mr. Justice Knox, Officiating Chief Justice, and Mr. Justice Aikman.

EAST INDIA RAILWAY COMPANY (*Defendant*) v. BUNYAD ALI
(*Plaintiff*).^{*} [12th July, 1895.]

Act No. IX of 1890 (Indian Railway Act), s. 72—Contract saving liability of Company for loss of goods carried by it—"Risk note."

The contract embodied in what is commonly known as a "risk note," i.e., a contract whereby in consideration of goods being carried by a Railway Company

^{*} Miscellaneous No. 173 of 1895. Reference under section 617 of Act No. XIV of 1882, by Pandit Bansidhar, Subordinate Judge of Saharanpur.

(1) 20 I.A. 176.

(2) 21 C. 66.

(3) 11 A. 999.

at a reduced rate, the consignor agrees that the Company shall be free of all responsibility for any loss or damage to the goods, is a valid and legal contract within the terms of s. 72 of Act No. IX of 1890. *Suntokh Rai v. East India Railway Company* (1) distinguished.

[Appr., 4 Ind. Cas. 907 (908) = 113 P.R. 1908 = 15 P.L.R. 1909; R., 30 C. 257 (261); 17 C.W.N. 529 (531); 18 Ind. Cas. 216 (217); 18 Ind. Cas. 731 (732); 14 M.L.J. 396 (399); 2 N.L.R. 125 (128); 5 O.C. 153.]

IN this case the plaintiff-respondent sued to recover from the East Indian Railway Company a sum of Rs. 110 as the value of certain boxes of ghi, which had been made over by the plaintiff to the Company at Khurja, for transmission to Serampur and had not reached their destination. The goods were despatched at owner's risk, and what is known as a "risk note" was taken from the consignor. A "risk note" contains the terms of a special agreement whereby the consignor, paying a lower freight than he would otherwise be bound to pay, "in consideration of such lower charge, agrees and undertakes to hold the said railway harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, the said consignment, from any cause whatever, before, during, and after transit over the said railway, or other railway working in connection therewith." The loss of the goods in question was admitted by the defendant Company; but they pleaded that they were absolved from liability by the terms of the contract entered into by the plaintiff. The Court of first instance (Munsif of Saharanpur) decreed the plaintiff's claim. The defendant appealed and the appellate Court (Subordinate Judge of Saharanpur) referred the question of the validity of the contract relied upon by the defendant to the High Court under section 617 of the Code of Civil Procedure. That Court was of opinion that, inasmuch as the ordinary liability of a Railway Company for loss of goods delivered to them for transmission was, by section 72 of Act No. IX of 1890, [43] that of a bailee under the Indian Contract Act, 1872, sections 151, 152 and 161, the Company could not contract itself out of all liability, since even a gratuitous bailee was not absolved from all liability from any cause whatever. The lower Court referred to the case of *Suntokh Rai v. East Indian Railway Company* (1) and *Tippanna v. The Southern Maratha Railway* (2).

The Hon'ble Mr. Colvin, for the appellant.

Pandit Sundar Lal, for the respondent.

JUDGMENT.

KNOX, OFFICIATING C.J., and AIKMAN, J.—The Subordinate Judge of Meerut had before him an appeal in which his decree would be final, and entertaining doubt as to the construction of a document, which construction affected the merits of the appeal before him, he has referred a statement of the facts of the case for the decision of this Court. The document regarding the construction of which the Subordinate Judge entertained doubt is what is ordinarily known as a "risk note," in other words, it is a document purporting to limit the responsibility of the East Indian Railway Company for the loss, destruction or deterioration of goods delivered to the said Company to be carried by railway. It is admitted by both the parties to the appeal that the agreement is in writing, signed by the persons sending the goods, and is otherwise in the form approved by the Governor-General in Council. It falls clearly

(1) N.W.P.H.C.R. (1867) 200 = 2 Agra H.C.R. 200.

(2) 17 B. 417.

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18 A. 42=
15 A.W.N.
(1895) 150.

within the provisions of section 72 of Act No. IX of 1890, and no attempt is made by the learned vakil for the respondents to take the agreement out of the provisions of section 72 of Act No. IX of 1890. Under this agreement the consignor, who had the option of forwarding his goods at an ordinary rate, in which case the Railway administration would have been responsible for their loss, elected, instead of paying that ordinary rate, to pay a lower charge, and in consideration of such lower charge agreed and undertook to hold the East Indian Railway Company harmless and free from all responsibility for any loss, destruction or deterioration of the said consignment from any cause whatever before, during or after transit over the said Railway. In the present case the goods delivered to the Railway Company for transit over their line were lost, and in [44] spite of the agreement entered into by him, the consignor sued the Railway Company for damages on account of such loss. The doubt entertained by the Subordinate Judge is really a doubt as to whether such an agreement is morally defensible. He seems to consider it wrong on the part of the Railway Company to tempt the public to incur such risk, and he seeks to fortify his opinion by a ruling of this Court in *Suntokh Rai v. East Indian Railway Company* (1). The risk note in that case was quite different. The law prevailing at that time was quite different, and the ruling has no bearing on the facts of the case.

The provisions of section 72 of Act No. IX of 1890 are quite clear and free from all ambiguity, and it is not open to any Court to take a case out of the provisions of the Statute when the case clearly falls within those provisions.

Our answer to the reference is in the affirmative. The defendant Company is absolved from all liability, under the circumstances set out, for the non-delivery of the plaintiff-respondent's goods. A copy of this judgment under the signature of the Registrar will be transmitted to the Court by which the reference has been made.

18 A. 44=15 A.W.N. (1895) 151.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

DARYAI BIBI AND ANOTHER (*Defendants*) v. BADRI PRASAD AND ANOTHER (*Plaintiffs*).^{*} [15th July, 1895.]

Civil Procedure Code, sections 626, 629—Review of judgment—Appeal.

No appeal will lie from an order granting a review of judgment except under the conditions specified in section 629 of the Code of Civil Procedure. *Bombay and Persia Steam Navigation Company, Ltd. v. The S.S. "Zuari"* (1) followed.

[R., 14 Ind. Cas. 39.]

IN this case the present respondents were plaintiffs in the original suit. The suit was decided *ex-parte* in their favour. The defendants appealed to the District Judge, who decreed the appeal on a point which had not been raised in the suit. The plaintiffs then applied for review of the lower appellate Court's judgment allowing the appeal. They tendered fresh evidence in the shape of a material document, with an affidavit as to the

^{*} First Appeal No. 1 of 1894, from an order of F. E. Elliot, Esq., District Judge of Allahabad, dated 23rd December 1893.

(1) N.W.P.H.C.R. (1867) 200=2 Agra H.C.R. 200.

(2) 12 B. 171.

reason of its non-production [45] at an earlier stage of the proceedings. The Court granted the review prayed for. Against this order the defendants appealed. They stated several grounds in their memorandum of appeal. Of these the first was that the admission of the application for review was in contravention of the provisions of section 624 of the Code of Civil Procedure: the other grounds were all on the merits.

Maulvi *Imam-ul-Kabir* and Maulvi *Muhammad Mahmud Hasan*, for the appellants.

Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

BLAIR and BURKITT, JJ.—A preliminary point is taken that on the facts no appeal lies in this case. It is an appeal in the nature of an objection to an order of the District Judge of Allahabad, granting a review of a judgment of his own. It is not pretended that this case falls within the provisions (a) and (b) of section 626; nor was the order in contravention of the provisions of section 624, nor was the application for review barred by limitation. That being so, we, following and approving of the ruling and the reasons in the case of the *Bombay and Persia Steam Navigation Company, Limited v. The S.S. "Zuari"* (1), dismiss this appeal with costs.

Appeal dismissed.

18 A. 45 = 16 A.W.N. (1895), 152.

APPELLATE CIVIL.

Before Mr. Justice Aikman.

IN THE MATTER OF THE PETITION OF INDARMAN.*
[19th July, 1895.]

Act No VII of 1889 (Succession Certificate Act), section 6—Certificate not necessarily to collect all the debts of the deceased.

A Court may legally grant to an applicant, under Act No. VII of 1889, certificate for the collection of a specified debt or specified debts of a deceased person. The Court is not bound to grant a certificate only for the collection of the whole of the debts of the deceased.

[R., 15 C.L.J. 384 (388) = 16 C.W.N. 231 (234).]

THE facts of this case sufficiently appear from the judgment of Aikman, J.

Messrs. *A. H. S. Reid* and *D. N. Banerji*, for the appellant.

JUDGMENT.

AIKMAN, J.—The appellant in this case is the son of Mathura Das, deceased. Mathura Das and Baiju Mal obtained a joint decree [46] against Kuar Suparandhuj Prasad Singh. The appellant wished to put this decree into execution, but, in order to do so, he had to produce before the Court which had to execute the decree a certificate granted under Act

* First Appeal No 46 of 1895, from an order of L. G. Evans, Esq., District Judge of Aligarh, dated the 28th February 1895.

[N.B.—In 16 A.W.N. (1895) 152, this case is cited as First Appeal from Order No. 149 of 1895 of the District Judge of Aligarh—Ed.]

(1) 12 B. 171.

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18 A. 44 =
15 A.W.N.
(1895) 151.

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18 A. 45 =
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(1895) 152.

No. VII of 1889, and having the judgment-debt specified therein. In order to enable him to comply with the requirements of section 4 of this Act the appellant asked the District Judge of Aligarh to grant him a certificate in respect of the judgment-debt referred to in his application. The learned District Judge passed the following order:—"I cannot grant a certificate for partial collection. The applicant is at liberty to apply for certificate for all debts due to the deceased."

It does not appear that there are any other debts, and, even if there were, I know of no law which compels an applicant under section 6 of Act VII of 1889 to ask for a certificate in respect of more debts than he wishes to collect. There is nothing to prevent a grant of such a certificate as that asked for by the appellant.

I allow the appeal, and, setting aside the Judge's order dated the 28th February 1895, direct him to restore the application to the file of pending applications and dispose of it according to law with reference to the remarks made above. As there is no respondent I make no order as to costs.

Appeal decreed.

18 A 46 = 15 A.W.N. (1895) 158.

APPELLATE CIVIL.

Before Mr. Justice Knox, Officiating Chief Justice, and Mr. Justice Aikman.

RAM NARAIN SINGH (*Defendant*) v. BABU SINGH (*Plaintiff*).^{*}
[23rd July, 1895.]

Act No. X of 1873 (Indian Oaths Act,) s. 8 — Oath purporting to affect a third person—Revocation of consent to be bound by a statement made on oath taken in a particular form.

The plaintiff in a civil suit offered to be bound by the statement which the defendant might make on oath holding the arm of his son. The defendant accepted the proposal, took the required oath, and made a statement which had the effect of defeating the plaintiff's claim. When the defendant came into Court to take the oath the plaintiff attempted to revoke his proposal, but alleged no further reason than that he did not understand what he had intended and did not think the defendant would speak the truth.

[47] *Held* that the form of oath above indicated ought not, having regard to s. 8 of Act No. X of 1873, to have been administered; but has it had been administered and was a form of oath especially binding upon Hindus, the statement made upon it should be accepted.

Held also that when one party to a suit offers to be bound by the oath of the other party, and such other party accepts the proposal, the party so offering to be bound should not be allowed to revoke his proposal except upon the strongest possible grounds proved to the satisfaction of the Court to be genuine grounds for revoking the proposal. *Lakhranj Singh v. Lulhma Kuar* (1) referred to.

[*Rel.*, 16 Ind. Cas. 733 (731); *Appr.*, 22 M. 236 (237); 5 P.R. 1903 = 37 P.L.R. 1903; 85 P.R. 1903 = 143 P.L.R. 1903; *R.*, 29 A. 49 = 3 A.L.J. 654 = A.W.N. (1906) 280; 17 M.L.J. 99 (100); *D.*, 66 P.R. 1910 = 114 P.L.R. 1910 = 134 P.W.R. 1910 = 7 Ind. Cas. 479.]

THE facts of this case are thus stated in the order of the lower appellate Court:—

^{*} First Appeal No. 61 of 1895, from an order of Syed Akbar Husain, Officiating District Judge of Jaunpur, dated the 14th May 1895.

" This was a suit for joint possession of certain immoveable property. The defendant No. 1 (Ram Narain Singh) is the uncle and the defendant No. 2 (Darshan Singh) is the own brother of the plaintiff. The defendant No. 1 admitted the claim, but the defendant No. 2 contested it on the allegation that the property in suit was his self-acquired property. On the 11th of January 1895 the plaintiff offered to abide by any statement which the defendant No. 2 might make on oath by holding the arm of his son. To this defendant No. 2 consented, and the 14th of January 1895 was fixed for recording the statement of Ram Narain, who said that his boy was not then present in Court. On the 14th of January the plaintiff filed a petition revoking his agreement, on the plea that he had no more faith in Ram Narain Singh's honesty, and paying for adjournment in order to enable him to produce his evidence." * * * "The Court (Munsif of Jaunpur), however, held that the plaintiff was bound by his agreement and should be compelled to examine Ram Narain Singh, and in that view the learned Munsif examined Ram Narain Singh in the manner originally suggested by the plaintiff, and, on Ram Narain Singh's stating that the property was his own separate property, dismissed the suit."

The plaintiff appealed, and the lower Appellate Court (Officiating District Judge of Jaunpur), holding that the plaintiff had a right to revoke his offer before the evidence was recorded, remanded the suit under s. 562 of Act No. XIV of 1882.

[48] From this order of remand the defendant Ram Narain Singh appealed to the High Court.

Babu *Durga Charan Banerji*, for the appellant.

Munshi *Gobind Prasad*, for the respondent.

JUDGMENT.

KNOX, OFFG. C.J., and AIKMAN, J.—In the Court of first instance the plaintiff, now respondent, offered to abide by any statement which the appellant might make on oath to be taken in this form, namely, that holding the arm of his son he should state what he could say on the matters asked of him. The appellant consented. The case was adjourned to enable the appellant to bring his son, who was not then in Court. On the day to which the case stood adjourned, the appellant appeared with his son, and the respondent then applied to be released from the proposal he had made. The only reason he could give was that he had made the proposal without understanding what he intended, and adding that he was of opinion that the appellant would not tell the truth. The Court refused to entertain the application, and the defendant made the statement in the form proposed by the respondent. The result was that the Munsif dismissed the respondent's suit, the statement made by the appellant upon the oath proposed being fatal to the claim.

We have no hesitation in saying that the oath proposed should never have been administered. It was an oath understood and purporting to affect a third person, and such an oath under Act No. X of 1873 is not an oath which could under any circumstances be lawfully administered. Since, however, it was administered, and the statement made, we are of opinion that the evidence so given was rightly considered conclusive proof of the matters stated. The peculiar nature of the oath and the effect which is attached to it by Hindus are such that any statement made upon such an oath would not, we are quite sure, be lightly made. It is, however, contended that, as the respondent, before the oath was administered, asked to withdraw from his proposal, he should have been allowed

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to withdraw, and the evidence not taken in the manner proposed by him. In support of this contention we were referred to the case of *Lekh Raj Singh v. Dulhma Kuar* (1). In that case one of the Judges, [49] Oldfield, J., said that he was aware of no rule under which a submission to reference of this kind, viz., a statement made under the peculiar circumstances set out in s. 8 of Act No. X of 1873, might not be revoked before the referee has given his evidence in pursuance of it. It appears to us that this is not the standpoint from which a proposal of the nature set out in s. 8 should be considered. When the proposal has been made by a party to a proceeding and the Court in pursuance of the proposal has asked the party required to take a particular form of oath whether he will do so, and the party so asked has agreed to take the oath, then, under such circumstances, no permission should be accorded to the party who made the proposal to withdraw from it, except upon the strongest possible grounds proved to the satisfaction of the Court to be genuine grounds for revoking the proposal. No such grounds were shown in the present case and the evidence given was, in our opinion, evidence by which the respondent was bound.

The respondent appealed against the order of the Munsif, and the District Judge, allowing the appeal, passed an order of remand under s. 562 of the Code of Civil Procedure, directing the Court of first instance to try the suit on its merits. The present appeal is from that order. For the reasons set out above we are of opinion that the appeal in the Court below should not have succeeded. We set aside the order of remand and restore the decree of the first Court dismissing the suit. The appellant will have his costs in this Court.

Appeal decreed.

18 A. 49 = 15 A.W.N. (1895) 155.

APPELLATE CIVIL.

Before Mr. Justice Aikman.

RAM NEWAZ AND OTHERS (*Decree-holders*) v. RAM CHARAN AND ANOTHER (*Judgment-debtors*).^{*} [26th July, 1895.]

Civil Procedure Code, s. 230—Execution of decree—Limitation.

R.N. and others obtained a simple money decree against R.S. and another on the 24th of February 1881. On the 2nd of May 1892, previous applications for execution having been unsuccessful, the decree-holders made an application for execution in consequence of which certain property of the judgment debtors was [50] attached. That application was subsequently struck off by the Court, the attachment being maintained. On the 7th of March 1893 a further application for execution was made.

Held that, whether the application of the 7th of March 1893 was or was not merely a continuation of the former application of the 2nd of May 1892, execution of the decree was barred by the rule prescribed by section 230 of the Code of Civil Procedure.

Held also that an order on an application for execution striking off the application, but maintaining attachment effected in pursuance thereof, was an order not warranted by law.

[*Diss.*, 11 C.W.N. 63 = 5 C.L.J. 80; F., 8 A.L.J. 412 (417) = 9 Ind. Cas. 817; R., 18 A. 486; 8 Ind. Cas. 727.]

^{*} Second Appeal No. 1065 of 1894, from a decree of Kunwar Mohan Lal, Subordinate Judge of Gorakhpur, dated the 2nd June 1894, reversing an order of Maulvi Inamul Haq, Munsif of Basti, dated the 21st September 1893.

(1) 4 A. 302.

THE facts of this case sufficiently appear from the judgment of Aikman, J.

Babu Durga Charan Banerji, for the appellants.

Babu Jogindro Nath Chaudhri, for the respondents.

JUDGMENT.

AIKMAN, J.—The appellants in this case obtained a simple money decree on the 23rd of February 1881, against the respondents. On the 2nd of May 1892 they applied to execute this decree. Several previous applications had been made, but proved infructuous. The Court in which the application of the 2nd of May 1892 was made, of its own motion struck off the application professing to maintain an attachment which had been made. In my opinion no order of such a nature can be passed. If there is no pending execution before the Court, it follows that there can be no subsisting attachment. The order which many subordinate Courts are in the habit of passing to strike off an execution case whilst maintaining an attachment which has been made in that case, is, I consider, a contradiction in terms. Such an order, it appears to me, can only have one object, and that is to prevent an execution case being shown as pending for an unduly long time on the files of the Court. If there is reason for maintaining an attachment there can be no reason for striking off the application in execution which led to its being made. On the 7th of March 1893 the decree-holders presented another application for the execution of their decree. The judgment-debtors objected that the application was barred by the 12 years' rule of limitation. Their objection was overruled by the Munsif, who held that the application of the 7th of March 1893 was in reality no fresh application, but was merely [51] in continuance of the application of the 2nd of May 1892. The judgment-debtors appealed to the Subordinate Judge, who held that the application of the 7th of March 1893 was a fresh application, and could not be executed, as the decree had become time-barred. Against this order of the Subordinate Judge the decree-holders have appealed to this Court. In my opinion whether the application of the 7th of March 1893 be considered to be a fresh application or merely an application in continuance of that of the 2nd of May 1892, it cannot be granted. Section 230 of the Code of Civil Procedure provides that where an application to execute a decree for the payment of money has been made under this section and has been granted, no subsequent application to execute the same decree shall be granted after the expiration of 12 years from the date of the decree sought to be enforced. It appears from the records of the previous case that although the previous applications failed for one reason or another to realise any money, at least two of them were "*granted*," inasmuch as property was attached in compliance with the request contained in the applications. It follows from this that a Court cannot now grant any application to execute, as it is forbidden to do so by the terms of section 230 of the Code of Civil Procedure. That section does not prescribe that no subsequent application shall be received after the expiration of 12 years; it forbids any application being *granted*. To comply with the request made by the decree-holders would be to disobey the law as contained in that section. The decree-holders endeavoured to prove that the judgment-debtor had by fraud prevented the execution of the decree within 12 years immediately preceding the date of their application, but this attempt failed.

For the above reasons the appeal fails and is dismissed with costs.

Appeal dismissed.

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18 A. 49=
15 A.W.N.
(1895) 155.

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18 A. 52 = 15 A.W.N. (1895) 153.

[52] APPELLATE CIVIL.

Before Mr. Justice Banerji.

MUKARRAB HUSAIN AND ANOTHER (*Objectors*) v. HURMAT-UN-NISSA
(*Decree-holder*).^{*} [29th July, 1895.]

18 A. 52 =
15 A.W.N.
(1895) 153.

Execution of decree—Civil Procedure Code, sections 244, 278.—Party to the suit in which a decree was passed.

Held that persons who had originally been made parties to a suit, but had been expressly exempted from the operation of the decree, were not "parties to the suit" within the meaning of section 244 of the Code of Civil Procedure with regard to objections taken by them in respect of the attachment of their property by the decree-holder, but that such objection must be considered to be an objection under section 278 of the Code. *Jangi Nath v. Phundo* (1) referred to.

[*Diss.*, 15 C.P.L.R. 109; *Appr.*, 23 A. 346; 30 C. 134 = 6 C.W.N. 10; *R.*, 21 M. 45; 2 O.C. 51 (55).]

THE facts of this case are sufficiently stated in the judgment of Banerji, J.

Munshi Madho Prasad, for the appellants.

Pandit Sundar Lal, for the respondent.

JUDGMENT.

BANERJI, J.—The preliminary objection that no appeal lies in this case must prevail. The facts are these:—The respondent brought a suit for dower against Syed Ashraf Ali. Ashraf Ali, it is alleged, had made a gift of some property in favour of the present appellants, and the present appellants were made parties to that suit. As against them the plaintiff's prayer was that the gift should be set aside. That prayer was disallowed on the ground that, as there was no claim against any property of Ashraf Ali, but the claim for dower was only a personal claim against him, the plaintiff had no cause of action against the present appellants. The decree was made only against Ashraf Ali. In execution of that decree the decree-holder, respondent, caused certain property to be attached as the property of Ashraf Ali. In respect of that property the present appellants filed objections disputing the decree-holder's right to bring that property to sale and claiming it as their own under the gift referred to above. The Court below has disallowed the appellants' objections. If the appellants can be regarded as parties to the suit within the meaning of cl. (c) of section 244 of the Code of Civil Procedure, an appeal, no doubt, lies; but if on the other hand they are to be treated as strangers, their objection [53] to the attachment of the property in question was an objection under section 278 of the Code of Civil Procedure, and their only remedy was a suit under section 283, and they have no right of appeal.

I am of opinion that the appellants cannot be held to be parties to the suit within the meaning of clause (c) of section 244. They were no doubt originally made parties, but they were released from liability for the decree. There is no decree as against them, and consequently no question as between them and the decree-holder relating to the execution of the decree. They are not parties to the execution proceedings, and indeed there

^{*} First Appeal No. 64 of 1895, from an order of Lala Brij Pal Das, Subordinate Judge of Allahabad, dated the 26th January 1895.

is no decretal order in respect of which the decree-holder by execution could claim any relief as against them. So far, therefore, as the property now sought to be attached is concerned, they are in the position of strangers and not of parties to the suit, and the question which arose between them and the decree-holder was not a question within section 244, cl. (c). This view is supported by the ruling in *Jangi Nath v. Phundo* (1), the principle of which applies to this case. In fact this is a much stronger case than that of *Jangi Nath v. Phundo*. As no appeal lay, this appeal is dismissed with costs.

Appeal dismissed.

1895
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18 A. 52=
15 A.W.N.
(1895) 153.

18 A. 53 = 15 A.W.N. (1895) 156.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Aikman.

ABBASI BEGAM (*Defendant*) v. IMDADI JAN (*Plaintiff*).
[30th July, 1895.]

Civil Procedure Code, section 32—Removal of name of defendant from record—Such order not to be made after first hearing.

An order striking the name of a defendant off the record of a suit cannot be made under s. 32 of the Code of Civil Procedure at a period subsequent to the first bearing of the suit.

THE facts of this case sufficiently appear from the judgment of the Court.

Maulvi Ghulam Mujtaba, for the appellant.

Mr. Abdul Raoof, for the respondent.

JUDGMENT.

BLAIR and AIKMAN, JJ.—This is an appeal from an order striking off the name of the defendant. The suit was instituted [54] on the 1st of December 1894, proceeded with up to the framing of the issues on the 27th of the same month, and on the 11th of February 1895 came on for hearing and was heard. On the 15th of February an application was made to add certain persons as defendants, one of whom was one Muhammadi Begam. The names were added, and it became necessary that notices be served upon all the defendants so added. An effort appears to have been made to serve Muhammadi Begam at the address supplied to the Court, we suppose, by the party who got the name put upon the record. She was not found at that place, and, on further information pointing to her being at the time elsewhere, fresh notices were issued and sent for service at the place where she was supposed to be. Again there was a failure to discover her. Thereupon, on the 8th of May, an application was made on behalf of the plaintiff to strike out her name from the list of defendants. It was based on the delay caused by the inability of the serving officer to serve notices upon her. That application was not supported by any affidavit. On the 10th of May the order was made striking out her name. On the same day, after the order, an application was made by the defendant for a substituted service upon

* First Appeal No. 53 of 1895, from an order of Pandit Raj Nath Sahib, Subordinate Judge of Moradabad, dated the 10th May 1895.

(1) 11 A. 74.

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18 A. 53=
18 A.W.N.
(1895) 156.

the lady. We assume that that application was not granted. The order striking the name off is the one appealed against.

Mr. *Ghulam Mujtaba*, who appears for the appellant, called our attention to s. 32 of the Code of Civil Procedure which specifies the circumstances under which the Court has power to add, or to remove, parties. The first paragraph relates solely to its powers of striking out. "The Court may, on or before the first hearing, upon the application of either party, and on such terms as the Court thinks just, order that the name of any party, whether as plaintiff or defendant, improperly joined, be struck out." There appear to be three conditions precedent to the striking out. There must be an application by one party or the other. The Court must not have progressed beyond the first hearing, and the Court must find the party improperly joined. When we come to the second clause, which relates to the addition and, so to speak, transmutation of parties, the language is different. "The Court may, at any time, [55] either upon or without such application, and on such terms as the Court thinks just, order that any plaintiff be made a defendant or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added." That is a discretion unlimited in point of time and not requiring that the Court should be moved by any party.

Mr. *Ghulam Mujtaba* contends that, the striking out of the name of the defendant not having taken place on or before the first hearing, such name could not be properly struck out afterwards. On the other hand it was suggested to us that this lady was a fictitious person and her name might be struck out as a clerical error. The facts hardly suggest that state of things. It was not alleged that she had no interest in the property and that therefore she was improperly joined as a party. It was also suggested that Mr. *Raoof's* application might be taken to be an application for a review of judgment. We have asked for the production of the document in order to see whether it discloses circumstances and sets forth any of the reasons for which, under s. 623 of the Code of Civil Procedure, a review might properly be granted. It was not produced, and we feel the only reason is that the application was not one under s. 623. We accede therefore to Mr. *Mujtaba's* contention that the Court had no right to strike off the name of the defendant after the first hearing of the case. It appears to us that the defendant applied to the Court for a proper remedy for the difficulty in which the parties found themselves. If the lady could not be found, the substituted service, even if such service never came to her knowledge, would be a good notice to her and binding her interest, if any, as if she had appeared. We set aside the order of the Court below, and allow the appeal with costs.

Appeal decreed.

18 A. 56 = 15 A.W.N. (1895) 158.

[56] APPELLATE CIVIL.

*Before Mr. Justice Knox and Mr. Justice Aikman.*C. WILSON (*Defendant*) v. M. MACAULIFFE (*Plaintiff*).[1st August, 1895.]¹*Company—Director selling his own shares to shareholder of company—Action for deceit—Director not in a fiduciary position as regards individual shareholders.*

A director of a company, though he may occupy a fiduciary position with regard to the shareholders collectively, holds no such position with regard to individual shareholders. *Gilbert's case* (1) and *Gower's case* (2) referred to.

THIS was an action to recover damages for the sale of shares in a company on the ground that the defendant at the time of sale knowing the shares to be worthless falsely represented both orally and in writing that they were a good investment, and thus induced the plaintiff to purchase. The plaintiff was a shareholder in the Himalaya Bank; the defendant was a director of the same Bank. The plaintiff in October, 1890 purchased 100 shares in the Bank from the defendant, and again, in November 1890, 47 more shares. The shares were sold at somewhat less than the rate at which they were then being quoted in the market. The plaintiff subsequently discovered the shares which he had purchased to be worthless, and brought the present suit, in which he claimed the sum of Rs. 20,800, being the price he had paid for the shares with interest to date of suit, further interest until realisation and costs. The plaint alleged various specific acts of misrepresentation on the part of the defendant, both in his capacity of director of the Bank, and as a private vendor of shares.

The defendant traversed most of the allegations in the plaint, but in particular specifically denied that the plaintiff had been induced to purchase the shares in question by any representations of his, true or otherwise, asserting that he had so purchased after making independent inquiries in Mussoorie and elsewhere and with the knowledge that there were rumours as to the solvency of the Bank.

The case went to trial on the main issue:—"Did the defendant by fraud or false representation induce the plaintiff to enter into [57] the contract in question?" and the subsidiary issue as to the relief to which the plaintiff might be entitled. The Court of first instance, while holding that the defendant, as a director of the Bank, stood in no fiduciary position towards the plaintiff, so as to render it incumbent on him to disclose the true condition of the Bank's affairs, found that "the defendant did use fraud in order to induce the plaintiff to purchase from him the shares in question." The Court accordingly gave the plaintiff a decree for the major portion of his claim.

The defendant appealed to the High Court.

In appeal it was found that the shares in question were to the knowledge of the defendant worthless at the time when he sold them to the plaintiff, and that the plaintiff on the other hand believed that he was making a good bargain. It was found also that a director was in the same position as any other member of the company with regard to the sale of his shares, and to such a transaction as the present the maxim

* First Appeal No. 221 of 1893, from a decree of H. M. R. Hopkins, Subordinate Judge of Dehra Dun, dated the 31st July 1893.

(1) L.R. 5 Ch. 559.

(2) L.R. 6 Eq. 77.

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"*caveat emptor*" would apply. As to the actual misrepresentations, oral and otherwise, alleged by the plaintiff as the cause of his entering into the purchase of which he complained, it was held that no such misrepresentation had been established to the satisfaction of the Court as would entitle the plaintiff to relief in an action for deceit: that is to say, that, though the defendant may have been guilty of misrepresentation, it was not proved that such misrepresentation was the cause which induced the plaintiff to purchase the shares in question. The Court accordingly decreed the appeal, but under the circumstances of the case, without costs.

[After a discussion of the evidence as to the existence of fraud or misrepresentation on the part of the defendant, the judgments of the Bench which heard the appeal went on in each case to discuss the legal point raised by the respondent as to the position held by a director in relation to the shareholders individually. Only so much of the judgments as deals with this latter question is here reported.—Ed.]

Mr. C. Ross Alston, for the appellant.

[58] The Hon'ble Mr. Colvin and Mr. C. Dillon, for the respondent.

JUDGMENTS.

KNOX, J.—We were at the hearing for some time much impressed with Mr. Colvin's argument that on the present case the appellant stood in a confidential relation to the respondent; that certain duties were imposed upon him by Act No. VI of 1882; that the appellant had a position which enabled him to acquire special knowledge to his own advantage, and that he was bound to protect the interest of the respondent. But while we were referred to cases which showed that a director did occupy a special position *quoad* the company and the shareholders [upon which see *Gilbert's case* (1) and *Gower's case* (2)], no single case was produced before us in which it had ever been held that the director of a company occupied any such relation to each individual shareholder. And in any case the relationship between directors and shareholders in a company is that of agent to principal, not of trustee and *cestui que trust*. I hold that the appeal must prevail, and, setting aside the judgment and decree of the lower Court, would dismiss the respondent's claim.

Under the circumstances of the case I would direct that each party pay his own costs.

AIKMAN, J.—Much argument was addressed to us with a view of showing that the defendant as director of the Bank stood in a fiduciary relation to the plaintiff, and that his mere silence as to the state of the Bank was sufficient to render him liable in an action for deceit. As to this I think the conclusion arrived at by the learned Subordinate Judge is correct, and that the case he refers to, *i.e.*, *Gilbert's case* (1), is an authority for the view which he took.

I would allow the appeal and dismiss the plaintiff's suit. But in the exercise of the discretion which the Court has on the question of costs, I would not allow the appellant his costs here or in the Court below, as his conduct, though not such as to render him liable in an action for deceit, is certainly not free from blame.

The order of the Court is that the appeal be decreed and the plaintiff's suit dismissed. The parties will pay their costs both here and below.

Appeal decreed.

(1) L.R. 5 Oh 559.

(2) L.R. 6 Eq. 77.

18 A. 59 = 15 A.W.N. (1895) 164.

[59] APPELLATE CIVIL.

Before Mr. Justice Knox, Mr. Justice Blair, and Mr. Justice Banerji.

HAR CHARAN SINGH (*Plaintiff*) v. HAR SHANKAR SINGH AND OTHERS
(*Defendants*).^{*} [2nd August, 1895.]

Civil Procedure Code, s. 13—Res judicata—Court of jurisdiction competent to try the suit in which such issue has been subsequently raised—Act No. XIX of 1873 (North-Western Provinces Land Revenue Act), ss. 113, 114.

Where a Court of Revenue, acting under s. 113 of Act No. XIX of 1873, has decided a question of title or of proprietary right, such decision, being the decision of "a Court of Civil Judicature of first instance," will operate as *res judicata* in a subsequent civil suit in which the same question is being litigated.

[R., 32 A. 8; 6 A.L.J. 917 (919) = 3 Ind. Cas. 954 (955); 5 A.L.J. 151 (N); D., 19 A.W.N. 190.]

THIS was an appeal under s. 10 of the Letters Patent of the High Court from the judgment of Burkitt, J., in an appeal which was heard by a Division Bench consisting of Tyrrell and Burkitt, JJ., in which appeal, the Judges composing the Bench having differed, the decree, in accordance with the provisions of s. 575 of the Code of Civil Procedure, followed the judgment of Burkitt, J. and was a decree dismissing the appeal. The case in first appeal will be found reported in I. L. R., 16 All. at p. 464. The facts of the case are fully stated in the judgment of Knox, J.

Maulvi Ghulam Muftaba, for the appellant.

Mr. T. Conlan, Munshi Jwala Prasad and Munshi Gobind Prasad, for the respondents.

JUDGMENT.

KNOX, J.—The appellant before us was plaintiff in the Court of first instance. He asked in his plaint to be put in proprietary possession as zamindar of a 2 anna 8 pie share in each of the villages Amghat, Rupupur and Rampur Udebhan, and of a 5 anna 5 pie share in each of the villages Kachhoba and Bhadoli. He represented that the ancestors of the respondents had been put into possession over all the above-named properties as usufructuary mortgagees in consideration of certain sums lent by their ancestor Bhaya Arjun Singh to the plaintiff. He represented further that the sums so advanced and all interest that might have accrued due on them had been fully repaid by the usufruct of the property mortgaged, and he therefore in his plaint added a prayer for the taking of accounts and for a decree for any *mesne* profits [60] that might be found due. If, however, the Court was of opinion that any money was still due from plaintiff he prayed for an order of redemption contingent upon the payment by him of such sum.

The answer made by the respondents was to the effect that upon the expiry of the term mentioned in the mortgage bonds as the date for the payment of the debt, the ancestor of the respondents had presented a petition for foreclosure; that the usual proceedings for foreclosure had ensued, and on the expiry of the year of grace allowed by law the possession of the respondents' ancestors had merged into a proprietary possession

* Appeal No. 46 of 1894, under s. 10 of the Letters Patent from a judgment of Mr. Justice Burkitt, dated the 4th July 1894.

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adverse to the appellant. Further, it was urged that the ancestor of the respondents had claimed partition of the same property in the Court of Revenue; that the appellant had impugned in the course of the partition proceedings, the proceedings relating to foreclosure as defective and urged that the mortgage subsisted. The Revenue Court had inquired into the merits of the objection and, under the provisions of ss. 113 and 114 of the North-Western Provinces Land Revenue Act, held that the respondents were in adverse proprietary possession. This decision was passed on the 19th of October 1888; no appeal had been made from it, and it was now a final decision of a Court of competent jurisdiction and operated as a bar to the trial of the present suit. The Subordinate Judge of Ghazipur held that s. 13 of the Code of Civil Procedure was a bar to the present suit and ordered that the plaintiff's claim be dismissed.

The plaintiff thereupon instituted an appeal, contending that the lower Court was wrong in holding that the suit was barred under s. 13 of the Code of Civil Procedure. That appeal was heard by a Division Bench of this Court, the Judges who heard the appeal were divided in opinion, and as one of them held that the suit was barred by the principle of *res judicata*, the decree appealed against was affirmed.

The present appeal is brought under s. 10 of the Letters Patent, and the questions raised for our consideration are two :—

(1) Whether the suit is or is not barred by the rule of *res judicata*.

[61] (2) Whether there is or is not any such bar in existence in the shape of a previous suit, and determination so far as the villages of Amghat, Rupupur and Rampur Udebhan are concerned.

As regards the share claimed by the appellant in the villages of Kachhoha and Bhadoli, it is amply evident from the evidence on record, and is in no way disputed, that in the year 1880 Bhaya Arjun Singh, the ancestor of respondents, did claim perfect partition of the land now sued for as being property held by him in his own proprietary right in those mahals. It is also equally clear that objection was made to the partition by the appellant on the ground that the respondents' ancestor had no higher rights in the land than those of a usufructuary mortgagee.

The Assistant Collector, in whose Court the claim for partition was pending, and in whose Court the objection also had been raised by the appellant, made an inquiry and recorded a proceeding and gave a decision declaring the right of Bhaya Arjun Singh to be a proprietary right in the land claimed.

This decision (we are not concerned with its merits or demerits, or with the reasoning upon which it was based,) was passed on the 19th October 1880. It was a decision which, under the provisions of s. 114 of the North-Western Provinces Land Revenue Act, 1873, must be held to be a decision of a Court of Civil Judicature of first instance. It was open to appeal to the District Court and to special appeal to this Court. No appeal was filed and the decision has long since become final.

The case as presented to us by Mr. *Ghulam Mujtaba* for the appellant is that the decision of the Revenue Court was *ultra vires*; that even if the Revenue Court had jurisdiction, it was not a Court competent to try the subsequent suit. The first part of the contention was based upon error. The learned vakil had overlooked the fact, patent on the face of the record, that Bhaya Har Charan Singh was a co-sharer in the mahal and in possession at the time when he raised this objection. The proceeding of the Court of Settlement, to be found at p. 13 of the respondents' book, shows that, even putting aside the disputed share, both Arjun Singh and

Har Charan [62] Singh were recorded co-sharers in the mahals Kachhoha and Bhadoli ; and the objection founded upon the hypothesis that they had no interests other than those in dispute, hence had no standing, the one to claim partition, the other to raise objection, falls to the ground. It was in fact abandoned.

The main contention was based upon the argument that, as the Revenue Court which decided the question in 1880 was a Court not competent to try this suit now brought, its decision could not operate as *res judicata*. We were referred to the case of *Misr Raghobar Dial v. Sheo Baksh Singh* (1) as an authority for the contention that that Court only could be a Court of competent jurisdiction which had jurisdiction over the matter in the subsequent suit in which the decision is used as conclusive. This construction of the phrase "Court of competent jurisdiction" was repeated in *Run Bahadur Singh v. Lucho Koer* (2). Both these judgments were considered in *Sheikh Hassu v. Ram Kumar Singh* (3), and we were referred to that judgment as an authority for the proposition that the Court of jurisdiction competent to try must be a Court having jurisdiction not only as to the nature but as to the amount of the suit. It was urged upon us that the Court of the Deputy Collector failed in both these respects. It was a Court that could have no jurisdiction either as to the nature or the amount of the present suit.

In maintaining this argument it has been overlooked that the position given by law to Courts of Land Revenue when determining questions in dispute under s. 113 of Act No. XIX of 1873, and passing decision thereon, is the position of a Court of Civil Judicature of first instance. Its decisions are raised to the rank and operative power of decisions of a Court of Civil Judicature of first instance, in other words, to the rank of decisions of a Court *quoad* the matter in dispute, of concurrent jurisdiction. This being the case, we see no reason to deprive such a decision of the power and virtue it would have had if it had been passed by a Court which both in name and in substance filled the position of a Court of Civil [63] Judicature of the first instance. In such case the decision would undoubtedly have operated as a bar under s. 13 of the Code of Civil Procedure, and we must hold it so to operate in the present case.

On behalf of the respondents it was contended that we should not grant a hearing to the contention that there is no decision of any kind on the record so far as the villages of Amghat, Rupupur and Rampur Udebhan are concerned. The defence raised has been that all the disputed property had been adjudicated upon by the Revenue Court. The judgment covered all the property in dispute and up till now in every Court the appellant has allowed the Courts to proceed upon the assumption that the Revenue Court proceedings covered all the property in all the five villages. We overruled this objection, but gave ample time to the respondents to obtain and produce copies of any decisions affecting the villages Amghat, Rupupur and Rampur Udebhan. Decisions affecting Kachhoha and Bhadoli are on the record.

The respondents have produced no copies of any such decisions, and we must infer that none such exist.

The second contention raised in appeal therefore prevails. We set aside the judgment and decree under appeal so far as it affects the property situate in Amghat, Rupupur and Rampur Udebhan, and remand the suit to the Court of first instance, with directions to re-admit it upon its

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(1) 9 C. 489.

(2) 11 C. 301.

(3) 16 A. 183.

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file of pending suits and to decide it according to law. Costs of this portion of the suit to follow the result. As regards the property in Kachhoha and Bhadoli, we dismiss the appeal with proportionate costs.

BANERJI, J.—I am entirely of the same opinion, but I wish to add a few observations.

As regards the property situated in the villages Amghat, Rupupur and Rampur Udebhan, the respondents could not successfully plead the bar of *res judicata* unless they could establish that there was a previous adjudication of the matters now in issue in respect of that property. They have not proved that any such adjudication was ever made. Their allegation was that the matter had been [64] finally decided by the Court of Revenue in the partition proceedings which took place in 1880. It appears, no doubt, that a partition was effected under the orders of the Court of Revenue, but no judgment has been produced to show that the matter in issue was finally decided in the partition proceedings. Where the bar of a previous judgment is pleaded, no assumption can be made that such a judgment exists or that such a judgment, even if it exists, decided the issues raised in the present suit. As there is no judgment before us affecting the property situated in the three villages named above, we cannot make any assumption in favour of the respondents, and we cannot presume from the mere fact of that property having been partitioned that the question of title now raised in regard to that property was finally decided between the parties or between those under whom they claim.

As regards the remaining two villages, it is not disputed that the Assistant Collector, by his judgment of the 19th of October 1890, decided, rightly or wrongly, that the predecessor in title of the respondents had acquired absolute proprietary right in the property situated in those villages, and that the mortgage made by the plaintiff had come to an end. In the partition proceedings in which that decision was given, Bhaya Arjun Singh, the person through whom the respondents derive title, claimed the absolute ownership of the share now in question. His claim was resisted by the present appellant, who alleged that the mortgage effected by him still subsisted and had not been foreclosed. A question of title and of proprietary right was thus raised, and under s. 113 of Act No. XIX of 1873, two courses were open to the Assistant Collector to whom the application for partition was made. He could either have declined to grant the application until the question in dispute had been determined by a competent Court, or he could himself have proceeded to enquire into the merits of the objection. Had he elected to pursue the first course, the matter now in issue would, having regard to the nature and value of the subject-matter in dispute, have been raised in a Civil Court of jurisdiction competent to try the present suit, and there can be no question that the decision [65] of that Court would, by reason of the provisions of s. 13 of the Code of Civil Procedure, have barred the trial of the same issues in the present suit. The Assistant Collector chose to pursue the second course, and decided the matter which is in issue in this suit. By the provisions of s. 114 of Act No. XIX of 1873, his decision must be held to be the decision of a Court of Civil Judicature of first instance, that is, of the Civil Court which would have tried the question in dispute between the parties had the Assistant Collector referred them to a Civil Court under s. 113, instead of enquiring into the merits of the objection himself. As I have said above, the Civil Court which would have tried the question, had the parties been referred to it, would have been the same Court which

had jurisdiction to try the present suit. Therefore the decision of the Assistant Collector must be held to be the decision of a Civil Court of jurisdiction competent to try the present suit, and as such, it operates as *res judicata* under the 13th section of the Code of Civil Procedure.

It seems to me to be wholly immaterial for the purposes of the question before us that the decision of the Assistant Collector may have been founded on crude and erroneous notions of law, and that he was personally incompetent by reason of want of jurisdiction to try the present suit.

For the above reasons I agree in the decree and order proposed by my learned colleague.

BLAIR, J.—I concur in both the judgments.

Appeal dismissed.

18 A. 65 = 15 A.W.N. (1895) 156.

APPELLATE CIVIL.

Before Mr. Justice Banerji.

AHMAD ALI (*Plaintiff*) v. NAJABAT KHAN AND OTHERS (*Defendants*).^{*}
[3rd August, 1895.]

Civil Procedure Code, s. 13—Res judicata—Parties to subsequent suit arrayed on the same side as co-defendants in previous suit.

Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff there must be such an adjudication, and in such a case the adjudication will be *res judicata* between the defendants as well as between [66] the plaintiff and the defendants. But for this effect to arise there must be a conflict of interests amongst the defendants and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity the judgment will not be *res judicata* amongst the defendants. *Ram Chandra Narayan v. Narayan Mahadev* (1) followed. *Cottingham v. Earl of Shrewsbury* (2) referred to.

[F., 31 C. 59 = 9 C.W.N. 30; U.B.R. (1907) C.P.C. p. 5 (6); Appr., 25 B. 74 (78); R., 22 A. 396; 22 B. 245 (250); 33 M. 112 (114) = 7 M.L.T. 89; 7 Ind. Cas. 67; 14 Ind. Cas. 535 (536) = 231 P.L.R. 1912 = 220 P.W.R. 1912; 2 O.C. 303 (305).]

IN this case the plaintiff sued to recover possession of $3\frac{1}{4}$ shares out of 12 shares in certain immoveable property, alleging that the defendants were in wrongful possession of the same.

The two principal defendants pleaded that the plaintiff and the defendants were joint owners of 10 shares out of 12 shares in the property in dispute in equal shares, that out of the plaintiff's share $1\frac{1}{4}$ shares had been sold by auction and the remainder was admittedly in the plaintiff's possession; that the plaintiff had consequently no cause of action, and that the claim was barred by s. 13 of the Code of Civil Procedure.

The Court of first instance (Munsif of Saharanpur) dismissed the plaintiff's suit, holding that it was not proved that the defendants were in possession of any larger share in the property in question than that to which they were entitled.

The plaintiff appealed, and the lower appellate Court (District Judge of Saharanpur) dismissed the appeal as barred by the principle of *res*

* Second Appeal No. 918 of 1894, from a decree of H. Bateman, Esq., District Judge of Saharanpur, dated the 4th May 1894, confirming a decree of Pandit Kanhya Lal, Munsif of Saharanpur, dated the 23rd December 1893.

(1) 11 B. 216.

(2) 3 Hare's Rep. 627.

1895 *judicata* by reason of the judgment in a previous suit, in which suit, however, the parties to the present suit were arranged on the same side as defendants.

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APPEL- The plaintiff thereupon appealed to the High Court.
LATE Munshi Kalindi Prasad, for the appellant.
CIVIL. Maulvi Ghulam Muftaba, for the respondents.

JUDGMENT.

18 A. 65=
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(1895) 156.

BANERJI, J. —The first contention raised on behalf of the appellants is that the judgment of the lower appellate Court does not fulfil the requirements of s. 574 of the Code of Civil Procedure. The judgment, no doubt, is a feeble compliance with the provisions of that section, and, like most other judgments of the learned Judge, is too brief to be intelligible, much less lucid. [67] It is impossible to know the facts of the case from the judgment, and the points for determination can only be gathered from the conclusion at which the learned Judge arrived. It would certainly be more satisfactory were the learned Judge to pay more attention to the provisions of s. 574 than he often does and than he has done in this case. I cannot, however, say that the judgment in this case is in violation of that section, and I do not see sufficient reason to interfere with the decree on that ground.

The next contention, namely, that the Court below has erroneously held the 13th section of the Code of Civil Procedure to be a bar to the appellant's suit, must prevail. The judgment which has been held to operate as *res judicata* was dated the 11th of February 1890. It was not passed between the parties to the present suit or between those from whom they derive title. It was passed in a suit in which the parties to the present action were ranged on the same side as co-defendants. A judgment to operate as *res judicata* under s. 13 of the Code of Civil Procedure must be between the same parties or between parties under whom they or any of them claim. A previous suit in which the parties to the subsequent suit were co-defendants cannot ordinarily be regarded as a suit between the same parties. It is true that in some cases an adjudication between co-defendants would conclude them in a subsequent litigation. The principle governing such cases was thus stated in *Cottingham v. Earl of Shrewsbury* (1) by Wigram, V. C.:—"If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the Court will try and decide that case and the co-defendants will be bound. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains." Following this case it was held by West, J. in *Ram Chandra Narayan v. Narayan Mahadev* (2) that "where an adjudication between the defendants is necessary to give the appropriate relief to the [68] plaintiff there must be such an adjudication, and in such a case the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. But for this effect to arise there must be a conflict of interest amongst the defendants and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity the judgment will not be *res judicata* amongst the defendants." The rule laid down in the above case is in my judgment the correct rule as to the effect of a previous judgment as between co-defendants.

(1) 3 Hare 627 (638).

(2) 11 B. 216.

Applying this rule to the present case, it is clear that the previous judgment on which the Court below has relied cannot operate as *res judicata* between the parties. The suit in which that judgment was passed no doubt related to the property now in dispute, and the issue which arose in the present case was also raised in that case, namely, whether the share claimed originally belonged to the present plaintiff Ahmad Ali. But that was a suit brought by the wife and the son of the present plaintiff on the allegation that a gift had been made in their favour by the now plaintiff Ahmad Ali. The validity of the gift and the title of the donor to make it were put in issue by the real defendants. Ahmad Ali was only a *pro forma* defendant, and he did not enter appearance. The Court found against the plaintiffs to that suit. The issues which were determined in that suit arose and were tried between the plaintiffs and the principal defendants. If the case of the plaintiffs to that suit was true, the present plaintiff had ceased to have any interest in the property in suit, and there was no conflict of interest between him and the other defendants, an adjudication of which was necessary. The real contest was between the plaintiffs to that suit and the principal defendants. The judgment passed in that suit cannot therefore operate as a bar to the present suit. The ruling of the Madras High Court in *Madhavi v. Kedu* (1), to which the learned Judge below has referred, is perfectly distinguishable and has no application to the present case.

[69] As the appeal to the Court below was decided upon a preliminary point, and its decision on that point was erroneous, I set aside the decree below and remand the case to the lower appellate Court under s. 562 of the Code of Civil Procedure with directions to re-admit the appeal under its original number in the register and to try it on the merits. Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

18 A. 69 = 15 A.W.N. (1895) 160.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

NAND KISHORE LAL (Plaintiff) v. AHMAD ATA AND ANOTHER (Defendants). ANMOLI BIBI AND ANOTHER (Plaintiffs) v. AHMAD ATA AND ANOTHER (Defendants). BHOLE BIBI (Plaintiff) v. AHMAD ATA AND ANOTHER (Defendants.)² [3rd August, 1895.]

Benamidar—Suit by benamidar on title for possession of immoveable property—Right of benamidar to sue in his own name.

A benamidar suing for the recovery of immoveable property on title can sue in his own name, and when such a suit is instituted by a benamidar it must be held to have been instituted with the consent and approval of the beneficiary, against whom any adverse decision on the title set up will take effect as a *res judicata*. *Prosunno Coomar Roy Chowdhry v. Gooroo Churn Sein* (2) and *Hari Gobind Adhikari v. Akhoy Kumar Mozumdar* (3) dissented from. *Fuseelun Beebee v. Omdah Beebee* (4) and *Meheroonissa Bibee v. Hur Churn Bose* (5) distinguished. *Gopeekrist Gosain v. Gungapersaud Gosain* (6) explained *Ram*

* Second Appeal Nos. 920, 1081 and 1245 of 1893, from decrees of L. M. Thornton, Esq., District Judge of Jaunpur, dated the 8th June 1893, confirming the decrees of Rai Anant Ram, Subordinate Judge of Jaunpur, dated the 23rd December 1892.

(1) 15 M. 264.

(2) 3 W.R. 159.

(3) 16 C. 364.

(4) 10 W.R. 469.

(5) 10 W.R. 220.

(6) 6 M.I.A. 53.

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Bhurosee Singh v. Bissesser Narain Singh (1). *Gopi Nath Chobey v. Bhugwat Pershad* (2) and *Shangara v. Krishnan* (3) referred to.

[Diss., 25 C. 98=3 C.W.N. 20; 25 C. 874; F., 21 A. 390; 28 A. 44=A.W.N. (1905) 173=2 A.L.J. 702; Appr., 3 L.B.R. 18; R., 22 B. 672; 22 B. 820 (824); 36 B. 37 (40)=13 Bom. L.R. 947 (949)=12 Ind. Cas. 532 (533); 30 C. 265; 30 M. 245=17 M.L.J. 174; 12 C.L.J. 357=7 Ind. Cas. 166 (170); 13 C.P. L.R. 33; 1 O.C. 10; 4 O.C. 100 (104); 10 O.C. 263.]

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THIS was a suit upon a deed of sale to recover possession of a share in zamindari property. The plaintiff, Nand Kishore Lal, stated in his plaint that one Musammat Jokhan Bibi had at one time been in proprietary possession of a sixteen anna mahal of which the property in suit formed part; that on the death of Jokhan Bibi this sixteen anna mahal descended in equal portions [70] to Ahmad Ata, her husband, the first defendant, and to Muhammad Amir Ali, her maternal uncle: that on the death of Amir Ali in 1885 his eight anna share descended to his son Muhammad Ali, the second defendant, and that Muhammad Ali, on the 25th November 1885, had sold to him a one anna share out of the eight anna share which he had inherited from his father. The plaintiff further alleged that defendant No. 1 had obstructed him in obtaining possession of the property sold to him as above described, and he accordingly claimed possession of the property sold and mesne profits.

The suits out of which the two other appeals (Nos. 1081 and 1245) arose were similar suits in respect of other portions of the same property sold by the defendant Muhammad Ali to other vendees, namely, the former in respect of a four anna share sold to Musammat Anmoli Bibi and Musammat Mariam Bibi in 1885, and the latter in respect of a two anna share sold to Musammat Bhole Bibi in 1889.

In all three suits the defendant Muhammad Ali admitted the plaintiffs' claims; but the other defendant resisted the suits and raised the plea *inter alia* that in all three cases the plaintiff or plaintiffs were not entitled to sue, as in each case the transaction was *benami* and the plaintiff or plaintiffs appearing on the record were not the persons really entitled to the benefit of the transactions upon which the suits were based.

The three suits were tried together by the Court of first instance (Subordinate Judge of Jaunpur) and dismissed, the Subordinate Judge holding that the transactions in question could not be enforced at the instance of the plaintiffs before the Court.

In each case the plaintiffs appealed, and their appeals were dismissed by the lower appellate Court (District Judge of Jaunpur).

The plaintiffs thereupon appealed to the High Court.

Mr. *Abdul Majid*, Munshi *Ram Prasad*, Pandit *Sundar Lal* and Munshi *Madho Prasad*, for the appellants. } in S. A. No. 920 of 1893.

Mr. *Amir-ud-din* and Maulvi *Ghulam Mujtaba*, for the respondents. }

[71] Mr. *Abdul Majid*, for the appellants. } in S. A. No. 1081 and S. A. No. 1245 of 1893.
Mr. *Amir-ud-din* and Maulvi *Ghulam Mujtaba*, for the respondents. }

JUDGMENT.

BURKITT, J.—This and the two connected appeals, Nos. 1081 and 1245 of 1893. are second appeals from decrees of the District Judge of

(1) 18 W.R. 454.

(2) 10 C. 697.

(3) 15 M. 267.

Jaunpur affirming the decrees of the Subordinate Judge of Jaunpur dismissing plaintiffs' suits. The facts of the cases appear to be that one Musammat Jokhan Bibi was the owner in possession of the entire village of mauza Dhania Mau. On her death in May 1880, her husband, the defendant-respondent Ahmad Ata, took possession of the whole 16 annas, and was recorded as proprietor. It is alleged that at the death of Musammat Jokhan Bibi one of her heirs was Sheikh Amir Ali, and that he was entitled to 8 annas of the property. This Amir Ali is now dead and is represented by his son Khwaja Muhammad Ali. Khwaja Muhammad Ali by three sale-deeds, purporting to be executed in respect of a four annas share in favor of Musammat Mariam Bibi and Anmoli Bibi in 1885, in respect of a two annas share in favor of Musammat Bhole Bibi in November 1889, and in respect of a one anna share in favor of the plaintiff-appellant in this case, one Nand Kishore, in 1889, purported to sell 7 out of the 8 annas to which he claims title in succession to his father Amir Ali. Three suits have been instituted on these deeds and have been dismissed.

In the course of the hearing it was alleged that the plaintiffs in those three suits were *benamidars* for other parties. The lower Courts have found that such was the fact and that finding is binding on us in second appeal. It is not very easy to say what was the precise ground on which the learned District Judge has affirmed the decision of the Court of first instance. The learned Judge distinctly and unmistakably holds that a *benamidar* can sue in his own name. He also apparently has not dismissed plaintiffs' suits on the ground that they were champertous, though he says:—"There is no positive law of champerty in the *mofussil* in India, but I still cannot suppose that the law permits and encourages the sort of person who has a good scent for sleeping and possible claims to possess himself of such for some slight and [72] concealed consideration, then to cause the owner of the claim to execute any papers that are necessary for litigation and then to bring suits against persons in possession at his discretion." These words certainly leave it doubtful whether the District Judge did not hold that the suits were bad as being champertous. He also says that there were no genuine sales and that the sales were fictitious and shams. From the tenor of his judgment and that of the Subordinate Judge which he adopts, it is clear that he has formed that opinion because he held that the sale considerations which actually passed between the vendor and the vendee were but small. In two cases it is shown by the Judge that a sum of Rs. 100 was paid in cash by the vendees to the vendor, and in the third case the sale-deed recites receipt of the sale consideration and further contains a promise by the vendee to assist the vendor in recovering the share he reserved to himself. The learned Judge as to this last deed finds that the sale consideration was not paid, and he also finds that the vendee did not assist the vendor in litigation. It is not easy to understand how the first of these questions could arise between the plaintiff and the defendant Ahmad Ata, and as to the failure to assist the vendor in his litigation, that might be a matter for a suit for damages by the vendor, but is not a reason for holding the sale-deed to be invalid or fictitious or a sham, or for allowing the defendant to raise such a plea.

It seems to me that in coming to a decision in these cases the learned District Judge has lost sight of section 54 of the Transfer of Property Act. In that section sale is defined to be "A transfer of ownership in exchange for a price paid or promised or part paid and part promised." Consequently it follows in all these three cases, as laid down in the case

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of *Shib Lal v. Bhagwan Das* (1), that, whether the sale consideration as entered in the sale-deed was fully paid, or only partially paid, or was not paid at all but was promised to be paid, the effect of the instruments was to transfer to the vendees whatever right and interest the vendor, Muhammad Ali, had in the property which he purported to transfer. If Muhammad Ali be the rightful owner of the 8 annas share to which he asserts [73] his right, his ownership as to seven out of those 8 annas has been effectually transferred to the vendees under the sale-deeds mentioned above.

At the hearing of these appeals, I may say, no strenuous effort was made to support the finding of the Judge as to that matter. The question to which the arguments of the counsel on both sides were directed was whether the vendees, being *benamidars*, were entitled as such to sue in their own names. The Judge has held that they can so sue, relying on two cases to which I shall refer further on. On this question it is to me difficult to understand how any one other than the actual plaintiffs in these three cases could sue. They, and they only, are the persons in whom the legal estate is vested. It seems to me that they only are the persons who are entitled to say to the defendant Ahmad Ata,—“Our vendor was the real owner of 8 annas of this village; he has legally transferred 7 out of these 8 annas to us; we therefore call on you to surrender possession to us.” And I cannot see how it matters to the defendant that these plaintiffs may be bound by a secret agreement to transfer to some other persons whatever benefit they may obtain by their suit. The latter persons, that is to say, the persons for whose benefit the Court below has found the purchases to have been effected, could not sue unless on the strength of the sale-deeds and without joining the *benamidar* as a party to the suit. A question between the *benamidars* and the alleged beneficiaries is not one to be decided in a suit between the purchaser and the defendant who is alleged to be in wrongful possession, but would be an issue in a suit by the alleged beneficiaries against the *benamidar* if the latter had been successful in obtaining a decree for the property and refused to hand over that property to the beneficiary. For the respondents great reliance was placed on the case of *Hari Gobind Adhikari v. Akhoy Kumar Mozumdar* (2). That case is decidedly in their favor, as it lays down broadly that in the case of suits for recovery of land on title a *benamidar* is not entitled to maintain the suit. As an authority for the proposition the case just cited refers to the Privy Council case of *Gopeekrist Gosain v. Gungapersaud* [74] *Gosain* (3). On a careful consideration of the latter case I cannot consider it to be an authority for the proposition that in the case of a suit for recovery of land on title a *benamidar* is not entitled to maintain the suit. No question of that kind was before their Lordships in that case nor is any such question dealt with in their judgment. But as this was one of the earliest cases in which the nature of and the law affecting *benami* transactions came before their Lordships, they, for the purpose of explaining the nature of *benami* transactions and of showing that such transactions had been recognized and adjudicated on by the Supreme Court at Calcutta, and for no other purpose, cited certain extracts from the judgments of Mr. Justice Hyde and of Sir Edward Ryan.

The first of these extracts, as I understand it, shows that the rule in mere personal demands was that the *benamidar* should sue in his own

(1) 11 A. 244.

(2) 16 C. 364.

(3) 6 M.I.A. 53.

name, but that in "many cases the plaintiff had recovered on notes not in his own name, but in some other name, giving evidence that the transaction was really his." With reference to real estate the extract proceeds,— "But it cannot be allowed to be both ways; in the case of a dispute of land, without directly contradicting those former decisions of the Court." (The semicolon after the word 'ways' in the extracts is evidently a typographical error.) In my opinion, the words last cited (assuming that they have any authority) do not support the rule laid down in 16 Calcutta, page 364. On the contrary, they appear to me to point to a diametrically opposite conclusion, and to mean that, though in mere personal demands a practice had grown up of allowing the suit to be instituted by the beneficiary instead of by the person in whose name the note stood, such a practice could not be allowed in the case of real estate.

It is impossible to my mind to give full effect to the antithesis contained in the words—"but it cannot be allowed to be both ways"—by any other interpretation. Those words, I hold, clearly point to a divergence in the practice in cases of disputes as to land from the practice obtaining in the case of mere personal demands. In the latter class of cases, the beneficiary was in many cases [75] allowed to sue, but in the former, I take it, the rule was that the party who possessed the legal title to the property in dispute was the person who should sue, and not the persons for whom he might hold *benami*.

As to the case in Sir Edward Ryan's time I am unable to deduce any rule from it. It appears to have been a bill of complaint on the Equity side of the late Supreme Court, the nature of which is not stated, and no more can be gathered than that the plaintiffs had called for some kind of accounts, which the Court refused them, apparently because they were *benamidars*; but, as already mentioned in considering these extracts, it must be borne in mind that they form no portion of the judgment of their Lordships of the Privy Council and were cited by their Lordships simply for the purpose mentioned above.

The case in I.L.R., 16 Calcutta 364, cites the case of *Prosunno Coomar Roy Chowdhry v. Gooroo Churn Sein* (1) as authority for the proposition that a *benamidar* cannot sue for the recovery of land on title. But on examining that case I find that it does not proceed on the authority of any reported case; indeed the learned Judges who decided it say:—"There is no direct precedent upon this point, but we incline to the above view as consonant with equity and the policy of the Civil Procedure Code;" and they allude to certain inconvenient results which they conceive might occur if a *benamidar* were allowed to sue. The case of *Fuzeelun Beebee v. Omdah Beebee* (2) [* which also is cited in I.L.R. 16 Calcutta, p. 364] was the case of a *vakil* who during his employment as such had purchased some property from his client, and to conceal his improper and unprofessional conduct had taken the conveyance *benami* in the name of his son-in-law. It was held by the Court that the son-in-law could not sue, and, considering that the *vakil* was endeavouring under cover of his son-in-law to obtain an advantage from his client which the law forbade, it is difficult to understand how the Court could have decided otherwise. The case is entirely a peculiar one, and I cannot regard it as an authority on the general question.

* [The words in rectangular brackets find a place in the original judgment.—ED.]

(1) 3 W.R. 159.

(2) 10 W.R. 469.

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[76] Another case from the same volume, namely, the case of *Meheeroonissa Bibee v. Hur Churn Bose* (1), was cited by the learned counsel for the appellant at the hearing of these appeals. This case also turns on a special state of facts. In it a tenant who had created several incumbrances on his holding allowed the tenure to be sold for default, and at auction purchased it in the name of a *benamidar*. The latter claimed to have acquired the tenure free from all the incumbrances which the original tenant had created. It was held most properly that the tenant could not take advantage of his own wrongful act and that the suit could not be maintained by the *benamidar*. In the case of *Ram Bhurosee Singh v. Bissesser Narain Mahata* (2) the case from 3 Weekly Reporter, p. 159, was discussed, and, though not actually dissented from, was not followed, or at least was held not to govern the case then under discussion. In the latter case the plaintiff held an ostensible title by a *mokurruree* lease and a bill of sale, and sued to recover some land which he alleged to be covered by his instruments of title. The defendant objected that the plaintiff was not the real owner of the village and therefore was not entitled to sue. The Court held that the ostensible title set up by the plaintiff "was sufficient to enable him to bring the suit, and that the defendants were not at liberty, in a suit of this description, to raise the question whether he was only nominally the owner of the property, somebody else being the real owner." The Court also was of opinion that the difficulties suggested in the case in 3 Weekly Reporter might all be met without holding that the party who brings the suit and has a *prima facie* title is bound to prove that he is the real owner. This case is very much on all-fours with the present appeals. The plaintiff-appellant in these appeals has *prima facie* a legal title, and, in the words of the judgment I have just cited, I think the respondents are not at liberty to raise the question whether those plaintiffs are only nominally the owners of the property, somebody else being the real owners.

In the case of *Gopi Nath Chobey v. Bhugwat Pershad* (3) it was not contended that a *benamidar* might not sue in his own name, [77] but on the contrary it was admitted that he might do so, and that, in the absence of evidence to the contrary, it was to be presumed, in the case of a suit by a *benamidar*, that it had been instituted with the full authority of the beneficial owner, and that any decision come to would have the effect of a *res judicata* as against the real owner. To the same effect is the ruling of the Madras High Court in the case of *Shangara v. Krishnan* (4).

From the cases cited above I am unable to find that any rule supported by authority exists to the effect that a *benamidar* cannot sue in his own name for the recovery of immoveable property on title. I am most strongly of opinion that such a suit is permissible and that when instituted by a *benamidar* it must be held to have been instituted with the consent and approval of the beneficiary, against whom any adverse decision on the title set up will take effect as a *res judicata*.

I therefore hold that these suits are not bad because they have been instituted by persons who have been found to be *benamidars*. This was the only ground on which a serious attempt was made to support the dismissal of the suits by the lower Courts.

I would therefore set aside the decrees dismissing the suits, and, as the suits were disposed of on the preliminary point that they were not

(1) 10 W.R. 220.

(2) 18 W.R. 454.

(3) 10 C. 697 (705.)

(4) 15 M. 267.

maintainable and without any decision on the merits as to the title of the vendor Muhammad Ali, I would remand the three cases through the District Judge to the Court of first instance with directions to replace them on the file of pending cases and decide them on the merits according to law. I would also direct that all costs here and hitherto should follow the result.

BLAIR, J.—I concur.

Appeal decreed and cause remanded.

18 A. 78 = 15 A.W.N. (1895) 227.

[78] APPELLATE CRIMINAL.

Before Mr. Justice Knor and Mr. Justice Banerji.

QUEEN-EMPRESS v. MAHABIR. [4th October, 1895.]

Criminal Procedure Code, section 164—Confession—Confession subsequently retracted, effect of.

It is unsafe for a court to rely on and act upon a confession which has been retracted unless after consideration of the whole evidence in the case the Court is in a position to come to the unhesitating conclusion that the confession is true; that is to say, usually, unless the confession is corroborated by credible independent evidence. *Queen-Empress v. Rangji* (1) referred to.

[*Diss.*, 1 L.B.R. 238 (245); *R.*, 20 A. 133 (134); 3 P.W.R. 1907 (Cr).]

THE facts of this case are sufficiently stated in the judgment of Banerji, J.

The Public Prosecutor (for whom Mr. J. N. Pogose), for the Crown.

JUDGMENT.

BANERJI, J.—Mahabir Ahir has been convicted of having murdered his sister Musammat Jugni and her illegitimate son, and has been sentenced to death. He has appealed.

It appears that Musammat Jugni was a woman of abandoned character, and that in consequence of her sometimes coming to live with the accused he had been put out of caste. It is stated on behalf of the prosecution that she came to the house of the accused about the time when she is said to have been murdered; that she brought with her her illegitimate son about 5 years old; that she insisted upon staying in the house of the accused, notwithstanding his refusal to receive her; and that thereupon the accused murdered her and her child early on the morning of the 22nd of May 1895.

On the 25th May the police received private information that two corpses were lying in a field in the village in which the accused lived, and proceeded to the spot. Some bones and two human skulls were found there. The accused was arrested the same day in a village seven or eight miles distant. The investigations were continued till the end of June, when he was sent up for trial.

On the 27th of May the accused made a statement before a third class Magistrate, and on the 4th of June he made a fuller statement before the Magistrate who held the preliminary inquiry in this case.

[79] The direct evidence against the accused consists of the deposition of one Madho Ahir, his cousin, and the two statements referred to

* Criminal Appeal No. 855 of 1895.

(1) 10 M. 295.

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above, which were confessions of guilt. There is also some circumstantial evidence, which, in my opinion, is of a feeble character. If the direct evidence be excluded from consideration, there is nothing to prove that Musammatt Jugni and her son have been murdered at all—much less that the accused murdered them. The supposition that the skulls and other bones were their skulls and bones is negatived almost completely by the medical evidence. The Civil Surgeon deposed that one of the skulls was that of a person whose age was probably less than 20 years, and that the other skull was that of a person whose age must have been 12 or 13 years. It has been proved that Musammatt Jugni was 35 or 36 years old, and that the age of her son was about 6 years. The skulls found by the police, and especially the one said to have been the skull of the child, could not, therefore, according to the medical evidence, have been those of Jugni and her child. The Civil Surgeon could not state whether the bones found were those of a man or woman. He thought that they were the bones of a young man or woman. Again, according to the medical evidence, some of the bones were in a decayed state. Having regard to the fact that the case for the prosecution was that the alleged murder took place on the 22nd of May, that is only eight days before the examination of the bones by the Civil Surgeon, they could not have undergone so much decay had they been the bones of persons who had met their death only eight days before. The discovery of the bones, therefore, as the evidence stands, does not, in my opinion, help the case for the prosecution, but on the contrary rebuts it to some extent. The only other piece of circumstantial evidence consists of the statements of three witnesses who have deposed that early on the morning of the 22nd of May, about three hours before dawn, they saw the accused going in the company of his sister and her son. I must say that I look upon the evidence of these witnesses with a great deal of suspicion. It is strange that all of them happened to be out of their homes at that early hour, and that all of them challenged the accused and he spoke to them and gave them the [80] same answer. Had these men met the accused in the company of the persons alleged to be deceased, it is not likely that they would have remained silent for full five days, although two dead bodies were seen lying not far from the road.

I am of opinion that these witnesses are not persons whose statements can be relied upon. The evidence as to the identification of a *sari* and an *angochha* found near the skull and bones as the *sari* of Musammatt Jugni and the *angochha* of her son is equally incredible.

As for the direct evidence, if Madho Ahir is to be believed, there is very damaging evidence against the accused. Madho deposed that he had seen the sister of the accused and her son at the house of the accused on Tuesday evening, and he further said :—"When one *pahar* of the night remained I was sleeping at my door, when I saw prisoner going away with his sister and her son to the north of the village to see them off *pahun-chane ko*). He said he was going to see them off when I asked him where he was going. She had the *munj* and cord with her. About a *ghari* or a *ghari* and a-half later I went to a grove at north of village for purposes of nature. I heard the boy's scream from the *tal* which is near the village. I took up my *lota* and ran towards the *tal*. I saw him (prisoner) killing the child with a chopper (*gandasa*). The woman was lying there. He threatened me and I ran home."

If Madho spoke the truth in making the above statement, he was an eye-witness of the murder; and yet we find him say nothing of what he

saw to any one, not even to his own wife, until the police appeared on the scene. The accused in his petition of appeal states that he is on bad terms with Madho, and in the Court of Session he stated that the police were quartered in the village for eight days, beat his sister and cousin and made them give evidence. These statements may or may not be true, but they are not improbable, and I am not satisfied that Madho has given true evidence. The learned Judge is of opinion that Madho was an accomplice. If that was so, it was unsafe to act upon his evidence without sufficient corroboration. And such corroboration [81] is wanting in this case. Having regard to his conduct subsequently to the alleged murder I am unable to rely upon his evidence.

The greatest difficulty in the case arises from the fact that the accused made two statements in which he confessed having murdered Musammatt Jugni and her son by striking them with a *gandasa*. The statements were retracted both before the committing Magistrate and in the Court of Session. The accused stated that he had made them at the instigation of the police. The statements were recorded with due observance of the provisions of the law, and, if they can be believed, they unmistakably establish the guilt of the accused. The mere fact that a confession has been subsequently retracted will not make it inadmissible against the accused. But before a Court can act upon such confession it must be satisfied as to its truth. Having regard to the fact that it not unoften happens that an accused person is forced or cajoled by the police into making confessions, it is the more necessary that a Court should be satisfied beyond reasonable doubt that the statements contained in the confessions of the accused are true. This necessity is, in my opinion, the greater where the confessions have subsequently been withdrawn. We have in that case two contradictory statements, and, as observed by Kernan, J., in *Queen-Empress v. Ranghi* (1) "the difficulty is to ascertain which of the statements is the truth, and the responsibility of relying on either statement is very great." For this reason it is, in my judgment, unsafe to rely on and act upon the retracted confessions unless upon a consideration of the whole of the evidence in the case the Court is in a position to come to the unhesitating conclusion that the confessions were true. It is often very difficult, if not impossible, to come to such a conclusion unless "there is" in the words of Kernan, J., "reliable independent evidence to corroborate to a material extent and in material particulars the statements contained in the withdrawn confessional statements." It seems to me, therefore, to be unsafe in the majority of cases to found a conviction on retracted confessions which are not corroborated by credible independent evidence.

[82] In this case such evidence is wanting, and I am not satisfied that the confessions were genuine. The first confession was made on the 27th May 1895, and the second on the 4th June 1895. The accused was taken into custody on the 25th May, and he remained in the custody of the police till the 2nd June. The first statement was thus made when he was in the custody of the police, and the second statement was made just after he had come out of police custody. It is probable, therefore, that he was under police influence when both the statements were made. Shortly after that influence had ceased he retracted the statements and stated that he had made them under the instigation of the police.

As I have shown above, there is no independent evidence on which

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reliance can be placed to corroborate the confessions, and on carefully considering them it seems to me that they contain statements which fit in with the case made out by the police. The medical evidence, as I have shown above, rebuts that case. It is also unlikely that the accused took out his sister and her boy in the manner alleged and murdered them at a spot where there was every chance of his being discovered. It is also unlikely that he would have allowed the corpses to lie at the place where the murder was committed, especially after he had met and spoken to no less than four persons, without making any attempt at concealing them. Further, he would have produced the *gandasa* with which the murder was committed had he voluntarily made a clean breast of all that he had done. The medical evidence makes it very improbable that the skulls and other bones were those of the persons who are said to have been murdered, and this circumstance throws grave doubt upon the truth of the confessions. It is also unlikely that if the woman was pushed out of the house as stated in the confession she would have taken with her a bundle of *munj* and a cord. It seems to be probable therefore that the police having found some *munj* and a cord near the corpses made the accused and Madho state that the woman Jugni had with her a bundle of *munj* and a cord. It is far from certain that the woman and her son are no longer alive. Under such circumstances I am not satisfied beyond all doubt that the confessions were true. On [83] the contrary, a reasonable doubt exists in my mind as to the guilt of the accused, and I do not feel it safe to convict him on the evidence before us. I would, therefore, give the accused the benefit of the doubt, and, setting aside his conviction and sentence, acquit him of the charge of which he has been convicted.

KNOX, J.—This is a case referred by the Sessions Court of Gorakhpur for confirmation of sentence of death. I agree in all that has been said by my brother Banerji. The direct evidence in the case is open to grave doubt as has been shown in the judgment just read. The accused in two statements admitted unreservedly that he was the murderer of Jugni and her boy, and that the corpses found are those of Jugni and her son. Those confessions were afterwards withdrawn and the strong evidence which they would otherwise afford against the accused becomes itself in turn open to doubt. It is true that the accused does not satisfactorily explain how he came to make these admissions and why he has resiled from them. It would have been well if the Court of Sessions had probed this matter further and got together in more detail from the accused the circumstances under which he came to make admissions so fatal to him. But the case is open to doubt. The learned Judge himself feels it in his judgment, and that being so, I agree that the proper course is to set aside the conviction and the sentence. We find Mahabir not guilty of the offence of which he was charged, namely, that on the 22nd May 1895, at Sheoraha Tal, he murdered Musammat Jugni and her son, and we direct his immediate release.

18 A. 83 = 15 A.W.N. (1895) 230.

APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.*AKHARA PANCHAITI THROUGH HIRA GIR AND OTHERS (*Defendants*)
v. SUBA LAL AND OTHERS (*Plaintiffs*).^{*} [24th October, 1895.]*Mortgage—Prior and subsequent mortgagees—Rights of subsequent mortgagees where prior mortgage is usufructuary.**Held* that where there exists a prior usufructuary mortgage, a subsequent mortgagee holding a simple mortgage over the same property cannot bring the mortgaged [84] property to sale in virtue of his incumbrance until such time as the usufructuary mortgage becomes capable of redemption. *Mata Din Kasodhan v. Kasim Husain* (1) explained and followed.

[R., 11 C.P.L.R. 75 ; 1 O.C. 53 (60) ; 1 O.C. 105 (111).]

THIS was a suit for sale on a mortgage. It appears that one Musamat Bhagmani was owner of certain zamindari property and houses, and she mortgaged the property on the 4th March 1884 to the Akhara Panchaiti for Rs. 600. Bhagmani died, leaving a daughter, Musammat Gujrati, her son Gajadhar and her husband Kalka. After the death of Bhagmani, Gujrati and her husband mortgaged the property in question to the plaintiff by a mortgage deed dated the 23rd January 1889. On the 21st May 1891, Gajadhar executed a sale deed of the zamindari for Rs. 2,000 to the Panchaiti Akhara, the money owing under the mortgage of the 4th of March 1884 being set off in this sale. The present suit was brought by Suba Lal on his mortgage of the 23rd January 1889, claiming to recover the money stated to be due to him by sale of the properties mortgaged as belonging to Gujrati and Kalka. Gujrati, Kalka, Gajadhar and the Panchaiti Akhara were all made parties defendants to the suit.

Gajadhar and Kalka admitted the execution of the deed, but denied the receipt of consideration except as to Rs. 20. Gajadhar and the defendants representing the Panchaiti Akhara said that Bhagmani had made a will leaving the property to Gajadhar ; that Gujrati had acquired no right to it ; and that she consequently had no power to mortgage it to the plaintiff.

The Court of first instance (Munsif of Allahabad) held that the alleged will in favour of Gajadhar was invalid ; but at the same time it disallowed the plaintiff's claim to the property, on the ground that Gujrati by allowing the property to go to Gajadhar without asserting her right had waived her right to it ; and the plaintiff, being the scribe of the alleged will, and knowing the facts connected with it, was estopped from claiming to sell the property as belonging to Gujrati. The first Court gave a decree in the suit against the person of Gujrati and against Kalka and the property mortgaged in the bond as belonging to him.

[85] The plaintiff appealed on the ground that the alleged will was not a will but a gift, and was inadmissible in evidence, and that the Court of first instance was wrong in applying the principles of waiver and estoppel to the case and discharging the property.

The lower appellate Court (Subordinate Judge of Allahabad) found that the alleged will was not a will but a deed of gift, and as such invalid,

^{*} Second Appeal No. 1172 of 1893, from a decree of Babu Brijpal Das, Subordinate Judge of Allahabad, dated the 7th August 1893, modifying a decree of Munshi Shiva Sahai, Munsif of Allahabad, dated the 13th February 1893.

(1) 13 A. 432.

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- it not having been registered. It found also that the mortgage to the plaintiff was valid as well as the former mortgage of the 4th March 1884 made by Bhagmani, but that the term of the earlier mortgage not having expired, it could not be redeemed by the present plaintiff. Finding also that the sale by Gajadhar was void, the lower appellate Court gave the plaintiff-appellant a decree for sale subject to the mortgage of the 4th March 1884.
- The defendant, the Akhara Panchaiti, appealed to the High Court. Munshi *Ram Prasad* and Babu *Durga Charan Banerji*, for the appellants.
Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

EDGE, C. J., and BANERJI, J.—This appeal has arisen out of a suit for sale brought under Act No. IV of 1882, on a simple mortgage. The appellants here, who are some of the defendants, were prior mortgagees holding under a usufructuary mortgage, the period of which will not expire until 1302 Fasli. The Subordinate Judge gave the plaintiffs a decree for sale, holding that the decision of this Court in *Mata Din Kasodhan v. Kazim Husain* (1) did not apply, and that it could not apply, as the prior mortgagees were usufructuary mortgagees the period of whose mortgage had not expired when this suit was brought. The Subordinate Judge made a decree for sale subject to the prior mortgage. From that decree this appeal has been brought.

It has been contended on behalf of the plaintiffs-respondents that the decision in *Mata Din Kasodhan v. Kazim Husain* does not govern this case, and that it would be a hardship to postpone the right of the second mortgagee until the expiration of the usufructuary mortgage, it being suggested that cases might occur in which, if the decision in *Mata Din Kasodhan v. Kazim Husain* [86] were applied to a suit by a subsequent mortgagee where the prior mortgage was a usufructuary one, the subsequent mortgagee might by reason of limitation be prevented from availing himself of the benefits of s. 90 of Act No. IV of 1882, in case his decree for sale when obtained and executed did not satisfy the subsequent mortgage.

In our opinion the decision of the majority of the Court in *Mata Din Kasodhan v. Kazim Husain* governs this case, and that case appears to us to have decided that a decree for sale under Act No. IV of 1882 cannot be merely a decree for sale of what is known in England as the equity of redemption but must be a decree for sale of the mortgaged property itself. Further, it appears to us that it would be impossible for the Legislature to protect persons willing to lend their money on inadequate security from loss either by the security being inadequate or being hampered by prior mortgages which might cause a suit by a subsequent mortgagee to be barred by limitation. In the present case the plaintiffs brought their suit before the time when they could in it ask for redemption of the usufructuary mortgage. In other words their suit was premature. Following *Mata Din Kasodhan v. Kazim Husain* and on the ground that the plaintiffs' present suit has been prematurely brought, we allow this appeal and dismiss the plaintiffs' suit with costs in all Courts.

Appeal decreed.

(1) 13 A. 432.

18 A. 86=15 A.W.N. (1895) 232.

APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.*THE COLLECTOR OF MUZAFFARNAGAR (*Defendant*) v. HUSAINI BEGAM (*Plaintiff*).^{*} [11th November, 1895.]*Civil Procedure Code, ss. 372, 582—Devolution of interest during pendency of suit—Assignment of decree prior to appeal—Application to substitute name of assignee as respondent to appeal—"Svit."*1895
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An application was made by an appellant to substitute for the name of the person originally named as respondent to the appeal, the name of a person to whom the decree had been assigned before the filing of the appeal, such application being made more than two years after notice of the assignment had reached the appellant. The person whose name was so sought to be substituted as respondent objected to being placed upon the record of the appeal. *Held* that the name of the proposed respondent should not be placed on the record.

[87] *Semble* that s. 372 of the Code of Civil Procedure does not apply to a case where the devolution of interest occurs between the time of the passing of a decree and the time of the filing of an appeal from that decree.

[D., 22 A. 231.]

THE facts of this case are sufficiently stated in the judgment of the Court.

Mr. A. H. S. Reid, for the appellant.

Pandit Sundar Lal, for the respondent.

JUDGMENT.

EDGE, C. J., and BURKITT, J.—In this appeal an application was presented on behalf of the Collector of Muzaffarnagar to add one Kishori Lal as a respondent to the appeal. The application was made on the 6th of May 1895. It is resisted on behalf of Kishori Lal, who objects to being made a party to the appeal by being brought upon the record. The decree under appeal was obtained by Husaini Begam on the 7th of June 1892. It appears that that decree was assigned to Kishori Lal on the 11th of June 1892. On the 17th of September 1892, Kishori Lal's name was substituted for the decree-holder's in the Court below. The Collector had notice of these proceedings. This appeal on behalf of the Collector from that decree was presented in this Court on the 29th of October 1892, and was admitted on the 14th of November following, Husaini Begam being named in the memorandum of appeal as the respondent. Owing to the gross negligence of some one, and although the Collector was aware that Kishori Lal's name had been substituted in September 1892, no steps were taken until May 1895, to make Kishori Lal a party to the appeal. It is not for us to indicate with whom the blame rests. We are now asked to add Kishori Lal's name, and we are asked to do so under section 372 of Act No. XIV of 1882. It is very doubtful whether this section applies at all to this case. The devolution of interest here did not take place pending the appeal, it took place after the decree in the Court below and before the memorandum of appeal was presented to this Court. We are aware that under certain circumstances the term "suit" includes not only the proceedings in the first Court, but the proceedings in the appeal and up to final execution; but it appears doubtful to us whether

* Application in First Appeal No. 227 of 1892.

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the words "pending the suit" in section 372 can be [88] construed to mean at any time from the commencement of the suit until its final determination on appeal, if there is an appeal. A reference to section 582 seems to make it obvious that a suit under section 372 does not, in that section, and as it stands alone, include an appeal, as it is by section 582 that a Court is entitled to read the word "suit," where it appears in chapter XXI as an appeal. Further it is only in proceedings arising out of the death, marriage or insolvency of parties that section 582 enables a Court in an appeal to read the word "suit" where it occurs in chapter XXI as an appeal. The devolution of interest in the present case did not arise on a death, or on a marriage or an insolvency.

Whether section 372 applies or not, Kishori Lal, who is the only person apparently at present interested in maintaining the decree, objects to being now made a party to this appeal. As the assignee of Husaini Begam, he would be entitled to support the decree in her name, but as he objects to being brought upon the record now, we dismiss his application. The appeal will now be heard.

18 A. 88=15 A.W.N. (1895) 233.

REVISIONAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

QUEEN-EMPRESS v. AGHA MUHAMMAD YUSUF.*
[16th November, 1895.]

Act No. XLV of 1860 (Indian Penal Code), section 379—Theft—Removal by creditor of debtor's property with a view to obtaining payment of his debt.

Held that the removal by a creditor against the will of his debtor of property belonging to such debtor with the view of compelling such debtor to discharge his debt amounts to theft within the meaning of section 379 of the Indian Penal Code. Queen-Empress v. Sumeshar Rai (1) referred to. Prosonno Kumar Patra v. Uday Sant (2) dissented from.

[R., 34 A. 89 (91)=8 A.L.J. 1237=12 Cr.L.J. 580 (581)=12 Ind. Cas. 844; Rat. Unrep. Cr. Cas. 908 (913); L.B.R. (1897—1901), Vol. I, 334.]

THIS was a reference made by the District Magistrate of Fatehpur under section 438 of the Code of Criminal Procedure under the following circumstances:—

One Agha Muhammad Yusuf was charged before a Deputy Magistrate with theft in having taken away four bullocks, a cart and some other property from the possession of one Ram Adhin, [89] the complainant. It was found by the Deputy Magistrate that Ram Adhin was indebted to some extent to Muhammad Yusuf, and that the latter, in the absence of Ram Adhin, forcibly removed the property in question from the house of Ram Adhin with the intention of thereby compelling Ram Adhin to discharge his debt. It was argued before the Deputy Magistrate on the strength of the case of *Prosonno Kumar Patra v. Uday Sant* (2) that the offence of theft within the meaning of section 379 of the Indian Penal Code was not constituted by the acts of the accused. The Deputy Magistrate, however, adverting to section 379, clauses (j) and (l) of the Indian Penal Code, and disagreeing with the ruling above referred to,

* Criminal Revision No. 590 of 1895.

(1) 8 A.W.N. (1888) 97.

(2) 22 O. 669.

convicted the accused of the offence of theft and sentenced him to a fine of Rs. 40, or in default to one month's rigorous imprisonment.

The case, being brought to the notice of the District Magistrate, was made the subject of a reference to the High Court as above stated.

The Public Prosecutor (Mr. A. H. S. Reid), for the Crown.

JUDGMENT.

EDGE, C. J., and BURKITT, J.—This case has been referred to us by the Magistrate of the district of Fatehpur, owing to the decision in *Prosonno Kumar Patra v. Uday Sant* (1). The facts of the present case are that one Ram Adhin was in debt to the accused. The accused proceeded to compel liquidation of the debt by taking away from Ram Adhin's house in his absence, and without Ram Adhin's consent, a cart and four bullocks belonging to Ram Adhin. He intended to hold them apparently until the debt was paid, as it was not proved or suggested that the accused intended permanently to deprive Ram Adhin of the property. This case is governed by the same principle as that of the *Queen-Empress v. Sumeshar Rai* (2). In our opinion the accused was properly convicted of theft. We are unable to agree with the decision of the High Court of Calcutta to which we have referred. We prefer to abide by the view of the law which has been accepted in these Provinces and which we think is correct.

— We see no reason for interfering. The record will be returned.

18 A. 90 = 18 A.W.N. (1895) 234.

[90] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

RAM GHULAM SINGH AND OTHERS (*Plaintiffs*) v. RAM BEHARI SINGH AND ANOTHER (*Defendants*).^{*} [19th November, 1895.]

Hindu Law—Joint Hindu family—Suit for possession—Property alleged to have been joint family property—Separation—Burden of proof.

Three brothers, Manohar Singh, Paljhan Singh and Harnandan Singh once constituted a joint Hindu family. After the death of all of them the descendants of Manohar Singh sued the descendants of Harnandan in effect to obtain their share of the property which had been of Paljhan Singh in his lifetime. In their plaint they alleged that the family was still joint. By their evidence, however, they set up a separation between themselves and Harnandan shortly after the death of Paljhan Singh. The defendants, on the other hand, alleged that some twenty or twenty-five years before suit, after the death of Manohar Singh, there had been a separation between the plaintiffs on the one side and Paljhan Singh and Harnandan Singh on the other.

Held that, the plaintiffs having set up a case which was inconsistent with the presumption of the family remaining joint, it was for them to prove that the separation took place as they alleged. *Obhoy Churn Ghose v. Gobind Chunder Dey* (3) referred to.

[R., 18 A.W.N. 60; 11 O.C. 381.]

THE facts of this case, so far as they are necessary for the purposes of this report, sufficiently appear from the judgment of the Court.

Pandit Sundar Lal, for the appellants.

Munshi Ram Prasad and Munshi Gobind Prasad, for the respondents.

* First Appeal No. 321 of 1893, from a decree of Babu Mohan Lal, Additional Subordinate Judge of Gorakhpur, dated the 25th September 1893.

(1) 22 C. 669.

(2) 8 A.W.N. (1888) 97.

(3) 9 C. 237.

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(1895) 234.

EDGE, C.J., and BURKITT, J.—This appeal has arisen in a suit in the plaint in which the plaintiffs alleged that the defendants and they (the plaintiffs) were members of a joint Hindu family; that no separation had taken place, and that the property in suit was joint. They claimed partition, and a declaration for maintenance of possession with regard to some of the property, alleged to have been in their possession. The real question in the suit was whether or not the plaintiffs were entitled to share in the property of one Paljhan Singh. The plaintiffs are the sons of one Manohar [91] Singh who died before 1864. The defendants are the sons of one Harnandan Singh who died on the 16th December 1891. Paljhan Singh died about 1885. Manohar Singh, Harnandan Singh and Paljhan Singh were brothers, and at one time were members of a joint Hindu family descended from their father Gauri Singh. Paljhan Singh left a widow, Nago Kuari, who died on the 3rd of May 1891. As we have said, the plaintiffs alleged in their plaint that the family was still joint. If that were a true statement of fact, they would have been entitled to the relief for which they asked. The plaintiffs, however, by their evidence contradicted the allegations in their plaint, and by that evidence sought to prove a separation between the plaintiffs on the one part and Harnandan Singh on the other after the death of Paljhan Singh, the separation being alleged to have taken place about six months after the death of Paljhan Singh, *i.e.*, about 1886. The defendants pleaded, and by their evidence sought to prove, that some twenty to twenty-five years before suit and after the death of Manohar Singh, the plaintiffs on the one side and Paljhan Singh and Harnandan Singh on the other, separated, Paljhan Singh and Harnandan Singh remaining joint *inter se*. If that defence is established, the plaintiffs' case claiming to share the property of Paljhan Singh fails. The Subordinate Judge found the issue as to separation in favour of the defendants, and, with the exception of a small portion of the relief asked for by the plaintiffs, the right to which portion was not disputed, he dismissed the plaintiffs' suit. From that decree the plaintiffs have brought this appeal.

The first question for consideration is—on whom is the *onus* of proof in this case? Undoubtedly the presumption is that a joint Hindu family continues joint, unless it be admitted by the parties or proved by evidence that a separation has taken place. It is contended on behalf of the plaintiffs-appellants that that presumption applies in this case, and that unless we are satisfied that the defendants have made out their case, the plaintiffs are entitled to a decree in appeal. We do not agree with that contention. If it had not been proved by either side or admitted by the parties here that prior to the time when this suit was instituted the descendants of [92] Gauri Singh had separated, the presumption to which we have referred would apply, and that presumption in this case would have been that at the commencement of this suit the descendants of Gauri Singh were still members of a joint family. It is, however, common ground, not on the pleadings, but on the evidence produced by both sides, that the descendants of Gauri Singh had separated prior to the commencement of this suit. For the plaintiffs it is contended that we should presume that the family remained joint until after the death of Paljhan Singh, even if we did not believe the evidence given on behalf of the plaintiffs to prove that the separation which took place was after the death of Paljhan Singh. In our opinion, the plaintiffs having, by their own evidence, destroyed

the presumption that this family was, at the commencement of the suit, a joint family, it lies upon the plaintiffs to prove a separation at such a period in the family history as would entitle the plaintiffs to the relief which they sought, and they are in the same position under the circumstances of this case as would be any other plaintiff who sought to dispossess a defendant in possession of property, *i.e.*, the plaintiffs have to prove their case. This view appears to us to be consistent with the principle of the decision of the Calcutta High Court in *Obhoy Churn Ghose v. Gobind Chunder Dey* (1).

[The remainder of the judgment is occupied entirely with a discussion of the evidence in the case, and is therefore not reported.—ED.]

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18 A. 92 = 15 A.W.N. (1895) 235.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

DWARKA DAS AND ANOTHER (*Defendants*) v. SANT BAKHSB
AND OTHERS (*Plaintiffs*).^{*} [21st November, 1895.]

Act No. I of 1872 (*Indian Evidence Act*), section 34—*Account-books—Corroborative evidence necessary to render defendant liable upon entries in plaintiffs' books.*

In a suit to recover money due upon a running account the plaintiff produced his account-books, which were found to be books regularly kept in the course of business in support of his claim. One of the plaintiffs gave evidence as to the entries in the account-books, but in such a manner that it was not clear whether he spoke from his personal knowledge of the transactions entered in the books, the entries in which were largely in his own handwriting, or simply as one describing [93] the state of affairs that was shown by the books. He was cross-examined, but no questions were asked him to show that he was not speaking as to his personal knowledge. *Held* that the evidence given as above should be interpreted in the manner most favourable to the plaintiff and might be accepted in support of the entries in the plaintiffs' account-books, which by themselves would not have been sufficient to charge the defendants with liability.

[R., 110 P.R. 1908.]

N.B.—In 15 A.W.N. (1895) 235, this case is referred as *First Appeal No. 75 of 1895*.—Ed.

THE facts of this case sufficiently appear from the judgment of the Court.

This was a suit brought by a firm of merchants of Shahganj in the Jaunpur district against another firm of the same place to recover some Rs. 872 alleged to be due upon a balance of account in respect of moneys lent by the plaintiffs to the defendants.

The principal defendants, Dwarka Das and Bhooleshar, denied the plaintiffs' claim *in toto*. They alleged in their written statement that they had never borrowed money from the plaintiffs and that the plaintiffs' books by the aid of which the claim was sought to be proved were forgeries. There were other persons impleaded as defendants, but one of these died during the pendency of the suit; and as to the others it was found that their connection with the firm of Dwarka Das and Bhooleshar was not proved.

^{*} First Appeal No. 75 of 1894, from a decree of G. Forbes, Esq., Officiating District Judge of Jaunpur, dated the 2nd February 1894.

(1) 9 C. 237 (243).

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The plaintiffs' case was supported mainly by their own account-books, which were found to have been regularly kept in the course of business. The various items, however, composing the total sum claimed by the plaintiffs were not specifically proved; but the Court of first instance (District Judge of Jaunpur) held that the books being generally in proper form and none of the items being suspicious, and the defendants having denied the claim as a whole and not merely taken exception to some items whilst admitting others, there was sufficient proof of the correctness of the plaintiffs' claim. The Court accordingly gave a decree in favour of the plaintiffs.

The defendants appealed to the High Court, on the ground mainly that the accounts relied upon had not been proved, and that it was under the circumstances for the plaintiffs to establish by evidence each item of the account.

Pandit *Sundar Lal* and *Munshi Madho Prasad*, for the appellants.
Mr. *J. Simeon* and *Maulvi Ghulam Mujtaba*, for the respondents.

JUDGMENT.

[94] EDGE, C. J., and BURKITT, J.—The plaintiffs, who are respondents in this appeal, brought their suit to recover moneys alleged to be due by the defendants to the plaintiff's firm. They were moneys alleged to have been advanced to the defendants upon different dates and over a series of years. The District Judge found in favour of the plaintiffs in respect of all the amounts claimed which were not barred by limitation. He found that the plaintiffs had proved so much of their case as was not barred by limitation by putting in evidence their account-books, and he disbelieved all the corroborative evidence of the loans which was called, with the exception to some extent of the evidence given by the witness Balbhaddar. The District Judge found that the books were regularly kept, and he assumed in point of law that an account-book which was proved to have been regularly kept was *prima facie* evidence as against the opposite party of the matters stated in it. He relied upon section 34 of Act No. I of 1872 (The Indian Evidence Act). The interpretation put by him upon section 34 is, in our opinion, erroneous. Section 34 applies only to entries in books of account which are regularly kept in the course of business, and the District Judge's view of the evidence which he believed was that the books of the plaintiffs' firm were regularly kept in the course of business. No doubt the entries in question were entries, on the Judge's finding, to which section 34 of the Evidence Act applies; but section 34 of the Evidence Act only makes entries in books of account regularly kept in the course of business relevant, when they refer to a matter into which the Court has to enquire, and what the Judge apparently overlooked was that section 34 expressly enacts:—"but such statements shall not alone be sufficient evidence to charge any person with liability." On the findings of facts of the Judge he ought, in our opinion, to have dismissed the suit. The entries alone were not sufficient evidence under the Act to charge the defendants with liability, and the District Judge did not believe the oral evidence as to the loans having been made.

Mr. *Simeon*, who has appeared here for the plaintiffs-respondents, has referred us to section 4 of Act No. XVIII of 1891. That section does not help us. Even if it applied, which it does [95] not, to the books of the plaintiffs' firm, it would not give the extracts from those books any greater force as a matter of evidence than the books themselves would have had.

We have to see whether the plaintiffs did in fact make out a case for their decree. We agree with the District Judge as to the oral evidence of the advances, with the exception of that of Balbhaddar. In our opinion Balbhaddar's evidence was true, and it did make out a *prima facie* case with regard to some of the transactions in question. However, that would not be sufficient to support the decree in full. One of the plaintiffs, Ajudhia, was called, and, on looking at the *bahi* (account-book) he stated the amounts which were advanced to the defendants and the amounts of the repayments. He says also that some of the entries were in the writing of Sheo Tabal and some had been made by himself; further, that the credit and debit entries of certain of the items had been made at the request of the defendants. His evidence in chief is consistent with its being evidence given by a man as to transactions of which he had personal knowledge, upon refreshing his memory by looking at accounts which were entered up either by himself personally or under his personal supervision, and it is also consistent with the case of a man who had no personal knowledge of the transactions entered in the account-books beyond the fact that there were entries in the account-books, some made by himself and some by another man, and those entries showed certain results. Ajudhia was somewhat loosely examined. It was, in our opinion, the duty of the pleader for the defendants, if he wanted to put an adverse interpretation on Ajudhia's evidence or wished to have it excluded from consideration, to have objected at the time and cross-examined Ajudhia as to whether the transactions of which he was speaking were within his own personal knowledge, or whether his evidence was solely based on the entries which he found in the account-books. Ajudhia was cross-examined at length. No question suggesting that he was not speaking from his own personal knowledge was put to him, and no objection was taken at the time to the questions put to him, on the plaintiff's behalf, or to his answers. Consequently, in our opinion, Ajudhia's evidence should receive the [96] favourable construction which would entitle us to treat it as substantive evidence in this case, and not to exclude it as evidence which was inadmissible. There is no reason to suppose that Ajudhia was speaking falsely. He is corroborated by Balbhaddar, and he is corroborated also by the entries in the books of his firm, which are relevant, those books having been properly kept in the ordinary course of business.

We do not believe the evidence for the defendants.

We dismiss this appeal with costs. The plaintiffs have filed objections. They objected to the view which the Judge took of the truthfulness of some of their witnesses. That did not form a ground of objection under s. 561 of the Code of Civil Procedure, as it did not go to any part of the case upon which they had not succeeded. The other ground of objection which was filed, was as to the disallowance of their costs in the Court below. We will not interfere with the discretion of the District Judge. The plaintiffs came into Court with apparently a true case, but determined to back that true case up by perjured evidence. In this Court their perjured evidence very nearly induced us to discredit their whole case. We disallow the objections with costs.

Appeal dismissed.

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18 A 92 =
15 A. W. N.
(1895) 235

1895

Nov. 26.

REVI-

SIONAL

CRIMINAL. QUEEN-EMPRESS v. PUNNA AND ANOTHER.* [26th November, 1895.]

18 A. 96=

15 A.W.N.

(1895) 241.

18 A. 96=15 A.W.N. (1895) 241.

REVISIONAL CRIMINAL.

*Before Mr. Justice Aikman.**Criminal Procedure Code, s. 560—Order for imprisonment in default of payment of compensation.*

Although compensation awarded under s. 560 of the Code of Criminal Procedure is recoverable as if it were a fine, it is not competent to a Magistrate immediately upon ordering a complainant to pay compensation to direct that he should in default be sentenced to imprisonment.

[F., 19 A. 73 (74).]

THIS was a reference under s. 438 of the Code of Criminal Procedure made by the Officiating Sessions Judge of Mainpuri. The facts of the case sufficiently appear from the judgment of Aikman, J.

JUDGMENT.

[97] AIKMAN, J.—This is a case reported by the learned Sessions Judge of Mainpuri for the orders of this Court. One Sham Lal brought a charge of theft against two men, Punna and Ruma. The charge was inquired into by Syed Mustafa, a Magistrate of the first class. The Magistrate came to the conclusion that the charge was vexatious, and, under s. 560 of the Code of Criminal Procedure, ordered the complainant Sham Lal to pay Rs. 50 as compensation to each of the accused, or, in default, to undergo one month's simple imprisonment. The compensation not having been paid at once, the complainant was forthwith committed to jail. Sub-s. (2) of s. 560 of the Code of Criminal Procedure lays down that compensation of which a Magistrate may order payment under sub-s. (1) shall be recoverable as if it were a fine, *i.e.*, by issue of a warrant for the levy thereof by distress and sale of any moveable property belonging to the person ordered to pay the compensation, and provides that, if it cannot be recovered, the imprisonment to be awarded shall be simple and shall not exceed 30 days. In my opinion in sub-section (2) the words "if it cannot be recovered" presuppose that before imprisonment is awarded an attempt must have been made to recover the money in the manner prescribed by s. 386 of the Code of Criminal Procedure. A Magistrate is not authorised immediately on ordering a complainant to pay compensation to direct that he should in default be sentenced to imprisonment. The order of the Magistrate sentencing the complainant Sham Lal to one month's simple imprisonment was under the circumstance illegal and is hereby set aside. It appears that the complainant was released after detention of one week on his filing security for payment of the compensation awarded, so no further order is necessary.

* Criminal Revision No. 676 of 1895.

18 A. 98 = 15 A.W.N. (1895) 236.

[98] APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkill.*RADHAN SINGH AND OTHERS (*Plaintiffs*) v. KUARJI DICHHIT
AND ANOTHER (*Defendants*). [26th November, 1895.]*Act No. I of 1872 (Indian Evidence Act), s. 9—Evidence, admissibility of—Copy of proceeding anterior to suit containing mention of the descent of one of the parties to the suit—Civil Procedure Code, s. 568.*1895
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One of the questions in issue in a suit as to the pedigree of a certain family being whether one Gauri Shankar was son of Balwant Singh or of one Moajjam Singh, belonging to a totally different family from that of Balwant Singh, an attested copy of a *rubkar* in some proceedings long anterior to the suit was tendered in evidence, in which *rubkar* Gauri Shankar was described as the son of Balwant Singh. *Held*, that the *rubkar* was admissible in evidence under the provisions of s. 9 of Act No. I of 1872.

THIS was an appeal in a suit in which certain members of a Hindu family sued as reversioners to have it declared that two mortgages, executed by a widow in another branch of the family, did not affect their reversionary interest in the property mortgaged. The defendants to the suit were the mortgagor and her mortgagee who had got decrees on his mortgages, brought the property to sale and purchased it himself. The plaintiffs set forth a pedigree in which they and the widow's late husband appeared as representing two of the three branches of the family of one Raja Ram. They produced five witnesses in support of the pedigree set up by them, two being members of the family and another the family *purohit*. The defendants set up a pedigree which was, in most respects, the same as that of the plaintiffs, but they cut off the branch to which, according to the plaintiffs, the widow's late husband had belonged from the plaintiffs' family and put it on to a totally different family. It thus became the principal issue in the suit to which family did the widow's branch belong, or, in its narrower form, was one Gauri Shankar, the son of one Balwant Singh, as the plaintiffs alleged, or the son of one Moajjam Singh, as was alleged by the defendants? The Court of first instance (Subordinate Judge of Jaunpur), on its finding as to this issue that the plaintiffs had not proved the [99] pedigree set up by them, dismissed the plaintiffs' suit. There were many other issues, but such as were tried by the Court of first instance were decided in favour of the plaintiffs. The plaintiffs appealed to the High Court, and, having subsequently to the decision of the suit become possessed of a document which seemed to be material evidence on the question of pedigree, tendered that document in evidence under the provisions of s. 568 of the Code of Civil Procedure. On this point the High Court, having discussed the evidence as to pedigree originally tendered, came to the conclusion that the Subordinate Judge had erred in rejecting on insufficient grounds the evidence tendered by the plaintiffs in support of their pedigree, decided that the document produced by the plaintiffs, as above described, was admissible in evidence, and ultimately decreed the appeal and remanded the case for trial on the remaining issues.

Mr. W. K. Porter and Babu Durga Charan Banerji, for the appellants.

Munshi Jwala Prasad and Pandit Sundar Lal, for the respondents.

* First Appeal No. 180 of 1894, from a decree of Rai Anant Ram, Subordinate Judge of Jaunpur, dated the 31st March 1894.

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The Court (EDGE, C.J., and BURKITT, J.) after discussing the evidence given in the Court below thus continued :—

JUDGMENT.

On the evidence we are prepared to hold that the plaintiffs-appellants had made out their case. But their case does not rest there. The suit in the Court below was decided on the 31st of March 1894. This appeal was preferred to this Court on the 7th of June 1894, and on the 24th of April 1895 a vakil for the appellants presented an application to this Court for admission of evidence which was not before the Court below. That application was supported by an affidavit of one of the plaintiffs, which shows that after the decree in the Court below he, on the 20th of April 1894, was given by one Mangli Prasad an attested copy of a *rubkar* of the Magistrate of Jaunpur, dated the 7th of December 1832. The *rubkar* was a judgment delivered by the Magistrate in a proceeding between one Sheoratan Singh on one side and Gauri Shankar Singh and Dyal Narain Singh on the other, and related to a lease alleged to have been given by Bairisal Singh to one Ghisa Singh, father of Sheoratan. Mangli Prasad was the great-grandson of that [100] Sheoratan Singh who was party to those proceedings. We are of opinion that the *rubkar* is admissible under s. 9 of the Indian Evidence Act, 1872, and also being of opinion that the plaintiffs had shown substantial cause why we should admit the attested copy in evidence, we admitted the document under s. 568 of the Code of Civil Procedure. Now, that document puts the dispute in this case beyond question. It related to a dispute between the two zamindars of one of the villages now in suit and a person who alleged he was their tenant. These two zamindars were Gauri Shankar Singh and Dyal Narain Singh. Gauri Shankar Singh is referred to in that *rubkar* as the son of Balwant Singh. Bairisal Singh, who was one of the sons of Raja Ram Singh, is referred to in the same *rubkar* as the uncle of Gauri Shankar Singh and as the grantor of the lease to the father of Sheoratan Singh. The other zamindar, who was a party to those proceedings, was Dyal Narain Singh, and he was described in the *rubkar* as the son of Sheo Narain Singh, deceased. Dyal Narain Singh and Sheo Narain Singh were men beyond all dispute descended from Raja Ram Singh. In our opinion that *rubkar* does establish the fact that in 1832 Gauri Shankar Singh was one of the zamindars of a village now in dispute and a nephew of Bairisal Singh, who admittedly was a son of Raja Ram Singh. The *rubkar* comes as it does with very great force. Long before the time when the plaintiffs became aware of the existence of this attested copy, they had, in the suit which had already been dismissed, pledged themselves to proving that Gauri Shankar Singh was a son of Balwant Singh, who was a son of Raja Ram Singh and a brother of Bairisal Singh. The copy is a genuine copy. It was not got for the purpose of instituting the present suit. The suit was not founded on any information supplied by it, and the record in which was the document of which this was a copy was destroyed in the Mutiny. And the copy comes from the proper custody of a descendant of one of the parties to the proceedings before the Magistrate. We find that Gauri Shankar Singh was son of Balwant Singh, who was a brother of Bairisal and Balwant, sons of Raja Ram, and that the plaintiffs are, as reversioners of Sheobaran Singh, entitled to sue. The Subordinate [101] Judge, having disposed of the suit on the preliminary point of pedigree, did not try the issue as to whether there existed such necessity

as entitled Musammat Gulab Kuar to make the mortgages in question or either of them. We set aside the decree of the Court below, and we remand the case under s. 562 of the Code of Civil Procedure for disposal of such issues as arise in the case and have not already been disposed of. We allow this appeal with costs.

Appeal decreed.

18 A. 101 (F.B.) = 15 A.W.N. (1895) 238

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox, Mr. Justice Blair and Mr. Justice Burkitt.

LEKHA (*Plaintiff*) v. BHAUNA AND OTHERS (*Defendants*).^{*}
[28th November, 1895.]

Civil Procedure Code. s. 549—Security for costs—Failure of appellant to file security—Rejection of appeal—Appeal from order of rejection—Order for security not to state specific amount for which security is required.

An order rejecting an appeal under s. 549 of the Code of Civil Procedure is not appealable either as an order or as a decree. *Siraj-ul-haq v. Khadim Husain* (1) overruled.

Where a Court, acting under s. 549 of the Code, orders an appellant to give security for costs, it is not necessary that any specific sum for which security is to be given should be named in the order for security. It is sufficient for the order to direct the appellant to furnish security within a time to be stated "for the costs of the appeal" or "for the costs of the original suit," or "for the costs of the appeal and of the original suit." *Thakur Das v. Kishori Lal* (2) overruled on this point.

[F., 30 A. 143 = 5 A.L.J. 109 = A.W.N. (1908) 53 = 3 M.L.T. 221; 8 Ind. Cas. 436 (437) = 9 M.L.T. 117 (118); L.B.R. (1893–1900) 556; R., 21 A. 133; 9 Ind. Cas. 748 = 14 O.C. 40; 4 L.B.R. 17; U.B.R. 1908, Limitation, II—178, p. 5.]

THE facts of this case and the arguments in support of the appeal are fully stated in the judgment of the Court.

Mr. J. Simeon, for the appellant.

Babu Ratan Chand, for the respondents.

The judgment of the Court (EDGE, C. J., KNOX, BLAIR and BURKITT, JJ.) was delivered by EDGE, C. J.:—

JUDGMENT.

This appeal was presented to this Court as an appeal from a decree of an appellate Court and was entered in the register of [102] second appeals. The appellant here was an appellant in the Court below and plaintiff in the suit. His suit was dismissed with costs by the first Court. After his appeal had been admitted in the Court below, the respondent to that appeal, who is respondent here also, presented, on the 30th May, 1893, an application under s. 549 of the Code of Civil Procedure asking for an order for security for "costs." He did not specify whether his application related to the costs of the first Court or the costs of the appeal, or of both. In our opinion that application must be read as an application for an order for security for the costs of the original suit and of

^{*} Second Appeal No. 1176 of 1893, from a decree of H. P. Mulock, Esq., District Judge of Moradabad, dated the 24th June, 1893, confirming a decree of Pandit Rajnath, Subordinate Judge of Moradabad, dated the 29th March, 1893.

(1) 5 A. 380.

(2) 9 A. 164.

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(1895) 236.

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(1895) 238

the appeal. What the respondent sought was an order which would secure him against the costs which he had incurred in the original suit and against those which he might incur in the appeal. On the 10th of June, 1893, the lower appellate Court made an order fixing the 22nd of June as the date upon which the appellant was to show cause against the application for security for costs. On the 22nd of June the appellant's pleader appeared and stated that he was not instructed as to the application. He was, however, the pleader engaged in the case on behalf of the appellant. The appellant now says that he had missed the train, and consequently did not arrive on the 22nd of June. It is apparent that he had had notice of the order of the 10th of June. On the 22nd of June, the Court made an order that security for costs should be given by the appellant on or before the 24th of June 1893, and that if such security was not given, the appeal would be rejected. On the 24th of June, the appellant asked for time for three months. The Court on that day made an order under s. 549 rejecting the appeal. From that order this appeal has been brought as an appeal from a decree.

Mr. *Simeon* has contended that an appeal lies from an order under s. 549 rejecting an appeal. He has also contended that the order of the 22nd of June was bad, in that it did not specify the amount, *i.e.*, the number of rupees, for which security should be given. In support of each of these contentions he has relied upon authorities of this Court.

[103] In support of the first contention he has relied on the decision of this Court in *Siraj-ul-haq v. Khadim Husain* (1). In that case all that the Court said in its judgment upon this point was:—"We are of opinion that the order striking off the appeal, because security was not furnished as directed under s. 549, Civil Procedure Code, is a decree within the meaning of s. 2 from which an appeal will lie,"—and gave no reasons for the opinion which it expressed. We shall deal first with the question as to whether an appeal lies.

S. 549 is a section applicable only to an appellate Court, and does not provide any procedure to be followed by a Court in dealing with an original suit as a Court of first instance. Consequently s. 582 of the Code does not enable us to read into the procedure relating to orders under s. 549 the terms or definitions used in those chapters of the Code relating to the trial and disposal of original suits. An order under s. 549 is not a 'final expression of an adjudication upon any right claimed or defence set up' within the meaning of the first paragraph of the definition clause relating to decree in s. 2 of the Code. We cannot read an order rejecting a plaint in the second paragraph of that definition clause as an order rejecting an appeal under s. 549. Consequently, in our opinion, for these reasons, if they stood alone, an order rejecting an appeal under s. 549 is not a decree within the meaning of the Code. An order under s. 549 is not appealable as an order under the Code. We are fortified in this opinion by an examination of s. 548 itself. The object of that section was to secure the respondent in an appeal from the risk of having to incur further costs which he might never succeed in getting out of the appellant. As we understand the section it was intended under the first paragraph that the Court should have entire discretion in all cases not coming under the second paragraph in making or refusing an order for security for costs. Under the second paragraph, which is the proviso to the first, the Court is given no discretion in the matter.

In cases falling within that proviso, the Court has to follow the mandate of the statute and [104] make an order for security for costs. An order for security for costs having been made under either the first paragraph or the second, it is by the third paragraph of the section enacted that if such security be not furnished within such time as the Court orders, the Court shall reject the appeal. There again the Court is given no discretion in the matter. It could not have been the intention of the Legislature that an appeal should lie from an order under section 549 rejecting an appeal when the order for security for costs was compulsorily made by the Court under the second paragraph of that section; and it could not be the intention of the Legislature that an appeal should lie if the original order for security for costs was one under the first paragraph of the section and should not lie if the original order for security was one under the second paragraph of the section. There is no appeal given by the Code from an order under the first or second paragraph of the section for security as to costs, and it could not have been intended that the order for security for costs, which was unappealable, might be questioned by an appeal from the act of the Court compulsorily done under the section on security for costs not being given as ordered. For the above reasons, we are of opinion that an order rejecting an appeal under s. 549 is not appealable either as an order or as a decree.

Mr. *Simeon* pressed us with the decision of a Full Bench of this Court in *J. R. Williams v. A. T. Brown* (1) in which the Full Bench held that an order under s. 381 dismissing a suit for failure by the plaintiff to furnish security for costs as ordered was a decree within the meaning of s. 2 of the Code and was appealable as such. All we need say is that that Full Bench decision was not a decision on the construction of s. 549. It appears to us that the first paragraph of the definition clause of s. 2 refers to a final adjudication deciding a suit or an appeal so far as the Court deciding it is concerned, and then only when such adjudication was on a right claimed or defence set up.

It is not strictly necessary to express an opinion on the second point argued by Mr. *Simeon*, namely, whether an order under [105] s. 549 for security for costs is or is not a good order if it does not specify the amount in rupees for which security is to be given. However, as it involves a matter of some importance so far as practice is concerned, we think it better to express the view which we all hold upon this point.

In support of his contention Mr. *Simeon* relied upon the case of *Thakur Das v. Kishori Lal* (2). In our opinion an order for security for costs should follow the words of s. 549 and should not specify the particular amount in rupees for which security should be given. It would be a good order under the section if it directed the appellant to furnish the security within a time to be stated "for the costs of the appeal," or "for the costs of the original suit," or "for the costs of the appeal and of the original suit." To hold, that the order must specify the amount in rupees of costs for which security should be given would, in our opinion, either be to frustrate the intention of the Legislature in framing the section, or to make the order a purely speculative order. The object of the section is that the respondent at the earliest moment which suits him may take advantage of the section; and, before incurring any expenses in the appeal beyond the 8 annas stamp on his application for security, may obtain security for the costs of the appeal. At that

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(1) 8 A. 108.

(2) 9 A. 164.

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(1895) 238.

time it would be impossible for the respondent, the appellant or the Court to say what might be the costs of the appeal. Advocates and vakils might or might not be employed by the respondent in an appeal; a remand under s. 566 might become necessary in the appeal, and expenses might be incurred on that account. We think that the Legislature intended that the order should be one simply "for the costs" of the appeal, of the suit, or of the suit and the appeal, without specifying the amount. Indeed the last paragraph of the section points to the security being one for an indefinite and not for a definite amount. We do not say that an order specifying the amount would be a bad order, but we consider that the better practice is that the amount should not be specified in the order.

We dismiss this appeal with costs.

Appeal dismissed.

18 A. 106 = 15 A.W.N. (1895) 240.

[106] APPELLATE CIVIL.

Before Mr. Justice Aikman.

RAM SARAN PANDE (*Defendant*) v. JANKI PANDE (*Plaintiff*).^{*}
[30th November, 1895.]

Civil Procedure Code, s. 244—Execution of decree—Suit for contribution against joint-judgment debtor.

Section 244 of the Code of Civil Procedure does not apply to a suit brought by one of two joint judgment-debtors who has been compelled to satisfy the decree in full against the other joint judgment-debtor for contribution.

[R., 5 C.L.J. 328.]

THE facts of this case sufficiently appear from the judgment of Aikman, J.

Munshi Kalindi Prasad, for the appellant.

Maulvi Ghulam Mujtaba, for the respondent.

JUDGMENT.

AIKMAN, J.—The following are the facts of this case:—There were three brothers, Ghansham, Puran and Bhichak. Puran died leaving a widow named Talwandi. Talwandi gave a 4-pie share in a village which had belonged to her husband to her nephews Gauri and Ram Saran, sons of Bhichak, each of the donees getting two pies. Gauri transferred his two-pies to Janki Pande, the respondent to this appeal. After the widow's death the sons of Ghansham brought a suit against the transferees, Janki Pande and Ram Saran, jointly, claiming two-pies out of the four-pie share which had been conveyed away by Talwandi. They got a decree jointly against Janki and Ram Saran for possession of two-pies. In pursuance of this decree the decree-holders got their names entered in lieu of Janki's, as in possession of the two-pie share which he had received from Gauri. Thus one of the two judgment-debtors satisfied the whole of the decree, and Ram Saran contributed nothing towards it. The suspicion cannot but arise that the decree-holders exempted the share

^{*} Second Appeal No. 1014 of 1894, from a decree of Kunwar Mohan Lal, Subordinate Judge of Gorakhpur, dated the 28th June, 1894, reversing a decree of Babu Ram Chandar Chaudhri, Munsif of Deoria, dated the 23rd February, 1893.

of Ram Saran, who was their cousin, and took the whole from Janki, who was an outsider. This, the decree being without specification, they were entitled to do. Janki has now brought what is really a suit for contribution against his co-judgment-debtor, Ram Saran, claiming to recover [107] from him a one pie share. He has got a decree from the lower appellate Court. Against this decree, Ram Saran appeals. The ground upon which the decree is impugned is that the plaintiff's suit would not lie with reference to the terms of s. 244 of the Code of Civil Procedure. In my opinion, this plea cannot be sustained. The decree has passed beyond the stage of execution. The Court which passed the decree, so far as that decree is concerned, is *functus officio*, and, this being so, the terms of s. 244 will not apply—see the case of *Pakar-ud-din Mahomed Ahsan v. The Official Trustee of Bengal* (1). So far as the execution of the decree is concerned, the plaintiff here could have no cause of complaint. The decree being passed against the judgment-debtors jointly, it could not be contended by him that there was any defect in the execution proceedings. The learned vakil for the respondent also refers me to the cases of *Aziz-ud-din Hossein v. Ramanugra Roy* (2), *Purmessuree Pershad Narain Singh v. Janki Kooer* (3) and a recent case, *Biru Mahata v. Shyama Churn Khawas* (4), in which it was held that, provided a suit, the institution of which is prohibited by s. 244, is instituted in the Court which would have to deal with an application under that section, this is a mere defect in form and there is no real want of jurisdiction. But it is unnecessary to rely on this ground, for I hold this was not a case in which an application could have been made under s. 244. The appeal fails and is dismissed with costs.

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18 A. 106 =
15 A.W.N.
(1895) 240.

Appeal dismissed.

18 A. 107 = 15 A.W.N. (1895) 242.

REVISIONAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice.

HIRA LAL (*Applicant*) v. SAHEB JAN (*Opposite party*).^{*}
[2nd December, 1895.]

Criminal Procedure Code, s. 488—Order for maintenance—Person against whom order is sought a competent witness on his own behalf

A person against whom an order for maintenance under s. 488 of the Code of Criminal Procedure is sought is a competent witness on his own behalf in such proceedings.

THE facts of this case sufficiently appear from the judgment of the Court.

[108] Mr. *Amir-ud-din*, for the petitioner.

Mr. *Howard*, for the opposite party.

JUDGMENT.

EDGE, C.J.—This is an application to revise an order in bastardy on the ground that the Magistrate did not examine some of the applicant's witnesses. The woman's case is that she had been kept by the applicant for two years, and when she became in the family-way by him he turned her out of doors. She proved that she had been kept by him; that she

* Criminal Revision No. 626 of 1895.

(1) 10 C. 538.

(2) 14 C. 605.

(3) 19 W. R. 90.

(4) 22 C. 483.

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15 A.W.N.
(1895) 242.

had been turned out of doors; and that the applicant was the father of her child. Now there were two people who must have known whether this man and this woman had had connection at or about the time when the child might have been conceived. These two people were the mother of the child and the applicant, whom she alleges to be its father. She gave her evidence. He could have tendered himself as a witness in his own behalf, but he carefully avoided going into the witness-box and tried by evidence to prove what I may call an argumentative case. He wanted the Magistrate to infer that he could not have kept the woman and had connection with her, because he was a Hindu and she was a Muhammadan, and he would be liable to be out-casted for keeping a Muhammadan woman.

The material question was—had he connection with the woman about the time when the child might have been conceived?—not whether he would be liable to be outcasted if he had. The man could have given evidence on oath if he had chosen to do so. He merely relied on the answers given by him to questions put by the Magistrate, and on evidence which he called. It is contended that if the Magistrate had examined all the witnesses he would have found that the woman was of bad character.

A woman may be of bad character and yet be entitled to an order for maintenance of her illegitimate child if she proves that the man against whom she proceeds was the father of the child. I am not informed that there is any affidavit to show that any witness who was not examined was prepared to say on oath that he himself was the father of the child. There is no sufficient ground for interfering, and I dismiss the application.

18 A. 109 = 16 A.W.N. (1896) 7.

[109] APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

GHULAM KADIR KHAN AND OTHERS (*Plaintiffs*) v. MUSTAKIM KHAN AND OTHERS (*Defendants*).^{*} [3rd December, 1895.]

Act No. IV of 1882 (Transfer of Property Act) s. 85—Mortgage—Suit for payment of mortgage money or foreclosure—Non-joinder of persons interested in the mortgaged property, effect of—Appeal—Plea taken for first time in appeal.

The non-joinder in a suit to which Chapter IV of Act No. IV of 1882 applies of a person interested in the mortgaged property within the meaning of s. 85 of that Act, and of whose interest the plaintiff has notice, is a fatal defect in the suit, unless cured by the action of the Court under s. 32 of the Code of Civil Procedure; and where such non-joinder is brought to the notice of the Court, the Court will give effect to the objection and dismiss the suit, even though such objection be raised for the first time in appeal. *Mata Din Kasodhan v. Kazim Husain* (1), *Janki Prasad v. Kishan Dat* (2), and *Bhiwani Prasad v. Kallu* (3), referred to.

[N.F., 3 Ind. Cas. 291 (293); R., 14 C.L.J. 530 (534) 12 Ind. Cas. 155 (157); 5 C.W.N. 423 (425); 12 C.W.N. 911 (913); 13 Ind. Cas. 197 (198) = 9 A.L.J. 86; 3 L.B.R. 241; 1 O.C. 53.]

THE facts of this case are sufficiently stated in the judgment of the Court.

^{*} First Appeal No. 197 of 1893, from a decree of Pandit Rajnath, Subordinate Judge of Moradabad, dated the 25th May 1893.

(1) 13 A. 432.

(2) 16 A. 478.

(3) 17 A. 537.

Mr. T. Conlan and Munshi Madho Prasad, for the appellants.

Mr. Abdul Majid and Babu Jogindro Nath Chaudhri, for the respondents.

JUDGMENT.

BANERJI and AIKMAN, JJ.—The appellants in the suit out of which this appeal has arisen were plaintiffs in the Court below. They brought the present suit on the basis of a mortgage-deed, dated the 14th of May 1861, as modified by a subsequent instrument dated the 12th of April 1862. They alleged that they held a mortgage by conditional sale over the property of the respondents, and they prayed that the defendants be directed to pay to them Rs. 2,270 on account of the principal mortgage money, and Rs. 22,730 on account of interest, after giving credit for Rs. 3,370, which they admit they had received as interest: that in the event of the defendants failing to pay the aforesaid amount, they be [110] declared foreclosed of their right of redemption, and that the plaintiffs be put in possession of the said property. The suit was dismissed by the Court below. The learned vakil for the respondents has contended that the decree of the Court below is a right decree inasmuch as upon their own plaint the plaintiffs failed to comply with the requirements of section 85 of Act No. IV of 1882, and consequently their suit has been properly dismissed. The list A attached to the plaint shows that a part of the property claimed is in the possession of one Amirzada, a prior mortgagee. That person has not been joined as a defendant. It is urged that Amirzada was a necessary party to the suit, and the omission to implead her was fatal to the suit. The objection was not, it is true, raised in the Court below, but having regard to the opinion expressed by the majority of the Judges of this Court in three Full Bench cases, we feel that we are bound to give effect to the objection, although it has now been raised for the first time. Section 85 of Act No. IV of 1882 requires that all persons having an interest in the property comprised in a mortgage, of whose interest the plaintiff has notice, must be joined as parties to any suit relating to such mortgage, brought under the fourth chapter of the Act. The present suit is a suit under that chapter, and upon the admission contained in the plaint, Amirzada has an interest in the property comprised in the mortgage. Amirzada was therefore a necessary party to the suit within the meaning of section 85. In *Mata Din Kasodhan v. Kazim Husain* (1) the majority of this Court held that the omission to join as a party a person who was a necessary party to the suit was a fatal omission by reason of which the suit of the plaintiff was liable to dismissal, and this notwithstanding the provisions of section 34 of the Code of Civil Procedure. At page 465 of the report the learned Chief Justice observed as follows:—"Notwithstanding section 34 of that Code, I am of opinion that we must act upon the imperative words in section 85 of Act IV of 1882." * * *

"It is necessary that litigants should be made to know and feel that [111] the Statute Law, when it affects their right of suit, must be complied with, and that in such a case as this Chapter IV of Act IV of 1882 must not be ignored and treated as a dead letter. Section 85 was advisedly, and with the object of preventing multiplicity of suits, introduced into Act No. IV of 1882, and we must give effect to it by dismissing, as I would, on that ground alone, if there were no other, this appeal with costs." In this view three other learned Judges of this Court concurred. In

(1) 13 A. 432.

1898

DEC. 3.

APPEL-

LATE

CIVIL.

18 A. 109 =

16 A.W.N.

(1896) 7.

1895
DEC. 3.
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APPEL-
LATE
CIVIL.
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18 A. 109=
16 A.W.N.
(1896) 7.

another Full Bench case—*Janki Prasad v. Kishen Dat* (1)—it was stated in the judgment of the Full Bench, that “the object of section 85 of Act No. IV of 1882 was to compel any person suing on a mortgage to bring into one suit, so far as he had notice of their interests, all persons interested in the property, so that in one suit, instead of in several, the rights and interests of the different persons interested in the mortgaged property might be ascertained, protected and dealt with. The result of the system which obtained previously to Act No. IV of 1882 was that mortgaged property, when sold in execution of a decree, seldom fetched anything like its value, and that was a result only to be expected from the uncertainty of the title obtained under a decree for sale under the system then in operation.” In the Full Bench case of *Bhawani Prasad v. Kallu* (2), the learned Chief Justice observed as follows in his judgment:—“The word ‘must’ is one of the strongest words of compulsion which a Legislature can employ, and Courts are, in my opinion, bound to give effect to it and not to ignore it and its significance.” In another part of the same judgment he said:—“Section 85 is highly imperative and * * it is the duty of a Court to dismiss a suit brought and attempted to be maintained by the plaintiff in contravention of that section, * * but the Court, if it sees fit so to do, may add necessary parties under section 32 of Act No. XIV of 1882.” This view was concurred in by the majority of the Judges constituting that Full Bench. We have thus an expression of opinion by a majority of the Judges of this Court regarding the imperative nature of the provisions of s. 85 which we, as a [112] Division Bench, are bound to give effect to. According to the opinion of the learned Judges to which we have referred, when a suit is brought in contravention of s. 85, it is the duty of the Court to dismiss the suit, unless it chooses to exercise the discretion vested in it by s. 32 of the Code of Civil Procedure, and to bring upon the record the party omitted from the suit. In this case the plaintiffs having failed to join as defendant Amirzada, of whose interest on their own showing they had notice, it was the duty of the Court below to dismiss the suit in accordance with the Full Bench rulings referred to above. We, as an appellate Court, ought now to do what the Court below ought to have done in the first instance. We have been asked to exercise our powers under section 32 of the Code of Civil Procedure, and to add Amirzada as a party to the suit. We are of opinion that we should not be justified in complying with the request of the learned counsel for the appellants. The appellants, as we have said at the outset of this judgment, claimed, in lieu of Rs. 2,270 advanced by them, a sum of Rs. 25,000, although they have already realized more than the principal amount lent by them; they are therefore persons who are not entitled to the sympathy of the Court. In the next place the addition of Amirzada as a party at this stage of the proceedings would necessitate the amendment of the plaint in some respects, and might involve a fresh trial of new issues. We are therefore of opinion that this is not a case in which we should exercise the discretion vested in us by section 32 of the Code of Civil Procedure. The plaintiffs having violated what has been held to be the imperative requirement of the law, their suit should have been dismissed on this ground. We dismiss the plaintiffs’ suit, and, confirming the decree below, dismiss this appeal with costs.

The objection under section 561 of the Code of Civil Procedure is not pressed.
Appeal dismissed.

18 A. 113 = 16 A.W.N. (1896) 8.

[113] APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.*GANGA PRASAD (*Defendant*) v. CHUNNI LAL (*Plaintiff*).
[6th December, 1895.]

1895

DEC. 6.

APPEL-

LATE

CIVIL.

Mortgage—Mortgage by mortgagee of his rights as such but without assignment—Rights of sub-mortgagee as against original mortgagee.

18 A. 113 =

16 A.W.N.

(1896) 8

R and others mortgaged certain immovable property to N. K. N. K. made a sub-mortgage to C. L. purporting to mortgage to him his rights as mortgagee, but without assigning his mortgage to C. L. Upon this title C. L. sued for sale of the property mortgaged by R. and others to N. K.

Held that C. L. was not entitled to bring the property mortgaged to N. K. to sale, but at most to obtain a decree for money against N. K., in execution of which he might possibly have attached, if it had not been paid off, the mortgage held by N. K.

[**Overruled**, 29 A. 385 = 4 A.L.J. 273 = A.W.N. (1907) 97 = 2 M.L.J. 218; **Diss.**, 20 M. 35 (39); 10 C.L.J. 470 = 4 Ind. Cas. 433; 5 O.C. 341; U.B.R. (1906) 3rd. Qr. Sub-Mortgage, p. 1; **N.F.**, 9 O.C. 233; **F.**, A.W.N. (1901) 153; **R.**, 20 A. 19 (22); 25 A. 46; 27 A. 472 = 2 A.L.J. 162 = A.W.N. (1905) 58; 27 A. 511 = 2 A.L.J. 434 = A.W.N. (1905) 76; 5 Ind. Cas. 654 (655); 9 C.L.J. 429 (431) = 2 Ind. Cas. 645 (646); P.L.R. (1900) 219.]

THE facts of this case are as follows :—

Rupa and others, or their predecessors in title, had mortgaged certain immovable property by two mortgages, dated the 21st of July 1869 and the 18th of February 1873, to one Nand Kishore. Nand Kishore by a bond dated the 19th February 1890 purported to mortgage his rights as mortgagee under the said mortgage to Chunni Lal for Rs. 290. On the 18th of July 1892, Chunni Lal instituted a suit against Nand Kishore and the mortgagors for recovery of the money advanced by him, with interest, by sale of the mortgaged property, and he also applied for an injunction to restrain the mortgagors from redeeming the mortgage. The injunction prayed for was granted, but meanwhile, on the same date that the suit of Chunni Lal was instituted, the mortgagors redeemed the mortgage in favour of Nand Kishore and made a fresh mortgage in favour of one Ganga Prasad. Ganga Prasad was accordingly made a party as defendant to the suit.

In answer to this suit Nand Kishore pleaded that the mortgage had been redeemed and was no longer subsisting; the original mortgagors raised a similar plea, and also pleaded that they had no notice of the plaintiff's debt. Ganga Prasad, the subsequent mortgagee, pleaded that he had acted in good faith and without knowledge of the plaintiff's debt.

[114] The Court of first instance (Munsif of Khurja) gave the plaintiff a decree under s. 88 of the Transfer of Property Act for sale of the mortgaged property.

The mortgagors and the second mortgagee appealed, and the lower appellate Court (Subordinate Judge of Meerut) dismissed the appeal.

The defendant Ganga Prasad appealed to the High Court.

Pandit *Moti Lal*, for the appellant.

Munshi *Gobind Prasad*, for the respondent.

* Second Appeal No. 1259 of 1893 from a decree of Rai Pandit Indar Narain. Additional Subordinate Judge of Meerut, dated the 25th May 1893, confirming a decree of Maulvi Muhammad Abdul Latiff, Munsif of Khurja, dated the 16th January 1893.

[In 16 A.W.N. (1896) 8, this case is cited as Second Appeal No. 1255 of 1893.—ED.]

1895

JUDGMENT.

DEC. 6.

APPEL-

LATE

CIVIL.

18 A. 113 =

16 A.W.N.

(1896) 8.

EDGE, C.J., and BURKITT, J.— Rupa and others mortgaged immovable property to Nand Kishore. Nand Kishore made a sub-mortgage to Chunni Lal, the present plaintiff, *i.e.*, purported to mortgage to him his rights as mortgagee, but did not assign his mortgage to him. Chunni Lal has brought this suit for sale of the property mortgaged by Rupa and others; in other words, he seeks to get the debt due from Nand Kishore to him paid by sale of the property of Rupa and others, who were not his mortgagors. He has obtained a decree for money against Nand Kishore, and he has also obtained a decree for sale of the property mortgaged by Rupa and others. Ganga Prasad, who was a party to the suit, was a mortgagee of some of the lands from Rupa and others subsequent to the mortgage to Nand Kishore. Ganga Prasad has paid off Nand Kishore's mortgage and has thus become sole mortgagee of the lands in question as far as the parties to this suit are concerned. He has appealed against so much of the decree below as was a decree for sale of the property mortgaged by Rupa and others. It is inconceivable to us how any Subordinate Judge could have given the plaintiff a decree for sale under s. 88 of Act No. IV of 1882 of property which was not mortgaged to him. The sole right of Chunni Lal was to get a decree for money against Nand Kishore, and then under that decree he might possibly have attached, if it had not been paid off, the mortgage held by Nand Kishore. The granting of a decree for sale is not the only extraordinary part of the decree of the Court below. The Court actually made an order for an injunction restraining the mortgagors from discharging by payment the mortgage which they had made. We fail to see upon [115] what principle any such order could have been made. We dismiss the appeal with costs, and set aside so much of the decree below as decreed a sale and an injunction.

Appeal dismissed.

18 A. 115 = 15 A.W.N. (1895) 243.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

NAJJU KHAN (*Plaintiff*) v. IMTIAZ-UD-DIN (*Defendant*).^{*}
[6th December, 1895.]

Co-sharers—Rights of co-sharers as to erection of buildings on joint land.

One of several joint-owners of land is not entitled to erect a building upon the joint property without the consent of the other joint owners, notwithstanding that the erection of such building may cause no direct loss to the other joint-owners. *Shadi v. Anup Singh* (1) referred to.

[*Diss.*, 30 O. 901; 4 C.W.N. 788; F., 5 A.L.J. 93 = A.W.N. (1908) 19; *Appr.*, 18 A. 361 (363); R., 2 A.L.J. 455; 20 A.W.N. 55; 20 A.W.N. 191; 3 M.L.J. 167 (168); 33 P.R. 1901 = 71 P.L.R. 1901.]

THE facts of this case appear from the order of reference made by Banerji, J., which was as follows:—

^{*} Second Appeal No. 1256 of 1893, from a decree of Pandit Raj Nath, Subordinate Judge of Moradabad, dated the 17th May 1893, modifying a decree of Babu Sheo Prasad, Munsif of Bijnor, dated the 14th December, 1891.

(1) 12 A. 436.

"This appeal relates to a certain building called a *shdari*, which the respondent has erected upon land belonging jointly to him and to the appellant. The lower appellate Court has found that the building was constructed without the acquiescence of the appellant, but it has dismissed his claim for the removal of the building and for the restoration of the site to its former position, on the ground that the appellant has not proved any substantial injury. The Subordinate Judge has not referred to any authority in support of his view, but he had evidently in his mind the ruling of this Court in *Paras Ram v. Sherjit* (1). The soundness of the proposition laid down in that case was questioned at least in the judgment of the learned Chief Justice in the Full Bench case of *Shadi v. Anup Singh* (2). The question being one of importance, and having regard to the rulings referred to above, I deem it desirable that this case should go before a Bench of two Judges."

Pandit *Moti Lal*, for the appellant.

The respondent was not represented.

JUDGMENT.

EDGE, C.J., and BURKITT, J.—One co-sharer erected a new building on some common land without the consent or acquiescence [116] of other co-sharers. One of the other co-sharers has brought this suit to have a mandatory injunction for the demolition of the building. The suit was resisted upon the ground that the land was not joint. This part of the claim to which we are referring was decreed by the first Court. On appeal, the Subordinate Judge dismissed the suit so far as this part of the claim is concerned; the other part of the claim had been dismissed by the first Court and from that there was no appeal.

The plaintiffs have appealed from the decree of the Subordinate Judge. The Subordinate Judge was of opinion that, although the land was common land held jointly by the co-sharers, the defendant's new building did not cause any direct loss to the other co-sharers. That is not the point in our opinion. The law provides a legitimate means by which any co-sharer may obtain partition. The law does not favour one co-sharer adversely to the other co-sharers making a partition in his own favour, and selecting the portion of the land he likes by erecting a building upon it. This case is within the principle of the decision in *Shadi v. Anup Singh* (2). We set aside the decree of the Court below with costs in both Courts and restore and confirm the decree of the first Court.

Appeal decreed.

18 A. 116 = 16 A.W.N. (1896) 11.

REVISIONAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

BUDDHU v. BABU LAL.* [9th December, 1895.]

Act No. XLV of 1860 (*Indian Penal Code*), s. 409—*Criminal breach of trust—Conviction for Criminal breach of trust on a general deficiency in accounts.*

Held, that a person accused under s. 409 of the *Indian Penal Code* might be legally convicted of the offence defined in that section on proof of a general

* Criminal Revision No. 621 of 1895.

(1) 9 A. 661.

(2) 12 A. 436

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18 A. 116=

16 A.W.N.

(1896) 11.

deficiency in his accounts, and that it was not necessary that the receipt of and non-accounting for specific items should be charged and proved against him, *Queen-Empress v. Kellie* (1) approved.

[Not Approved. 2 C.W.N. 341 (346); R., 33 A. 36 (40)=7 A.L.J. 897=11 Cr.L.J., 442=7 Ind. Cas. 186.]

IN this case one Babu Lal had been convicted of the offence under s. 409 of the Indian Penal Code by a first class Magistrate of Allahabad, and sentenced to six months' rigorous imprisonment [117] and a fine of Rs. 550, or in default to one year's rigorous imprisonment. It appears that the complainant, Buddhu Lal, was a grain merchant and the accused was his agent for the sale of grain, paid by Buddhu Lal at the rate of Rs. 5 per mensem. The charge against Babu Lal consisted of three counts. The first was for the misappropriation of Rs. 600-10 said to be due, after certain deductions, upon a balance of accounts struck in 1952 Sambat. The second was in respect of an item of Rs. 127-15-3 for debts due from before 1949 Sambat. The third was in respect of an item of Rs. 16-8 for the rent of a house said to have been received by Babu Lal for his master and not paid over in full. The Magistrate after examination of the account books of both parties found that the charge was proved as to the second and third counts, and as to the first was proved to the extent of Rs. 393-14-9, and accordingly convicted and sentenced Babu Lal as above indicated.

Babu Lal appealed to the Sessions Judge, who, after remarking on the fact that each of the sums charged against the appellant was not a single sum misappropriated at a definite time, but was made up of various items received from time to time and not accounted for, acquitted the appellant on the ground that a charge of this nature was bad in law.

Buddhu Lal thereupon applied to the High Court for revision of the order of acquittal.

Mr. A. E. Ryves, for the applicant.

Mr. G. P. Boys for the opposite party.

JUDGMENT.

EDGE, C.J., and BURKITT, J.—A Magistrate of the first class convicted Babu Lal on three charges of the offence punishable under s. 409 of the Indian Penal Code, and sentenced him accordingly. Babu Lal appealed to the Sessions Judge, and the Sessions Judge, as we understand his judgment, was of opinion that Babu Lal was not in law liable to be tried, "on the aggregate of numerous alleged offences." We do not quite understand what the Sessions Judge precisely meant by that, but we surmise that he may have thought that a man could not be convicted of the offence under s. [118] 409 of the Indian Penal Code in respect of the deficiency proved on an aggregate of several amounts received by him for his employer. There were in fact three specific charges on which the Magistrate had convicted Babu Lal. We are aware that it has been considered by some that a charge of embezzlement should be confined to a specific sum received and not accounted for. Where it is possible to prove that a specific sum received has been embezzled, the charge should be confined to that particular item, but where an agent or servant has received over a period of time several sums on behalf of his employer, and has, during the same time, expended moneys on behalf of or made payments to his employer, but still a deficiency was left, for which the agent or servant would or could

not account, it might be impossible to fix him with the embezzlement of any one particular item received by him, although, taking the items proved on both sides of the account and his course of conduct, it might be obvious that he had embezzled a large sum of money, namely, the difference between the amounts received and those expended and accounted for. The question as to whether an accused person can be charged with criminal breach of trust in respect of a general deficiency has been dealt with by our brother Aikman in *Queen-Empress v. Kellie* (1). With his judgment in that case we entirely agree. The accused does not appear to have been prejudiced by three charges as to general deficiencies having been tried together, and consequently section 537 of the Code of Criminal Procedure would apply. The learned Sessions Judge was probably not aware of the judgment of our brother Aikman to which we have referred, and consequently went wrong in law. We set aside the order of the Judge, and direct him to proceed with the trial of the appeal before him of Babu Lal, according to law. We direct a warrant to issue for the arrest of the accused. The warrant will direct that he be brought before the Court of the Sessions Judge, and the Sessions Judge may commit him to prison pending the disposal of the appeal or may admit him to bail.

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18 A. 116=
16 A.W.N.
(1896) 11.

18 A. 119 = 16 A.W.N. (1896), 9.

[119] REVISIONAL CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

JAWAHIR SINGH AND ANOTHER (*Applicants*) v. DEBI SINGH
AND OTHERS (*Opposite parties*).^{*} [11th December, 1895.]

Civil Procedure Code, ss. 556, 558, 588, 622—Dismissal of appeal "for default of prosecution," appellant and his pleaders being present—Refusal to reinstate appeal—Remedy of appellant—Revision.

A Civil appeal was being heard before a Subordinate Judge, the appellant and two pleaders on his behalf being present. During the argument, one of the pleaders was called away to another Court and remained absent, and as neither the other pleader nor the appellant was in a position to continue the argument, the Subordinate Judge passed an order, purporting to be under s. 556 of the Code of Civil Procedure, dismissing the appeal "for default of prosecution." An application under s. 558 to reinstate the appeal was rejected. The appellant appealed under s. 588 to the High Court against the order under s. 556. *Held* that no such appeal lay, as the order in question could not have been made under s. 556. But the appellant was allowed to apply in revision under s. 622 against the order under s. 556, and upon that application it was *held* that the Court below had acted illegally and with material irregularity in dismissing the appeal for default under s. 556.

[F., 17 C. P.L.R. 3 ; 8 O.C. 261.]

THE facts of this case are as follows:—

The applicant here was appellant in an appeal pending before the Subordinate Judge of Meerut. When the appeal came on for hearing the appellant himself and two pleaders on his behalf were present in the Court of the Subordinate Judge. One of the pleaders opened the case, but in a short time was called away to attend to a case before the District Judge.

^{*} Application in connection with First Appeal No. 37 of 1895, from an order of Maulvi Biraj-ud din, Subordinate Judge of Meerut, dated the 5th January 1895.

(1) 17 A. 153.

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DEC. 11.
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CIVIL.

18 A. 119=
16 A.W.N.
(1896) 9.

He went to the Judge's Court and asked the Judge to postpone the case pending before him, but the Judge declined to do so. The Subordinate Judge meanwhile, after waiting some little time for the pleader to return, called up the other pleader for the appellant, or the appellant in person, to support the appeal, and, when each of them declared his inability to do so, dismissed the appeal for the default of prosecution.

The appellant applied to the Subordinate Judge for restoration of the appeal to the list of pending appeals. The Subordinate Judge, however, dismissed the application, holding that, upon the facts as stated above, there was not sufficient cause shown for restoration of the appeal.

[120] Against this order the appellant appealed to the High Court. When this appeal was called on the Court dismissed it holding that the appeal in the lower Court had not been dismissed for default; but the appellant was permitted to file an application for revision of the Subordinate Judge's order dismissing his appeal.

Pandit *Moti Lal*, for the appellants.

Mr. *T. Conlan*, Pandit *Bishambar Nath* and Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

BLAIR and BURKITT, JJ.—This case came before us at first as an appeal under s. 588 of the Code of Civil Procedure from an order passed under s. 558, refusing to readmit an appeal which had been dismissed under s. 556. At the hearing, however, it became immediately evident that the appeal could not be supported, as it was shown that the appellant and his pleaders were present when the appeal was called on for hearing in the lower Court. We therefore dismissed the appeal, and at the same time we allowed an application to be put in by the appellant under section 622 of the Code for revision of the order below by which his appeal had been dismissed. That application having been admitted has now been heard, and we are of opinion that it must be allowed. It was contended for the opposite party, that the appeal was dismissed on its merits. That, however, clearly was not so. From the terms of the order of the Court below on the application for readmission of the appeal, and from the proceedings which then took place, it is evident that the Subordinate Judge intended to pass, and did pass, and believed he was passing, an order under s. 556 by which he dismissed the appeal for default. The words he used were—"for default of prosecution,"—but, as the appellant and his pleaders were present, and as one of the pleaders had addressed the Court, though, no doubt, he went to another Court soon after the commencement of his argument and did not return, and the other pleader refused to address the Court, we are of opinion that the Court below was wrong and acted [121] illegally and with material irregularity in dismissing the appeal for default under s. 556.

We therefore allow this application, and, setting aside the order of the lower Court dismissing the appeal for default, we direct the record to be returned to the Court below with instructions to pass a legal order, namely, one simply dismissing the appeal without adding the words "for default" or "for default of prosecution." We make no order as to costs.

Application allowed.

18 A. 121 = 16 A.W.N. (1896) 12.

APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.*BHAWANI PRASAD AND ANOTHER (*Plaintiffs*) v. GHULAM MUHAMMAD
AND OTHERS (*Defendants*).^{*} [13th December, 1895.]*Act No. XII of 1881 (N.W.P. Rent Act), s. 7—Expropriatory tenant—Expropriatory tenancy arising on sale of part of the zamindar's share.*

In order that the provisions of s. 7 of Act No. XII of 1881 may come into operation, it is not necessary that the zamindar should lose or part with his proprietary rights in respect of the whole of his interest in the *mahal*.

[*Appr.*, 22 A. 205 (208).]

IN this case the plaintiffs-appellants purchased 14 annas out of a 16-anna *mahal* from the predecessor in title of the defendants-respondents, who retained the remaining 2 annas in his possession. The plaintiffs subsequently sued the representatives of their vendor in the Court of a Munsif for joint proprietary possession of a certain grove belonging to the *mahal* in question and for damages on account of fruit appropriated by the defendants-respondents. The defendants pleaded that the land in suit was their *sir* and that the suit was not cognizable by a Civil Court.

The Court of first instance (Munsif of Allahabad) found that the land was *sir* of the defendants of which they had become ex-proprietary tenants, and that consequently the suit was not within his jurisdiction; and he dismissed it.

On appeal by the plaintiffs, the lower appellate Court (District Judge of Allahabad) dismissed the appeal, on the finding [122] that the defendants were either proprietors or ex-proprietary tenants and that in either event on the case as framed by the plaintiffs a Civil Court had no jurisdiction.

The plaintiffs appealed to the High Court.

Munshi Ram Prasad and Pandit Sundar Lal, for the appellants.

Mr. T. Conlan and Maulvi Mahmud Hasan, for the respondents.

JUDGMENT.

EDGE, C. J., and BURKITT, J.—The plaintiffs in this suit purchased fourteen out of sixteen annas owned by the defendants in a village. They brought their suit to obtain possession of a portion of the *sir* land in the village, which had been held by the defendants as *sir* at the time of sale. They have relied upon a ruling of the Board of Revenue of these Provinces, according to which, if it is correct, s. 7 of Act No. XII of 1881 can never apply so long as the zamindar retains the minutest fraction of his proprietary right in the village, all of his interest in which except such fraction he has sold. As we have understood, the Board of Revenue's decision, that Board considered that the section only applied when the zamindar lost or parted with all his proprietary rights and ceased to have any proprietary rights in the village. The object of the Legislature in enacting s. 7 was to provide some sort of protection to proprietors of land whose rights were parted with either by private contract or auction sale. The Legislature intended that such proprietors should not be cast

* Second Appeal, No. 1261 of 1893, from a decree of F.E. Elliot, Esq., District Judge of Allahabad, dated the 26th September 1893, confirming a decree of Nand Lal Banerji, Esq., Munsif of Allahabad, dated the 12th July 1893.

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on the world, but should still be left with some interest in the lands which they had held as their *sir*. It accordingly enacted that they should become exproprietary tenants of the *sir* land held by them at the time when their proprietary rights were lost or parted with. The Legislature also further favoured such proprietors by enacting that the rent payable by them should be 4 annas in the rupee less than the prevailing rate payable by tenants at will for land of similar quality and with similar advantages.

If we were to read this section and apply it as it was read and applied by the Board of Revenue, the object of the Legislature would be frustrated by an evasion of the statute. One is well [123] aware that attempts are frequently made to evade the effect of s. 7, and we should be opening a door through which it would be possible for such evasions to become general in these Provinces. All that would be necessary, if the ruling of the Board of Revenue is correct, to prevent the arising of exproprietary rights would be for a purchaser on a sale from a zemindar to leave with the zemindar the minutest fraction of the proprietary rights which he had. He would still be a proprietor, no matter how small the fraction was, and, according to the Board of Revenue, s. 7 would not apply, although the proportion of *sir* represented by the fractional interest remaining in the zemindar might be represented by the one hundredth part of a bigha. Further, according to the Board of Revenue, that one-hundredth part of a bigha would be the only scrap of land in the village of which the unfortunate zamindar could ever become an ex-proprietary tenant. That could not have been the protection which the Legislature intended to afford by s. 7. The first Court dismissed the suit. The lower appellate Court dismissed the appeal. We dismiss this appeal and confirm the decrees below with costs.

Appeal dismissed.

18 A. 123=16 A.W.N. (1896) 13.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

DEBI PRASAD (*Plaintiff*) v. BALDEO (*Defendant*).^{*}
[13th December, 1895.]

Civil Procedure Code, s. 276—Execution of decree—Attachment—Lease of property under attachment.

Held that a zar-i-peshgi lease and an ordinary agricultural lease made by a judgment-debtor of property under attachment were alienations which were void by reason of the prohibition contained in section 276 of the Code of Civil Procedure.

[*Appr.*, 20 A. 349 (351); *R.*, 17 C.L.J. 384 (386)=17 Ind. Cas. 1; 13 C.P.L.R. 145; 15 C.P.L.R. 6.]

THE plaintiff in this case sued for possession of immoveable property and cancellation of two leases of the said property. His case was that he was purchaser of certain property, including that in suit, at an auction sale under decrees held by one Gobardan and by others against one Balbhaddar Singh, and had obtained confirmation of the sale and formal

^{*} Second Appeal, No. 1174 of 1893, from a decree of Babu Baijnath, Subordinate Judge of Agra, dated the 28th July 1893, reversing a decree of Babu Hari Mohan Banerji, Munsif of Agra, dated the 6th March 1893.

delivery of the property sold; but [124] that the judgment-debtor had, while the said property was under attachment, leased certain portions of it by two leases dated the 28th of April 1890, and the 16th of July 1890, to the defendant Baldeo.

The defendant Baldeo resisted the suit principally on the ground that the leases were executed in good faith, and not whilst the property comprised therein was under attachment.

The Court of first instance (Munsif of Agra) found that the two leases in question were fraudulent transactions and executed whilst the property was under attachment in contravention of s. 276 of the Code of Civil Procedure, and that the plaintiff was entitled to the possession and *mesne* profits claimed by him. It accordingly decreed the plaintiff's claim.

The defendant Baldeo appealed.

The lower appellate Court (Subordinate Judge of Agra), although agreeing with the finding of fact of the Court below that the leases were executed during the subsistence of the attachment, held that the leases were not void, but voidable only at the instance of the decree-holders to defraud whom they were executed, and as one of these decree-holders was said to be Baldeo, the defendant himself, and the other, one Paras Ram, had raised no objection, it decreed the appeal and dismissed the plaintiff's suit. The plaintiff thereupon appealed to the High Court.

Pandit *Bishambur Nath*, Pandit *Sundar Lal* and Pandit *Moti Lal*, for the appellant.

Munshi *Ram Prasad* for the respondent.

JUDGMENT.

EDGE, C.J., and BURKITT, J.—Whilst property was under attachment the judgment-debtor granted two leases of it. The plaintiff in this suit purchased that property at an auction sale held in execution of the decrees under which the property was under attachment. Section 276 of the Code of Civil Procedure is not limited to cases in which the alienation is unfavourable to the judgment-creditor. It prohibits an alienation altogether. There were two leases granted in this case by the judgment-debtor. The one was a *zar-i-peshgi* and the other an ordinary agricultural lease. [125] They were private alienations of the property attached. We declare that by reason of s. 276 of the Code of Civil Procedure the two leases above referred to were void. We allow the appeal with costs in all Courts, and, setting aside the decree of the Court below, we restore the decree of the first Court.

Appeal decreed.

18 A. 125 = 16 A.W.N. (1896) 1.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

JINO (*Defendant*) v. MANON (*Plaintiff*).^{*} [13th December, 1895.]

Pleadings—Suit, frame of—Plaint asking for reliefs inconsistent with each other—Plaint so framed no ground for dismissing suit.

Held that the fact that a plaintiff claims in his plaint two alternative reliefs which are inconsistent with each other is no ground in itself for the dismissal of

^{*} First Appeal, No. 130 of 1893, from a decree of Babu Sarwal Singh, Subordinate Judge of Saharanpur, dated the 30th March 1893.

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the suit. *Iyappa v. Ramalakshamma* (1) dissented from; *Mahomed Baksh Khan v. Hussein Bibi* (2) referred to.

[F., 5 L.B.R. 251 (253) = 9 Ind. Cas. 469 (470); 4 Bur. L.T. 124; 1 O.C. 174; Appr., 34 C. 51 = 4 C.L.J. 437 = 11 C.W.N. 20 = 1 M.L.T. 364; 5 Ind. Cas. 745 (746) = 6 N.L.R. 33 (35).

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. T. Conlan, Mr. Muhammad Raoof and Pandit Sunder Lall, for the appellant.

The Hon'ble Mr. Colvin, Munshi Ram Prasad and Babu Durga Charan Banerji, for the respondent.

JUDGMENT.

BANERJI and AIKMAN, JJ.—The suit out of which this appeal has arisen was brought by the respondent, Musammât Manon, against the appellant, Musammât Jino, and three other defendants. The plaintiff's suit was dismissed against these other defendants and decreed against Musammât Jino, who now appeals.

The object of the suit was to avoid a bond, bearing date the 21st of July 1889, and purporting to have been executed by Musammât Manon in favour of Musammât Jino. The avoidance of the bond was asked for on two grounds: First, that it was a forgery and never was executed by the plaintiff, and next (in the event of the Court not finding the bond to be a forgery), that it was void for want of consideration.

[126] The bond recites that gold mohurs and ornaments to the value of Rs. 51,100 had been deposited in trust with Musammât Manon by Musammât Jino, and that these had been accidentally lost by Musammât Manon. It sets forth that out of this amount Rs. 3,100 had already been paid, and covenants to pay the balance, Rs. 48,000, in a lump sum in the course of ten years. As security for the payment of this balance the obligor hypothecates her landed property. The bond provides further that in the event of the obligor dying within the ten years the amount secured may be recovered from the hypothecated property with interest at 12 annas per cent. per mensem.

The plaint alleges that the defendants colluded with one another to forge the bond, and that in order to supply a consideration for the bond they invented the story of the deposit of the gold mohurs and jewelry. The plaintiff denies that any property belonging to Musammât Jino was ever deposited with her, and pleads that if property had been deposited and stolen she would not have been liable to make good the loss. With reference to this last plea, it may be observed, that it is not alleged in the bond that the property was stolen.

In the plaint as originally framed, two reliefs in the alternative were claimed:—

(1) "That it may be declared by the Court that the bond aforesaid, dated the 21st of July 1889, and registered on the 23rd of July 1889, for Rs. 48,000, was not executed by the plaintiff, nor was it executed legally on her behalf, nor was it registered formally.

(2) "That in case of the Court hesitating to grant the above relief, it may at least be declared that the bond aforesaid is waste paper, and the contract set forth therein null and void for want of actual and valid consideration."

By an amendment dated the 7th of March 1891, the following was substituted for the two reliefs set forth above:—

"The plaintiff prays that by decision of the Court the bond dated the 21st of July 1889, and registered on the 23rd of July [127] 1889, for Rs. 48,000, may be declared to be null and void as against the plaintiff."

Both in the lower Court and here it was contended on behalf of the defendant that the suit as brought would not lie. In support of this contention we are referred to the decision in the case of *Iyappa v. Ramalakshamma* (1). The learned Judges who decided that case, in the course of their judgment, observe as follows:—

"The gist of the plaintiff's charge against the defendant was that she never had executed a sale-deed in his favour, and that the document set up by him was a forgery. It was not competent to the plaintiff to combine with this charge as an alternative the wholly inconsistent charge that if she did execute the document no consideration was received by her, or that fraud was practised upon her." The case referred to was disposed of on another ground, and the above remark was consequently an *obiter dictum*.

But if the above extract contains a correct statement of the law, the suit of the respondent here ought to have been thrown out, as she has done what the learned Judges in the Madras case held it was not competent for a plaintiff to do, that is, combined with a charge of forgery "the wholly inconsistent charge that if she did execute the document no consideration was received by her." But we find ourselves unable to follow the learned Judges who decided the case of *Iyappa v. Ramalakshamma* in holding that a Court has power to throw out a suit on the ground that in its opinion the plaint sets up two inconsistent cases. If a plaintiff chooses to come into Court on a plaint which contains allegations inconsistent with one another, this circumstance might militate strongly against the plaintiff succeeding in the suit. But we do not think a Court would be justified on this ground alone in dismissing the suit. We are of opinion that the Code of Civil Procedure does not give a Court power to reject such a plaint. It is true that under s. 53 (b) (iii) of the Code a plaint may be returned for amendment, if it "joins causes of action which ought not to be joined in the same suit." But this, we consider, refers to causes [128] of action the joinder of which is prohibited by s. 44 of the Code.

The learned Judges who decided the Madras case refer to a judgment of the Privy Council, *Mahomed Buksh Khan v. Hosseini Bibi* (2), as supporting the proposition laid down in the passage quoted. That was a suit brought to set aside a deed of gift. In their judgment their Lordships of the Privy Council say:—"The only ground of action alleged in the plaint is that the *hibbanama* of the 30th of May 1881 was a fabricated document, and that her (*i.e.*, the plaintiff's) alleged signature was a forgery." One of the issues framed in the case was as follows:—"Whether the *hibbanama* on behalf of Shahzadi Bibi is genuine and valid and executed with her knowledge and consent, or whether it was manufactured without her knowledge and consent, or whether it was executed under undue influence."

With reference to this issue the Privy Council observe:—"In their Lordships' opinion the latter part of that issue ought not to have been admitted. It was absolutely inconsistent with the case made by the

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(1) 13 M. 549.

(2) 15 I.A. 81=15 C. 684.

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plaintiff. It only becomes possible on the assumption that the alleged cause of action was unfounded. There was another issue which also was only admissible on that assumption, namely, 3rd, whether, in case the said *hibbanama* is proved to be genuine, it is invalid on any ground according to Muhammadan law."

But notwithstanding this observation their Lordships go on to say : — "The questions therefore which had to be decided by the Court, and which now have to be considered by their Lordships, are these:—First, was the deed really executed by Shahzadi? Secondly, if so, are there any circumstances which go to prove that it ought not to be held binding upon her? and thirdly, is the gift valid under Muhammadan law?" And although after a review of the evidence their Lordships find that the plaintiff's plea of non-execution is false, they go on to consider the question whether the deed was executed under undue influence, and whether it was invalid according to Muhammadan law.

[129] The plaintiff's case here is distinguishable from the case which was before the Privy Council, in that the plaintiff does not rely alone on a plea of non-execution.

Having regard to this, and also to the manner in which the case before the Privy Council was dealt with, we are unable to hold that the plaintiff's suit as brought will not lie.

[The Court then went on to consider the merits of the appeal, and, finding that the plaintiff had not established grounds which would entitle her to avoid the bond, decreed the appeal and dismissed the plaintiff's suit.]

Appeal decreed.

18 A. 129 = 16 A.W.N. (1896) 14.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

PARBATI (*Plaintiff*) v. NIADAR (*Defendant*).^{*} [13th December, 1895.]

Lambardar—Irregular appointment of lambardar by Collector—Landlord and tenant—Co-sharers—Right of tenant to pay his entire rent to individual co-sharer.

Held that where the Collector of a district appointed by order one of two co-sharers in a *mahal* to be lambardar and directed the tenants to pay rent to her, no lambardar having been appointed at the settlement of the *mahal*, or at any time by agreement between the co-sharers, such appointment by the Collector did not empower the lambardar, so appointed, to collect the rents of the tenants.

Held also that, in the absence of either an arrangement recorded at the settlement under s. 65 of Act No. XIX of 1873, or a local custom or special contract, one of several co-sharers in a *mahal* could not be taken to have a general right to receive the whole of the rent payable by a tenant in the *mahal*.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. E. A. Howard and Mr. Abdul Raoof, for the appellant.

Pandit Sundar Lal, for the respondent.

^{*} Second Appeal, No. 1275 of 1893, from a decree of H. Bateman, Esq., District Judge of Saharanpur, dated the 28th August 1893, reversing a decree of Pandit Kanhya Lal, Assistant Collector of Muzaffarnagar, dated the 6th September 1892.

JUDGMENT.

EDGE, C.J., and BURKITT, J.—This was a suit for rent of an agricultural holding brought under Act No. XII of 1881 by one of two co-sharers in a *mahal* against a tenant. The two co-sharers are the widows of the late Baldeo Sahai, who was sole owner of the *mahal*. The tenant pleaded payment to the widow, who is not [130] a party to this suit. The first Court decreed the claim. The District Judge dismissed the suit in appeal. The plaintiff, Musammat Parbati, has brought this appeal. There was at the settlement, so far as the evidence on the record goes, no arrangement made by the Settlement officer, or agreed to by the co-sharers, as to the manner in which lambardars or co-sharers in this *mahal* were to collect from the cultivators, and consequently there is no record in the settlement of any such arrangement; possibly for the reason that there was then no necessity for any such arrangement, there being then one sole proprietor of the *mahal*. The Collector of the district by an order of the 7th of May 1892 appointed Musammat Parbati, one of the co-sharers, to be lambardar of the *mahal*, and, as we are told, directed that the tenants should pay their rents to Musammat Parbati as lambardar. What power in law the Collector had in this particular case to direct that the rents should be paid to a lambardar whom he appointed to an office created by himself and not created at the settlement or by arrangement between the co-sharers, we fail to see. We were referred to a decision in *Ganga Sahai v. Ganga Bakhsh* (1). That case is not in point. There at the settlement the office of lambardar was created and the lambardar was the person to receive the rents, and in the *wajib ul-arz* it was stated that the lambardar collected the rents. It was contended here on behalf of the respondent that any co-sharer has authority to receive the whole of the rent payable by a tenant, and is only liable to account therefor to the co-sharers. That is a proposition too general to meet with our acceptance. If that general proposition were correct, it would be difficult to understand the object of s. 106 of Act No. XII of 1881. No doubt it may be recorded under s. 65 of Act No. XIX of 1873, at the settlement that each co-sharer may receive rent from the tenants, or there may be a local custom or special contract to that effect. Here there is neither local custom nor special contract, nor a record under s. 65 of Act No. XIX of 1873. We are, in this particular case, unable to say that the Court below was [131] wrong in holding that the receipt given by Musammat Sundar, one of the two co-sharers, was a valid receipt and discharge for the rent due. We dismiss this appeal with costs.

Appeal dismissed.

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(1) 10 A.W.N. (1890) 3.

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18 A. 131 = 16 A.W.N. (1896) 2.

APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.*SALIMA BIBI AND OTHERS (*Defendants*) v. SHEIKH MUHAMMAD
AND OTHERS (*Plaintiffs*).^{*} [14th December, 1895.]18 A. 131 =
16 A.W.N.
(1896) 2.*Cause of action, definition of - Misjoinder of causes of action—Civil Procedure Code, ss. 31, 45, 53.*

The term 'cause of action' as used in ss. 31 and 45 of the Code of Civil Procedure is there used in the same sense as it is used in English law, *i.e.*, a cause of action means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact, which is necessary to be proved.

Where three plaintiffs brought a joint suit for the possession of immovable property, in which two of them were claiming half the property under a title by inheritance, and the third was claiming the other half of the property in virtue of a sale thereof to him by the first two plaintiffs, *held* that the suit so framed was bad for misjoinder of causes of action, and that the plaint should be returned, that the plaintiffs might elect which of them should proceed with the suit.

Jugobundhoo Dutt v. Mrs. C.B. Maseyk (1), *Anund Chunder Ghose v. Komul Narain Ghose* (2), *Prem Shook v. Bheekoo* (3), *Cooke v. Gill* (4), *Read v. Brown* (5), *Smurthwaite v. Wannay* (6), *Musummat Chand Kour v. Partab Singh* (7), *Murti v. Bhola Ram* (8), *Nusserwanji Merwanji Panday v. Gordon* (9), *Ramanuja v. Devanayaka* (10), and *Ram Sevak Singh v. Nakched Singh* (11) referred to.

[N.F., 33 C. 367 = 10 C.W.N. 508; 2 O.C. 149 (173); F., 18 A. 219; 2 C.L.J. 602 (607); R., 18 A. 396; 18 A. 403 (405); 18 A. 432 (434); 23 A. 167 (170); 27 M. 80; 34 M. 55 (56) = 8 M.L.T. 6 = 6 Ind. Cas. 15 = (1910) M.W.N. 229; 7 Ind. Cas. 75 (78); 13 C.P.L.R. 130 (135); 3 O.C. 176; 3 O.C. 215; 38 P.R. 1903 = 87 P.L.R. 1903; D., 16 Ind. Cas. 623 (624).]

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi Ram Prasad, for the appellants.

Pandit Sundar Lal, for the respondents.

JUDGMENT.

EDGE, C. J., and BURKITT, J.—This appeal has been brought by the defendants from the decree of the Subordinate Judge of Jaunpur. The plaintiffs in the suit are Sheikh Muhammad, the [132] son, and Musammat Nisha Bibi, the widow of Sheikh Imam Bukhsb, deceased, and Sheikh Akbar Ali. The suit is one in which the plaintiffs claim to be declared sharers of one-half and the defendant No. 3 sharer in the other half of the property set forth in the list accompanying the plaint, and the plaintiffs further claim a decree for possession of the half share of the property included in the list. The plaintiffs further claim a large sum as *mesne* profits, and other reliefs. The two first-mentioned plaintiffs whom we shall call plaintiffs Nos. 1 and 2, claim title through Sheikh Imam Bakhsb, deceased, and in the eighth paragraph of the plaint

* First Appeal, No. 136 of 1892, from a decree of Rai Anant Ram, Subordinate Judge of Jaunpore, dated the 12th March 1892.

(1) W.R. (1864) 81.

(3) N.W.P.H.C.R. (1868) 242 = (3 Agra H.C.R. 242).

(5) L.R. 22 Q.B.D. 128.

(7) 15 I. A. 156.

(10) 8 M. 361.

(2) 2 W.R. 219.

(4) L.R. 8 C.P. 107.

(6) L.R. (1894) A.C. 494.

(9) 6 B. 266.

(8) 16 A. 165.

(11) 4 A. 261.

it is alleged ;—“ The plaintiffs Nos. 1 and 2 have sold one-half out of their half-share in the property in suit to plaintiff No. 3, and so the plaintiff No. 3 has also joined in the suit.” The defendants by their pleadings denied the title of the plaintiffs, and also pleaded that the suit was bad for misjoinder ; it is with the latter plea that we propose to deal in this judgment. The Subordinate Judge gave the plaintiffs a decree for their claim in part ; from that decree this appeal has been brought by the defendants. In this judgment we do not propose to express any opinion on the alleged title of the plaintiffs or on any issue arising in the case, except that raised by the plea of misjoinder of parties and causes of action.

The suit was instituted on the 21st of May 1891. The alleged assignment by the plaintiffs Nos. 1 and 2 to the plaintiff No. 3, Sheikh Akbar Ali, was by a sale-deed alleged to have been executed on the 9th of October 1889, by which the plaintiffs Nos. 1 and 2, acknowledging to have received the entire consideration of 7,000 rupees, purported to sell and assign to Sheikh Akbar Ali a moiety of their alleged share in certain zamindari property and houses and in debts due to them. In the detail at the end of the sale-deed of the property sold the specific shares, the title to which the deed purported to pass, are set forth. Assuming for present purposes that the sale-deed did pass to Akbar Ali the interest which it purported to assign, and that the plaintiffs Nos. 1 and 2 had title to that share in the property, the moiety of which the deed purported to assign, it is obvious that the plaintiffs Nos. 1 and 2 [133] had not, at the time when the suit was instituted, any interest in the moiety of the half-share which the deed purported to pass to Sheikh Akbar Ali, and that at the time when the suit was instituted Sheikh Akbar Ali had no interest in the moiety of the half-share originally of the plaintiffs Nos. 1 and 2, which was not by that deed assigned to him. It is also manifest that at the commencement of this suit the plaintiffs Nos. 1 and 2 had no cause of action in respect of the alleged wrongful possession by the defendants of the share which the plaintiffs Nos. 1 and 2 had assigned to Sheikh Akbar Ali, and similarly that Sheikh Akbar Ali at the institution of this suit had no cause of action in respect of that part of the share of the plaintiffs Nos. 1 and 2 which had not been assigned to him. The Subordinate Judge decided that there was no misjoinder of parties, or of causes of action. The defendants have, by their memorandum of appeal, alleged that the claim is bad for misjoinder. On behalf of the plaintiffs it was contended before us that the cause of action of all the plaintiffs was joint ; that the common cause of action of the plaintiffs was the alleged wrongful withholding by the defendants from the plaintiffs of possession ; and that in any event the plaintiffs were entitled, under section 45 of Act No. XIV of 1882, to unite in this suit their several causes of action, if in fact their causes of action were several, and reliance was placed upon some decisions in India, according to which several plaintiffs having several titles to separate subjects of property had one cause of action if they were dispossessed at the same time and by the same act of the defendants. On behalf of the defendants it was contended that the cause of action of the plaintiffs Nos. 1 and 2 was distinct and separate from the cause of action of the plaintiff No. 3, Sheikh Akbar Ali ; and that, although the alleged title of the three plaintiffs down to the assignment of the 9th of October of 1889 is a common title, and although the plaintiffs allege a wrongful withholding of possession from them jointly, the plaintiffs Nos. 1 and 2 and the plaintiff

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No. 3 had not within the meaning of s. 45 a cause of action at the date of the suit in which they were jointly interested, although they might [134] be mutually interested in defeating the defendants in the suit. It was also contended on behalf of the defendants-appellants that the suit was in contravention of the second paragraph of s 31 of Act No. XIV of 1882, which is as follows:—

“ Nothing in the section shall be deemed to enable plaintiffs to join in respect of distinct causes of action.”

In addition to the cases which will be subsequently mentioned by name in our judgment, the following cases were referred to in the course of the argument on the question which we have to decide: *Behari Lal v. Kodu Ram* (1), *Mewa Kuar v. Banarsi Prasad* (2), *Haranomi Dassi v. Hari Churn Chowdhry* (3), *Fakirapa v. Ruddrapa* (4), *Bai Shri Majirajba v. Magan Lal Bhai Shankar* (5), *Loke Nath Surma v. Keshab Ram Doss* (6), and *James Hills v. S.G. Clark* (7).

In order to understand the course of legislation and the authorities on this subject, it is necessary to refer to some of the Codes of Civil Procedure which preceded the present Code. By s. 8 of Act No. VIII of 1859, it was enacted:—“Causes of action by and against the same parties, and cognizable by the same Court, may be joined in the same suit, provided the entire claim in respect of the amount or value of the property in suit do not exceed the jurisdiction of such Court.” Whilst that section was in force it was decided in *Jugobundhoo Datt v. Mr. C.B. Maseyk* (8) that in a suit by two plaintiffs for the value of personal property plundered, of which one plaintiff claimed to be the proprietor of certain articles, and the other plaintiff of others, if the cause, the time, the place and the parties charged be the same in both instances, the fact that both plaintiffs had not a joint interest in the whole of the property plundered by the defendants was insufficient to put them out of Court. Whilst the same section was in force it was decided in *Anund Chunder Ghose v. Kumul Narain Ghose* (9) that where a village had been divided into four separate [135] portions amongst four different parties who were afterwards dispossessed under one and the same survey award, which demarcated the village as appertaining to the share of another person, the four persons dispossessed had a common cause of action and could jointly sue the person to whom possession of their four separate portions of the village had been given. That case was expressly decided on s. 8 of Act No. VIII of 1859, the learned Judges holding that, “as the survey award was one act by which all the plaintiffs were dispossessed and defendant put in possession of the one village which had been divided into four portions, the four sets of proprietors of the village aggrieved by that one act had a common cause of action.” The next case to which we will refer is that of *Prem Shook v. Bheekoo* (10). That case arose under section 5 of Act No. VIII of 1859, which gave Civil Courts jurisdiction “if, in the case of suits for land or other immoveable property, such land or property shall be situate within the limits to which their respective jurisdiction may extend; and in all other cases if the cause of action shall have arisen, or the defendant at the time of the commencement of the suit shall dwell, or personally work for gain, within such limits.” That was

(1) 15 A. 380.

(2) 17 A. 533.

(3) 22 C. 833.

(4) 16 B. 119.

(5) 19 B. 303.

(6) 13 C. 147.

(7) 14 B.L.R. 367.

(8) W.R. (1864) 81.

(9) 2 W.R. 219.

(10) N. W.P.H.C.R. (1868) 242 = (3 Agra H.C.R. 242).

a suit upon a bond executed in the Saharanpur district. The suit was brought in the Dehra Court, and not in that of the Saharanpur Court. In that case, the learned Judges held that the Legislature meant to give jurisdiction to the Court where the facts which immediately confer the right to sue occurred. They said:—"In the present case the non-payment of the amount of the bond, is the circumstance which has immediately conferred the right to sue, but to maintain the suit the plaintiff must prove the bond the non-payment of which is the cause of suit." In 1877, Act No. X of 1877 was passed. The first paragraph of s. 45 of that Act was as follows:—"Subject to the rules contained in section 44, the plaintiff may unite in the same suit several causes of action, and any plaintiffs having causes of action against the same defendant or defendants may unite such causes of action in the same suit." The next amendment of Civil [136] Procedure was effected by Act No. XII of 1879; and by section 9 of that Act the first paragraph of s. 45 of Act No. X of 1877 was amended by substituting for that paragraph the words following:—"Subject to the rules contained in Chapter II and in section 44, the plaintiff may unite in the same suit several causes of action against the same defendant or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit." The same wording was followed in section 45 of the present Code of Civil Procedure (Act No. XIV of 1882) when that Code was passed. Although it appears to us that section 8 of Act No. VIII of 1859, the first paragraph of section 45 of Act No. X of 1877, and the first paragraph of the present Code mean the same thing, we assume that the Legislature by the amendment of 1877, by the amendment of 1879, and by the wording of the first paragraph of section 45, as it at present stands, intended to make it clear that their intention was that several plaintiffs could only join in suing several defendants in one suit for several causes of action when the plaintiffs were jointly interested in each and all of such causes of action, and that the second part of the first paragraph of section 45 is merely enacting that several plaintiffs jointly interested in the same causes of action against the same defendant or several defendants jointly may sue in the same manner as by the first part of that paragraph it is enacted one plaintiff may sue one defendant or more jointly in one suit on several causes of action, to which the defendants, if more than one, were parties, and that it did not intend to confer a right by section 45 on several plaintiffs to sue, on causes of action which were not jointly vested in them, one or more defendants, although the acts of all the defendants jointly might have completed a separate cause of action of each several plaintiff and afforded him a cause of action on which he could sue alone.

The cases which have been decided on section 5 of Act No. VIII of 1859, and upon section 17 of Act No. X of 1877, and [137] upon section 17 of Act XIV of 1882, whether they were rightly decided or not, do not appear to us to be in point. The difficulty which arose under section 5 of Act No. VIII of 1859, under clause (a) of section 17 of Act No. X of 1877, and under clause (a), section 17 of Act No. XIV of 1882 had to be met, and, as we understand those decisions, what they meant was that the cause of action arises when the last act necessary for constituting a cause of action is done or happens. It was attempted by explanation III to section 17 of Act No. XIV of 1882 to deal to some extent with the difficulties which had arisen in applying clause (a) as it

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1895 had stood in section 17 of Act No. X of 1877, and as it had stood in effect
DEC. 14. in section 5 of Act No. VIII of 1859.

— The question which we have to consider is—What did the Legislature
APPEL- mean when it used in the last paragraph of section 31 of Act No. XIV of
LATE 1882, the words "distinct causes of action," and what did it mean by the
CIVIL. first paragraph of section 45 of the same Act? In other words, did the
— Legislature mean merely by cause of action the final act of a series which
18 A. 131= constituted a cause of action, or did it mean by a cause of action all those
16 A.W.N. facts which, if traversed by the defendant and not proved by the plaintiff,
(1896) 2. would entitle the defendant in the suit to judgment? In our opinion the
Legislature, when it used the terms "cause of action" and "causes of
action," meant what has been known for centuries [see *Cooke v. Gill* (1)]
to the law in England as a cause of action or causes of action and did not
mean that a cause of action meant a part only of the cause of action. It was
held by Lord Esher, M. R., in *Read v. Brown* (2), that a cause of action is
"every fact which it would be necessary for the plaintiff to prove, if
traversed, in order to support his right to the judgment of the Court. It
does not comprise every piece of evidence which is necessary to prove
each fact, but every fact, which is necessary to be proved." Fry, L. J.,
agreed: and said:—"Everything which, if not proved, gives the defendant
an immediate right to judgment must be part of the cause of action." In
the same case Lopes, L.J., said:—"I agree with the definition given
[138] by the Master of the Rolls of a cause of action, and that it includes
any fact which it would be necessary to prove, if traversed, in order to
enable a plaintiff to sustain his action." In our opinion the definitions
above quoted from the judgments in *Read v. Brown* correctly define the
term "cause of action," as the Legislature intended that term to be under-
stood in the Code of Civil Procedure. That those definitions were correct
may be inferred from the judgments of the learned Lords in *Smurthwaite
v. Hannay* (3) and of their Lordships of the Privy Council in *Musammatt
Chand Kuar v. Partab Singh* (4). In *Murti v. Bhola Ram* (5) the Full
Bench of this Court considered that the cause of action of the Code of
Civil Procedure was the same as the cause of action as defined in *Read v.
Brown*. In *Nusserwanji Merwanji Panday v. Gordon* (6) Sir Charles
Sargent, J., clearly indicated that it was not the final act of a series which
constituted a cause of action, but all those acts which it was necessary for
the plaintiff to prove, if traversed, to entitle him to judgment. The learned
Judges in *Ramanuja v. Devanayaka* (7) took the same view of the law.

If some of the decisions relied on on behalf of the plaintiffs were
correct, one hundred different consignors of separate parcels of goods accepted
by a Railway Company to be carried and delivered to different consignees,
might join in suing in one suit the Railway Company, if by one and the
same negligent act of the Railway Company, or its servants, the truck in
which the one hundred parcels of goods were being carried by the
Railway Company was, with its contents, destroyed. It appears to us that
there is no middle course; the Court must either adhere to the true and
correct meaning of the term "cause of action," or permit any number of
persons, each of whom has a separate and distinct cause of action, to bring
one common suit against a wrong-doer, provided only that the separate
wrong which was committed against each of the parties, was committed
at one and the same time and by the same act. In the case before us the

(1) L. R. 8 C.P. 107.

(2) L. R. 22 Q. B. D. 128.

(3) L. R. (1894) A. C. 494.

(4) 15 I.A. 156.

(5) 16 A. 165.

(6) 6 B. 266.

(7) 8 M. 361.

plaintiffs Nos. 1 and 2 could not, if the assignment[139] of 1889 was proved, succeed in getting a decree for the share of the property in suit, which they assigned to the plaintiff No. 3, nor could the plaintiff No. 3, Sheikh Akbar Ali, succeed in getting a decree for his share of that property, unless he proved, not only the title of the other plaintiffs to the property down to the assignment of 1889, but also the assignment to himself. The three plaintiffs are no doubt jointly interested in defeating the defendants, but they have not a joint cause of action.

We were much pressed in argument on behalf of the plaintiffs with the decision of this Court in *Ram Sewak Singh v. Nakhed Singh* (1). No doubt if the decision is to be applied generally and not with regard to the particular facts of the case then before the Court, it would support the contention on behalf of the plaintiffs that there has been no misjoinder here. That decision, however, referred to a state of facts in which all the several plaintiffs having separate interests, brought one common suit for possession of a certain share of property which had belonged to what had been a joint Hindu family.

We assume that the Legislature did not intend the concluding paragraph of section 31 or the first paragraph of section 9, Act No. XII of 1879, directly or indirectly to prohibit the joining by Hindu or Muhammadan heirs in one suit of their causes of action in respect of what had been the property of their ancestor or of the family. In these provinces it has always been the practise to allow Hindu or Muhammadan heirs, even where their interests were several, to join in one suit for the recovery of property which had belonged to a common ancestor through whom title was claimed. Convenience commends the permission of such a practise, and, although the judgment of one of the learned Judges in the case to which we are referring appears to go beyond the necessity of maintaining that practice, we regard the decision in that case as necessarily confined to the maintenance of the practice to which we have referred and to go no further. We consider that in that case that judgment was right, and we express no dissent from it. There[140] never could have been any doubt that the members of a joint Hindu family were and are entitled to sue jointly in respect of joint property. The present is a totally different case.

In this case the alleged assignee of a moiety of the interest of the plaintiffs Nos. 1 and 2 in the property in suit joined with them in the suit. This course, so far as these Provinces are concerned, is quite a modern course of procedure, which has been recently adopted, obviously with the intention of evading a decision between a trafficker in litigation and his assignor as to their mutual rights in the transaction. Previously, when a trafficker in litigation undertook, in consideration of getting a share in the proceeds of the litigation to finance the claimant's suit, he ran the chance of having allowed to him, not an exorbitant share in the property recovered, but a just recompense for the money expended by him in the litigation.

Recent decisions of this Court, one of which on appeal before Her Majesty in Council was upheld, have made it apparent to traffickers in litigation that, if they are left to bring suits against the other contracting party to enforce their contracts, they must prove that the contracts were not gambling contracts and were not unjust and inequitable; hence has arisen the attempt to avoid such results by the trafficker in litigation taking an assignment of a moiety or other part of the property in dispute

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(1) 4 A. 261.

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and joining himself as a plaintiff with persons whose litigation he had agreed to finance. We do not prejudice any dispute that may arise between the plaintiffs in this case *inter se*, but we cannot help noticing the fact that no portion of the alleged consideration money for the assignment of 1889 was paid in the presence of the Registrar.

We hold that the cause of action of the plaintiffs Nos. 1 and 2 was distinct from the cause of action of the plaintiff Sheikh Akbar Ali, and that the plaintiffs were not jointly interested in the cause of action alleged in the plaint, and that there has been misjoinder.

We further hold that the three plaintiffs were not entitled jointly to bring or maintain one suit in respect of their separate causes of actions. We set aside the decree below, and direct the [141] Court below to perform the duty which that Court ought to have performed under s. 53 of Act No. XIV of 1882; that is to say, we direct the Court below to return the plaint to the plaintiffs for amendment, so that the plaintiffs may elect which of them are, or is, to continue as plaintiffs or plaintiff in the suit. This appeal is allowed with costs in this Court and in the Court below.

Appeal decreed.

18 A. 141=16 A.W.N. (1896) 9.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

SHIRIN BEGAM AND ANOTHER (*Decree-holders*) v. AGHA ALI KHAN AND OTHERS (*Judgment-debtors*).^{*} [16th December, 1895.]

Civil Procedure Code, s. 311—Execution of decree—Application to set aside sale in execution—Plea to jurisdiction of executing Court not admissible in an application under s. 311.

Held that in an application under s. 311 of the Code of Civil Procedure to set aside a sale in execution of a decree it is necessary for the applicant to show not only that there has been a material irregularity in publishing or conducting the sale but also that substantial injury had been sustained in consequence of such material irregularity. *Arunachellam v. Arunachellam* (1) and *Tasadduk Rasul v. Ahmad Hasan* (2).

Held also that in such an application it is not competent to the applicant to raise, nor to the Court to entertain, any plea to the jurisdiction of the Court executing the decree, as, for example, a plea that the property sold, or part of it, was ancestral and ought to have been sold in accordance with the provisions of section 320 of the Code.

[F., 28 A. 273=3 A.L.J. 140=A.W.N. (1906) 3; R., 21 A. 140; 1 O.C. 186; 6 O. C. 61.]

THE facts of this case are fully stated in the judgment of Burkitt, J. Pandit *Sundar Lal* and Pandit *Moti Lal*, for the appellants. Munshi *Ram Prasad*, for the respondents.

JUDGMENT.

BURKITT, J.—This is an appeal from an order of the Subordinate Judge of Cawnpore setting aside a sale of certain immoveable property. It appears that in execution of a decree held by the appellants a large number of villages belonging to the respondents were sold by auction on the 20th

^{*} First Appeal, No. 54 of 1895, from an order of Maulvi Zain-ul-abdin, Subordinate Judge of Cawnpore, dated the 23rd April 1895.

(1) 15 I. A. 171.

(2) 21 C. 66.

of July 1894. On the 15th of the following month the respondents, judgment-debtors, applied to the execution Court to have the sale set aside under the [142] provisions of s. 311 of the Code of Civil Procedure. In their application they alleged that the property sold was "ancestral," and that therefore the decree directing the sale should have been transmitted to the Collector for execution under s. 320 of the Code of Civil Procedure. It was further alleged that the sale notification had not been properly proclaimed, and that the decree-holders had taken steps to prevent the attendance of intending purchasers at the sale, by reason of which action on their part the property was sold below the rate prevailing in the district. The decree-holders denied the truth of the statements contained in the application, and further they pleaded that, as the Court on June 9th, 1894, had decided that the property was not ancestral, it could not now go behind its previous decision, the judgment-debtors not having taken any objection before the sale was ordered. The Subordinate Judge held that, although notice of the sale proceedings had been served according to law, the judgment-debtors had no personal knowledge of those proceedings, and that the silence of the judgment-debtors could not empower the Court to direct the sale of ancestral property otherwise than in the manner provided by s. 320 of Act No. XIV of 1882. He further found that the judgment-debtors had failed to prove that the sale notification had not been properly proclaimed, and that they had also failed to prove any pecuniary injury. As to the question of the nature of the property the Court found that only one village, Rampur, was the ancestral property of the judgment-debtors within the meaning of the Government notification of the 30th of August 1880 and the rules prescribed in connection therewith. On that finding the Subordinate Judge came to the conclusion that he was not competent to sell that village, and he accordingly set aside the sale of July 20th, 1894, as being one held without jurisdiction, and directed the decree, so far as that village was concerned, to be transmitted to the Collector for execution.

The decree-holders appeal.

In my opinion the order under appeal cannot be supported. S. 311 of the Code of Civil Procedure permits a person whose [143] immovable property has been sold in execution of a decree to apply to have the sale set aside on the ground of a material irregularity in publishing or conducting the sale, and further it provides that no sale shall be set aside on the ground of irregularity unless on proof that the applicant had sustained substantial injury by reason of the irregularity. In recent cases—*Arunachellam v. Arunachellam* (1), and *Tasadduk Rasul v. Ahmad Hasan* (2), their Lordships of the Privy Council have laid great stress on the concluding words of s. 311, and held that the applicant must by evidence prove the fact of substantial injury, and that without evidence to that effect such injury cannot be assumed. In this case there is a distinct finding that no such injury has been proved. On that ground alone the application to set aside the sale should have been rejected. I therefore think it quite unnecessary to express any opinion as to whether the Court below was or was not right in its finding that the village of Rampur came within the Government notification mentioned above.

But there is also another and even a stronger ground—a question very fully argued at the hearing of this appeal—on which, in my opinion, this application should have been rejected. In addition to an allegation

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1895 . of an irregularity in publishing the sale proclamation, which the Court
 DEC. 16. below found to be unfounded, the application alleged a want of jurisdiction
 — in the execution Court to sell the property because it was ancestral. I
 APPEL- fail to see how that allegation can in any way be considered even to
 LATE suggest an irregularity in publishing or conducting the sale. On the
 CIVIL. finding of the Court below, it must be taken that the necessary publication
 — was regularly made, and no irregularity in conducting the sale was alleged.
 18 A. 141= All the proceedings in and respecting the sale were perfectly regular. But
 16 A.W.N. that of which these applicants under s. 311 chiefly complain is not any
 (1896) 9. irregularity attending the actual sale, but that the execution Court under
 whose orders the village was sold had no jurisdiction to sell it. They in
 effect must be taken to say "all the proceedings in the publication and
 the conduct of the sale were [144] regular, but the execution Court had
 no jurisdiction to sell, and therefore we ask that the sale be set aside."
 In my opinion, bearing in mind the wording and object of s. 311, such a
 relief cannot be granted to a person applying under that section.

The object of s. 311 is to grant a summary relief on an applica-
 tion to a person who alleges material irregularity in the publication or
 conduct of a sale of immoveable property which had belonged to him, and
 who can prove that by reason of the irregularity he has sustained sub-
 stantial injury. There being no other machinery provided in the Code
 for setting aside a sale held in execution of a decree, a person whose
 property had been sold in an irregular manner would have been obliged to
 have recourse to a regular suit to have the sale set aside, but for
 the provisions of s. 311. Those provisions, however, cover only the
 case of material irregularities in the publication or conduct of the
 actual sale. The material words of the section are "material irregu-
 larity in publishing or conducting it," i.e., the sale. In my opinion those
 words cannot be taken to confer on the Court hearing an application
 under s. 311 any power to inquire into the jurisdiction to sell of the Court
 by which the sale was held, nor is such want of jurisdiction, if estab-
 lished, an "irregularity in the publishing or in the conducting" of the sale
 itself. It may be that in the present case the Court had no power to sell, and
 that the sale is therefore null and void, and that the respondents would be
 justified in treating it as a nullity or in instituting a suit to have it
 declared null and void. But, however that may be, I am clearly of opinion
 that on an application under s. 311 the applicant cannot obtain a
 declaration that by reason of want of jurisdiction to sell in the execution
 Court a sale is null and void, and that is practically the relief asked for
 here. All that such an applicant can obtain is, on proof of irregularity in
 the publication and conduct of the sale and of substantial injury caused
 thereby, an order setting aside the sale, which is a very different thing
 from a declaration that the sale is null and void *ab initio*. The former
 relief assumes that the Court had power to sell, while the latter denies the
 [145] existence of that power. Moreover, the words "set aside" are
 inapplicable to the case of a sale which is null and void. That which is
 a nullity cannot, from its very nature, be "set aside," as was held by
 the Bombay High Court in *Shivaji Yesji Chawan v. The Collector of
 Ratnagiri* (1). The only possible relief against it is to have it declared to
 be null and void; while in the cases to which s. 311 applies the sale is
 merely voidable and not void, and so *can* be set aside. If the Legislature
 intended to give to s. 311 the extensive effect which is contended for

(1) 11. B. 429.

here, it could easily have said so. But on the wording of the section as it stands I see no reason why it should be applied further than the plain grammatical meaning of its language permits.

It was argued at the hearing of this appeal that s. 312 was in point and that a Court should not confirm a sale when it had come to a finding that it had had no power to sell. I am of opinion that that argument is not sound. If I am right in the propositions I have laid down above, the result is that an applicant under s. 311 cannot be allowed in an application under that section to allege that a sale was null and void by reason of want of jurisdiction in the Court by which the sale was held. It therefore follows that a Court hearing an application under s. 311 could not have before it any materials on which it could come to the conclusion that it had sold without jurisdiction, just as in this case I hold that the Court was wrong in entering into the question of its jurisdiction to sell when it had before it only an application under s. 311 in which no question of jurisdiction could arise. If the Court found that the "irregularities" cognizable under s. 311 were not established, it would be bound under s. 312 to confirm the sale. In the present case I hold that the Subordinate Judge ought not to have entertained, on an application under s. 311, the question of his jurisdiction to sell; and, as he was of opinion that the objection taken to the regularity of the publication of the sale was unfounded, he ought to have rejected the application made to him to set aside the sale and ought to have confirmed the sale, [146] and should, I think, do so now, despite of his finding on the question of jurisdiction, which was an irrelevant and immaterial finding upon an application under s. 311. Several cases were cited to us at the hearing, two of which, *Sukhdeo Rai v. Sheo Ghulam* (1) and *Banke Lal v. Muhammad Husain Khan* (2) are quite on all fours with the present case. But in those cases the point of "substantial injury," on which so much stress is laid by the lords of the Privy Council in the cases cited already in this judgment, does not seem to have been brought to the attention of the learned Judges who decided those two cases, and that is a matter which very much impairs the authority of those cases.

For the reasons given above, I would reverse the order under appeal setting aside the sale of Rampur, and I would direct that the sale of that village on July 20th, 1894, be confirmed. I would allow appellants their costs in this Court and in the Court below.

BLAIR, J.—I agree.

Appeal decreed.

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16 A.W.N.
(1896) 9.

(1) 4 A. 382.

(2) 7 A.W.N. (1887) 32.

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PRIVY
COUNCIL.

18 A. 146 (P.C.) = 23 I.A. 1 = 6 M.L.J. 47 = 6 Sar. P.C.J. 675.

PRIVY COUNCIL.

PRESENT:

*Lords Hobhouse, Macnaghten and Morris, and Sir R. Couch.**[On appeal from the High Court at Allahabad.]*

18 A. 146

(P.C.) =

23 I.A. 1 = 6 *JIWAN SINGH (Defendant-appellant) v. MISRI LAL (Plaintiff-respondent).**

M.L.J. 47 =

*[14th November and 7th December. 1895.]*6 Sar. P.C.J.
675.*Hindu law—Hindu widow—Sale by a Hindu widow—Whether the reversioner consented that she should the whole inheritance, or only her life-estate.*

The sale by a Hindu widow of a share in village lands, of which share her husband had been proprietor, having taken place without justifying necessity, could extend no further than to transfer her interest as a widow, for life, unless the consent of the reversionary heir had been given to her selling the whole inheritance. The appellant's case was that this consent had been given. The evidence of its having been given was the fact that this heir having been appointed the widow's mukhtar for the purpose, had executed, on her behalf, a sale-deed containing words to the effect that the vendee had become (as the English translation on the record expressed it) "absolute" owner of the share sold.

This heir, however, received no consideration to induce him to relinquish the reversionary title: and, on the death of the widow, his descendant claimed the inheritance against the vendee's son, then in possession.

[147] *Held*, that it had not been made so clear that the conveyance transferred the whole estate of inheritance as to cause it to follow that the reversionary heir, when shown to have consented to the transfer by the widow, must be taken to have consented to a transfer by her of the whole estate of inheritance.

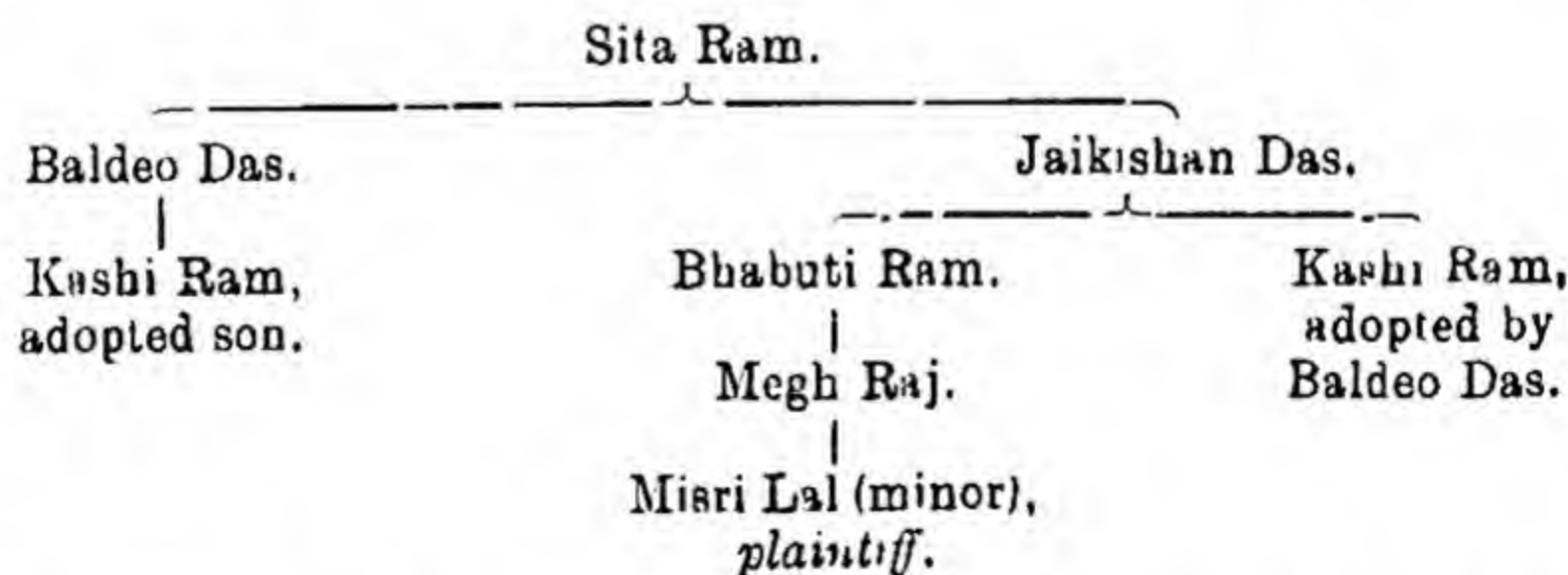
Therefore, the judgment of the appellate Court below, that the transfer extended only to the widow's life-estate, must be maintained.

[R., 47 P.R. 1903 = 56 P.L.R. 1903; D., 3 C.W.N. 207.]

APPEAL from a decree (20th May, 1892) of the High Court, reversing a decree (7th December, 1890) of the Subordinate Judge of Aligarh.

The respondent, a minor under the guardianship of his step-mother, Musammât Lachmin, was the plaintiff in this suit (7th February, 1890) for proprietary possession of the inheritance, with mesne profits of a one-third share of the twenty biswas of mauza Begpur Kanjaula in the Koel tahsil of the Aligarh district. This had belonged to Kashi Ram, who died before 1863, and who had an ancestor common to him and to the plaintiff, from which ancestor the latter was fourth in descent.

The plaintiff's position is explained by the following genealogical table:—



The question was whether the estate of inheritance in the one-third share had been validly sold in 1863 by the widow of the deceased proprietor, Kashi Ram, or only her own estate for life therein had been transferred. This ultimately depended on whether the consent of the

nearest reversionary heir of Kashi Ram, when the sale took place, had been given to the sale of the greater, or only of the less, estate.

The plaintiff alleged that the one-third share had been purchased by Kashi Ram, on whose death, Gomti, his widow, having inherited for her widow's estate, sold it to Kewal Singh, father of the defendant: a sale-deed, dated the 7th September, 1863, being executed. [148] But the alienation extended to no greater estate than for Gomti's life: and on her death, the inheritance devolved upon the plaintiff.

The defence was that a transfer of the whole estate of inheritance was made in 1863 by the widow, with the consent of the next reversionary heir, Jaikishan Das; who had executed the deed on behalf of the widow, under a mukhtarnamah from her, empowering him for that purpose. He had also registered the deed; which, as he was aware, conveyed the absolute title. Issues raised the questions of Jaikishan's having given his consent to the sale, and to what quantity of estate.

The Subordinate Judge was of opinion that the defence was established. The material part of his judgment was as follows:—

"The evidence of Kishan Lal, agent of the firm of Durga Shankar and Lalji Mal, shows that Rs. 1,100 out of the consideration of the sale was paid to the vendors, and Rs. 400 having been paid to them by Jaikishan, the sale was thus made for consideration. The result of the evidence therefore is that Jaikishan Das, who was then the Musammat's nearest and the only living reversioner, admitted the validity of the sale which was effected through his agency, and I find on this issue for the defendant.

"The evidence adduced by the defendant has also proved that Megh Raj, the plaintiff's father, by the course of the conduct he took after Gomti's death, admitted the validity of her act in effecting a sale of this property. It appears that Musammat Gomti had sued Ranchhore Das, his alleged adopted son, for her late husband's estate, and on the 28th June, 1871, that suit was compromised, whereby, with the exception of a house and two bonds for Rs. 13,525, which were made over to Gomti, and Rs. 10,000 worth of debts, which were allotted to Ranchhore Das, the whole of Kashi Ram's property, which included the consideration money of this sale, was conveyed by a charitable gift to Gosain Parsotam Das. Megh Raj, the plaintiff's father, did not only not object to this compromise, but, after Gomti's death, sued, and [149] obtained a decree upon one of the bonds that had been allotted to her, as her heir, and his plaint in that suit admits the compromise."

"The sale to the defendant being therefore for consideration, and having been effected through the agency and with the consent of Jaikishan Das, the plaintiff's grandfather, and the plaintiff's father having by his conduct also admitted it, the plaintiff could not now say that it was confined merely to the vendor's life-interest, or that it did not transfer an absolute title to the vendee. The rule of law laid down by the Privy Council in *Raj Lukhee Dabee v. Gokool Chunder Chowdhry* (1) is that in order to make valid the sale by a Hindu widow of her husband's property, the consent of such of her husband's kindred, who are likely to be affected by the transaction, is necessary; and that there should be such a concurrence of the members of the family as would suffice to raise a presumption that the transaction was a fair one and justified by the Hindu law. Such consent may be proved, not only

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PRIVY
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18 A. 146

(P.C.) =

23 I.A. 1 = 6

M.L.J. 47 =

6 Sar. P.C.J.

675.

(1) 13 M.I.A. 209 = 2 P.O.J. 518.

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18 A. 146
(P.C.)=
23 I.A. 1=6
M.L.J. 47=
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675.

“by signature or attestation of the deed, but by presence at, or knowledge of, the transaction followed by acquiescence, expressed or implied. All these elements are present in this case; for, at the time the sale was made, the plaintiff had not been born, and Jaikishan Das, his grandfather, who was the only person in the family likely to be affected by the transaction, not only attested it at the time, but also expressedly by his conduct acknowledged its validity afterwards, at the time the plaintiff to the present suit had not been born, and his grandfather's consent being sufficient, it could not now be questioned by him, and not only the plaintiff's grandfather, but his father also acknowledged the validity of the sale by the proceedings he took on Gomti's death.”

Accordingly, a decree was made dismissing the suit.

The High Court (TYRRELL and KNOX, JJ.) reversed this. They held, although the plaint, the issues, and the respondent's memorandum of appeal assumed to the contrary, that “there is [150] not a word in the sale-deed which is inconsistent with the transfer being limited to the life-interest of the widow vendor. There is no expression such as is usually employed to intimate that an absolute title was conveyed. The price paid, Rs. 1,500, the revenue of the share being Rs. 238, would point to the conclusion that it was the widow's life-interest only that was conveyed. Rs. 1,500 would hardly represent five years' purchase of the property.”

They found no word in the sale deed that was inconsistent with the transfer being limited to the life-interest of the widow, vendor. There was no expression, such as is usually employed, to intimate that an absolute title was conveyed. They continued thus:—“The Subordinate Judge found that the transfer was made by Gomti without any such necessity, or other cause, as would justify her in alienating more than her own life-interest in her husband's estate. He found that she alienated it because she could not manage it. If, then, the plaintiff is not bound by the acquiescence of his great-grandfather, and thus estopped from bringing this action, his claim is maintainable. The Court below found, on this issue, that the sale was made with the consent and acquiescence of Jaikishan Das, plaintiff's great-grandfather, who is found to have actively negotiated the sale, and procured the execution and registration of the sale-deed. It is found that he was subsequently a party to a deed whereby the buyer hypothecated this property as security for some money which he borrowed.” The judgment further on, was as follows: “Now the Subordinate Judge was obviously wrong in stating that Jaikishan Das in 1863 was the only living reversioner in respect of the estate of Kashi Ram. It is proved, and it is not questioned, that in 1863 Jaikishan Das had a son, who was then the father of Megh Raj, who was born in 1863, and survived till May 1881. This Megh Raj was the father of the plaintiff-appellant. It is obvious then that the transfer was not validated by the consent of all the persons having a right of expectancy in regard to Kashi Ram's [151] estate on the 17th of September 1863, and that the single member of the family, who helped and assisted in the making of the transfer, is not shown by a tittle of evidence to have consented to any transfer beyond the life-interest of the widows. But it was further argued that the plaintiff's father Megh Raj, by his actions, put the plaintiff out of Court. The Subordinate Judge found that the transfer, in 1873, by Musammatt Gomti, was a valid one. The evidence relied on to support this position is derived from five documents which are

"printed in the first book of the respondent. One, No. 26 of the record, is a bond in which Kewal Ram, the vendee of Musammat Gomti, under a deed, dated 17th September 1873, raised Rs. 400 on the security of a one-third zemindari property in Begpur Kanjaula, owned and possessed by him. Now there is nothing in this deed to identify the one-third of the village hypothecated with the one-third purchased by the obligor in 1863. On the contrary, it is described as 'one-third zemindari property owned and possessed by him,' whereas in another bond he speaks of the one-third zemindari property as 'purchased' by him. But conceding that the one-third zemindari property hypothecated in this bond was the one-third purchased from the widow Musammat Gomti, it does not appear that it was anything beyond her life-interest that was pledged. It would be ample security for the Rs. 400 so raised. The next deed mentioned is No. 24, and is dated the 17th of September, 1863, by which, after the sale, Kewal Ram borrowed Rs. 400 on the security of one-third share of Musammat Gomti from Jaikishan Das, great-grandfather of the appellant. Here again there is nothing to show that Kewal Ram had acquired, or professed to have acquired, more than the life-interest of the vendors in the village. The same remarks apply to the documents numbered 25 and 27 in the record. The Subordinate Judge of Aligarh based one further argument against the plaintiff upon document No. 31 of the record, which is a petition of plaint by Megh Raj, father of the appellant, in which he refers to a controversy and a compromise between [152] Musammat Gomti and a stranger called Ranchhore Das, about some portion of Kashi Ram's estate which did not include and had no reference to the property now in suit. Having considered all the evidence which has been brought to our notice, we find no justification for the conclusion arrived at by the Court below, and we are somewhat surprised at the finding, first, that in 1863, Jaikishan Das was the only living reversioner of Kashi Ram, which is a glaring mistake of fact; and secondly, that Jaikishan Das, and after his death his grandson Megh Raj, acted in such a way as to be estopped or as to estop the plaintiff from asserting that Musammat Gomti in 1863 did not convey under the sale-deed of 17th September, 1863, anything more than her life-interest in Kashi Ram's estate.

"The result of the foregoing considerations is that the plaintiff's claim must be decreed, and allowing the appeal, we decree the claim of Misri Lal, minor, with costs of this Court and of the Court below. The question as to mesne profits will be settled in the execution of the decree."

Mr. *Herbert Cowell*, for the appellant, argued that the whole estate of inheritance had been validly transferred to the appellant's father, the widow's alienation being supported by a consent, sufficiently given by Jaikishan Das, the latter having been in 1863 the nearest reversionary heir to Kashi Ram. Having given his consent, evidenced by the part he had taken in reference to the transaction, and the sale-deed, Jaikishan was estopped from disputing the widow's title to transfer the whole estate; and his grandson Megh Raj, and his great-grandson, the plaintiff, were, as they made title through him, bound by the same estoppel. Evidence, however, had been given showing that Megh Raj had himself acted as admitting the validity of the sale of the whole estate of inheritance. Disputes having arisen between Gomti and her adopted son, Ranchhore Das, it was agreed by way of compromise that each should take specific portions of Kashi Ram's estate, and that the residue should

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PRIVY
COUNCIL.

18 A. 146

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23 I.A. 1=6

M.L.J. 47=

6 Sar. P.C.J.

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DEC. 7.
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PRIVY
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18 A. 146
(P.C.) =
23 I.A. 1 = 6
M.L.J. 47 =
6 Sar. P.C.J.
675.

be given to the family *guru*, Parsotam Lalji. A deed of gift was executed by Ranchhore in pursuance of this arrangement, and to [153] this Megh Raj assented; he had filed a plaint in the Aligarh Court, in 1880, reciting that deed, and making title, as Kashi Ram's reversionary heir, only to that portion of Kashi Ram's estate which had come to Gomti under this compromise. Jaikishan's consent was shown by his execution of the deed of 1863, as mukhtar for the widow, his registration of it, and his receipt, on her behalf, of the purchase-money. He must be taken to have consented to the terms of the deed transferring the absolute estate. [LORD HOBHOUSE.—The question is not so much what is the legal construction of the sale, deed, as it is this question—of what estate did Jaikishan consent to the transfer? He consented to the express terms of the deed, which were that the purchaser should become absolute owner. The correctness of the judgment of the High Court, as to there being no expression to that effect, is disputed. Jaikishan, subsequently, was party to a mortgage from the purchaser of the estate that had been transferred; and there is evidence of conduct, both on his part and on that of Megh Raj, showing that they regarded the transfer as having been of the estate of inheritance, and not merely a transfer of the widow's own interest.

The respondent did not appear. Afterwards, on the 7th December, their Lordships' judgment was delivered by Sir R. COUCH:—

JUDGMENT.

The property in question in this appeal formerly belonged to one Sita Ram, who died leaving two sons, Baldeo Das and Jaikishan Das. Baldeo Das the elder died leaving a widow, Musammat Nabbo, and an adopted son, Kashi Ram. The latter died without children, leaving a widow, Gomti, who thereupon took by inheritance the estate of a widow under the Hindu law. Nabbo, who took nothing, died in 1878, and Gomti died on the 8th of March, 1880. Jaikishan Das had two sons, Bhabuti Ram and Kashi Ram, who was adopted by Baldeo Das. Bhabuti Ram, who survived his father, died in the lifetime of Gomti, leaving a son, Megh Raj, who survived Gomti and died on the 22nd of May, 1881, leaving a son the respondent, Misri Lal. Consequently on the death of Gomti Megh Raj became entitled as heir of Kashi Ram to possession of [154] the property which consisted of one-third of a mauza called Begpur Kanjaula, pargana Koel.

On the 7th of February 1890 Misri Lal, then a minor, by his guardian brought a suit against the appellant Jiwan Singh, who was in possession of the property, to recover possession of it and mesne profits.

The defence in the written statement was that after the death of Khashi Ram Jaikishan Das sold the property to Kewal Ram for Rs. 1,500 and a deed of sale in respect of it was executed by Jaikishan Das on behalf of Nabbo and Gomti under his supervision and registered by his special power of attorney, dated 17th September 1863; that Gomti adopted one Ranchhore Das as her son with the consent of Jaikishan Das; that the adopted son became the possessor of the property and money left by Kashi Ram; that a dispute arose between Gomti and Ranchhore Das which was compromised by part of the property left by Kashi Ram being taken by Gomti, part by Ranchhore Das and the remainder being presented to Sri Maharaj Parsotam Dasji; and that after the death of Gomti Megh Raj brought a suit on a bond which was given to Gomti under the compromise and did not claim the property in the possession of Ranchhore

Das and Gosain Parsotam Das. There was no proof of the adoption and no evidence of any legal necessity for the sale. The defence must rest upon the effect of the deed of sale and the conduct of Jaikishan with regard to it. The deed admitted in evidence for the plaintiff purported to be made by Nabbo and Gomti and to sell one-third share of the village Begpur Kanjaula, with all the rights and interests pertaining thereto for Rs. 1,500; it stated that the vendors "put the vendee in possession of the share sold instead of us like ourselves"; and that "the vendee has become an absolute owner of the share sold from the date of sale." It was signed as follows:—"Musammatt Gomti, lambardar, wife and Musammatt Nabbo, pattidar, mother of Kashi Ram, heirs of Kashi Ram, by the pen of Jaikishan Das, *sarbarakar* and mukhtar." It is dated the 17th of September 1863, and there was a power of attorney of the same date from Nabbo and Gomti [155] to Jaikishan authorizing him to execute the deed and get it registered, which he did. Gomti only had an estate in the property, Nabbo had none. If the effect of the deed was to pass only the estate which Gomti had as widow, Misri Lal would be entitled to recover possession. Upon the evidence in the suit the question appears to their Lordships to be:—Was it so clear that more than Gomti's beneficial estate in the property—the estate which she might have sold if there had been a legal necessity for it—passed by the deed, that Jaikishan Das must be taken to have consented to its passing? The Subordinate Judge who dismissed the suit does not appear to have considered this question. He seems to have assumed that this estate would pass. When the case came before the High Court on appeal, the two learned Judges were of opinion that only the estate of the widow passed by the deed. In the judgment they say,—“There is not a word in the sale deed which is inconsistent with the transfer being limited to the life-interest of the widow-vendors. There is no expression such as is usually employed, to intimate that an absolute title was conveyed.”

* * * * *

The single member of the family, who helped and assisted in the making of the transfer, is not shown by a tittle of evidence to have consented to any transfer beyond the life-interest of the widows.” This view of the transaction is supported by the fact that there is no evidence that Jaikishan Das received any part of the Rs. 1,500 or was in any way benefited by, or had any inducement to concur in, a sale which would destroy his right as the apparent reversionary heir. Their Lordships do not think it is necessary for them to give any opinion upon the construction of the deed. The opinion of the High Court which has been quoted is conclusive that it cannot be so clear that the whole estate passed by the deed that Jaikishan Das must be taken to have consented to its passing. The answer to the other part of the defence is that Jaikishan Das was no party to the compromise in June 1871, and that Megh Raj's claiming on the death of Gomti the share of the property which she took under it is not inconsistent with the claim in this [156] suit, but the contrary. It was necessary for the appellant to displace the title by inheritance of Misri Lal by satisfactory proof that the whole estate and not only the estate of Gomti as widow was sold to Kewal Ram. He has failed to do this, and their Lordships will humbly advise Her Majesty to affirm the decree of the High Court in favour of the respondent and dismiss the appeal.

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DEC. 7.

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PRIVY
COUNCIL.

18 A. 146

(P.C.)=

23 I.A. 1=6

M.L.J. 47=

6 Sar. P.C.J.
675.*Appeal dismissed.*Solicitors for the appellant:
Messrs. T. L. Wilson and Co.

1895

Nov. 27.

APPEL-

LATE

CIVIL.

18 A. 156 =
16 A.W.N.
(1896) 28.

18 A. 156 = 16 A.W.N. (1896) 28.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Blair.

R. WALL AND ANOTHER (*Applicants*) v. J. E. HOWARD AND ANOTHER
(*Opposite parties*). [27th November, 1895.]

Act No. VI of 1882 (Indian Companies Act), s. 214—Company—Civil Procedure Code, s. 368—Parties—Substitution of representatives of deceased respondent.

R. W. and others, contributories to a Company which had gone into liquidation, filed an application under s. 214 of Act No. VI of 1882, directed against certain officers of the Company. That application, after certain issues had been framed and partially tried, was dismissed, and an order was also made giving costs against the applicants. The applicants appealed to the High Court against the order of dismissal. Pending this appeal one of the opposite parties died, and it was sought to put his legal representatives upon the record of the appeal as respondents. *Held*, that in view of explanation II to s. 214 of the Indian Companies Act, 1882, the legal representatives of the said deceased respondent could not be brought upon the record, either in respect of the relief prayed for in the original application or in respect of the order making costs payable by the applicants, as that order could not be separated from the dismissal of the application.

ON the 14th of March 1894 an application was presented by the present applicants and others to the Court of the District Judge of Allahabad, purporting to be made under ss. 214 and 162 of the Indian Companies Act, 1882, and praying that an inquiry might be made into certain alleged misfeasance on the part of some of the officers of the Agra Savings Bank, which was then in process of liquidation under the supervision of the Court. That application was received by the Court and certain issues were framed. The [157] application came on for hearing and two orders were passed, one dismissing the application so far as it was an application under s. 214 of the Indian Companies Act and giving costs against the applicants, but allowing the hearing to continue so far as the application was under s. 162 of the Act; and the other, passed after some days' interval, dismissing the rest of the application. Against these orders, dated the 30th of April and the 19th of May 1894, respectively, two of the original applicants appealed to the High Court. Pending the appeal one of the officers of the Bank, to whom notice of the application had been issued, died, and an application was made to bring the names of his legal representatives on the record of the appeal.

Mr. W. K. Porter for the applicants.

Mr. W. Wallach for the opposite parties.

JUDGMENT.

KNOX and BLAIR, JJ.—This is an application praying this Court to substitute the names of Sophia Jessie Mann and John Edwin Howard for the name of one H.C. Mann, deceased, as respondents to an appeal pending in this Court. The sections of the Code mentioned in the application are s. 368 and 582 of Act No. XIV of 1882.

It appears that proceedings were taken under s. 214 of the Indian Companies Act against H. C. Mann and others. That application was dismissed upon some preliminary point, we are informed, and an order was added directing the appellants before us to pay costs. An appeal was filed from this order, and, before that appeal could come on for

hearing, H. C. Mann, one of the respondents, died. Upon an application for substitution of names, we issued a notice to the respondents to show cause. The learned counsel who appears for the respondents in showing cause drew our attention to explanation II of s. 214 of the Indian Companies Act. That explanation lays down in the most clear and distinct terms that proceedings cannot be taken under s. 214 against the representatives of a deceased officer. The learned counsel for the appellants argued that, as proceedings had already been taken, this explanation did not apply to the present case, and that [158] it was open to the appellants to continue them against the representatives of the deceased. We were referred to no precedent in support of this view, and such a view appears to us to be in direct contravention of the letter and spirit of s. 214. But it was argued that if this was the interpretation to be placed upon the explanation in question, at any rate there was a right of appeal, so far as that part of the order is concerned, which directs that costs be paid by the appellants to the deceased H. C. Mann; and that, if this order as to costs was illegal, their recovery could be claimed and enforced against the representatives of the said H. C. Mann. We do not see how this part of the order can be divorced from the rest of the order. The order, as a whole, was passed in proceedings taken under s. 214. It cannot be enforced either in whole or in part against the representatives of the deceased except by a proceeding which can only be taken under or in pursuance of the proceedings already taken under s. 214. Any attempt to take such proceedings would be an attempt to take them against persons over whom the law has thrown a shield. The effect and tenor of s. 214 has been fully discussed in this Court in other proceedings, and in the judgment passed in those proceedings we fully concur. They explain, what in fact s. 214 puts in more concise language, the nature and object of this section; and we are satisfied that it is a section which provides special remedies differing from all other legal proceedings. We dismiss the application with costs.

Application dismissed.

18 A. 158 = 16 A.W.N. (1896) 15.

REVISIONAL CRIMINAL.

Before Sir John Edge, Chief Justice.

QUEEN-EMPRESS v. KHUSHALI RAM AND OTHERS.

[12th December, 1895.]

Criminal Procedure Code, ss. 133, 135, 138, 139—Order for removal of obstruction—Appointment of jury to consider the reasonableness of such order—Procedure.

One K. R., having been ordered by a Magistrate under s. 133 of the Code of Criminal Procedure to remove an alleged obstruction, applied for a jury. Five jurors were chosen, who, having examined the place in dispute, proceeded without consultation to deliver separate and independent opinions. The verdict of the [159] majority was in favour of upholding the Magistrate's order. The Magistrate however discharged his order.

On reference by the Sessions Judge under s. 438 of the Code, it was held that the last order of the Magistrate should be set aside and the case remanded for consideration by a fresh jury.

[R., 30 A. 364 (367) = 5 A.L.J. 488 (490) = 4 A.W.N. (1908) 151 = 8 Cr. L.J. 1.]

THE facts of the case sufficiently appear from the order of Edge, C.J. Mr. D. N. Banerji for the opposite parties.

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Nov. 27.

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(1896) 28.

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JUDGMENT.

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16 A.W.N.
(1896) 15.

EDGE, C. J.—A Magistrate, acting under section 133 of Act No. X of 1882, made an order on Khushali Ram and others to remove an alleged unlawful obstruction or to appear at a time and place fixed by the order and move to have the order set aside or modified under section 135. The persons against whom the order was made applied to the Magistrate to appoint a jury. The Magistrate proceeded in accordance with section 138, and a jury was summoned. The jurors, five in number, appear to have gone to the *locus in quo* and then individually to have made up their minds without any discussion of the question. The two jurors and the foreman appointed by the Magistrate found that the order of the Magistrate to abate the nuisance was reasonable. The two nominated by Khushali and his companions found against the Magistrate's order. The Magistrate thereupon, under section 139, discharged the order, so far as I can see. He says that he kept the question open. But what he did appears in law to have been a discharging of the order. The majority of the jury having found that the order was a reasonable one, I fail to see how the Magistrate could discharge the order. The jury should have consulted together and not acted like partisans; and if they required evidence, evidence should have been produced before them. It was for the Magistrate to show by evidence that the obstruction referred to was an unlawful obstruction of a public way or in a public place. I set aside the proceedings subsequent to the application made under section 135 of Act No. X of 1882, and direct the Magistrate of the district to cause a jury to be summoned in accordance with section 138 and to cause the question involved to be tried.

18 A. 160=16 A.W.N. (1896) 15.

[160] APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

AMANAT BIBI AND ANOTHER (*Plaintiffs*) v. AJUDHIA AND OTHERS,
(*Defendants*).^{*} [20th December 1895].

Act No. XV of 1877 (Indian Limitation Act) sch. ii, Art. 116—Limitation—Suit for breach of contract in writing registered.

The plaintiffs purchased certain immoveable property from the defendants by a registered sale-deed on the 20th of June 1888. It was stipulated in the sale-deed that if the profits of the property should be below Rs. 300, the vendors would make good the deficiency. The vendees sued upon this contract on the 19th of September 1892, alleging that the profits amounted to only Rs. 177-1. Held that the suit as regards limitation was governed by article 116 of the second schedule of Act No. XV of 1877, and not by article 65, *Kishen Lal v. Kinlock* (1) referred to.

[R., 2 N.L.R. 174.]

THIS was a suit to recover compensation for breach of a covenant in a deed of sale under the following circumstances:—The defendants, or their predecessors in title, sold certain zamindari property to the plaintiffs by a registered sale-deed, dated the 20th of June 1888, stating that the net profits of the property amounted to Rs. 300 per annum. The price agreed

^{*} First Appeal No. 316 of 1893, from a decree of Pandit Indar Narain, Subordinate Judge of Mirzapur, dated the 6th December 1893.

upon was Rs. 6,000, of which apparently only some Rs. 2,000 was paid, for the defendants-vendors sued for and obtained a decree for the unpaid purchase money, which decree was upheld by the High Court. That decree the defendants-vendors sold to one Prithi Pal Dasondhi, who was also made a defendant in this suit. The sale-deed on the basis of which the suit was brought contained a stipulation by which, if on delivery of possession the profits of the property were found to be less than Rs. 300, the vendors agreed either to give other land to make up the deficiency, or to refund a proportionate amount of the purchase-money with interest at Rs. 2 per cent. per annum. The plaintiffs brought their suit on the 19th of September 1892. They alleged that about a year after the purchase they found that the profits of the property amounted to Rs. 177-1-0 only. They claimed therefore a refund of a proportionate portion of the purchase money according to the covenant in the sale-deed referred to above.

[161] The defendants pleaded *inter alia* that the suit was barred by limitation; and this plea was accepted by the Court of first instance (Subordinate Judge of Mirzapur), who dismissed the suit, holding that article 65 of the second schedule of the Indian Limitation Act, 1877, applied to it. But the Subordinate Judge went on to consider the case also on the merits, and found that the plaintiffs had not proved that the profits did not, or could not, have amounted to the stipulated sum during the years in question. The plaintiffs appealed to the High Court.

Messrs. T. Conlan and Abdul Raoof and Maulvi Ghulam Mujtaba for the appellants.

Messrs. D. N. Banerji, W. Wallach and R. Malcomson for the respondents.

JUDGMENT.

BANERJI and AIKMAN, JJ.—This was a suit brought by the appellant to recover compensation. The defendants Nos. 1 to 10 sold certain property to the plaintiffs by a sale-deed dated the 20th of June 1888, for a consideration of Rs. 6,000. It was stipulated in the sale-deed that if at the time of delivery of possession the profits arising from the property were found to be less than Rs. 300, the deficiency would be made up either by a conveyance of other property or by the refund of a proportionate part of the consideration money. The sale-deed also provided that if any dispute arose as to the possession of the vendees, the vendors would make compensation. The present suit was brought on the strength of the stipulations in the sale-deed referred to above, and the allegation of the plaintiffs was that the profits accruing from the property amounted only to Rs. 177-1, and that there was thus a deficiency of Rs. 122-15. It was also alleged that the vendors had resisted mutation of names and had thus caused damages estimated at Rs. 100. The plaintiffs accordingly sued to obtain a refund of a portion of the consideration money and to recover Rs. 100 as damages. The Court below has dismissed the suit. It was of opinion that article 65 of the second schedule of the Indian Limitation Act, 1877, applied, and that the claim was barred by limitation. It also tried the case on the merits and came to the conclusion [162] that the plaintiffs had failed to prove that there was a deficiency in the profits. We are of opinion that this was a suit for compensation for breach of a contract in writing registered, and therefore the period of limitation applicable to it was six years under article 116. We think that the ruling in *Kishen Lal v. Kinlock* (1) is in point, and we are of

(1) 3 A. 712.

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(1896) 15.

opinion that the Court below was wrong in holding the claim to be barred by limitation.

As all the evidence which the parties could adduce was on the record, we asked the learned counsel for the appellants to support their case on the merits. In our judgment the plaintiffs have utterly failed to prove that on the date on which possession was delivered to them the profits arising from the property fell below Rs. 300. The only evidence on which the plaintiffs rely consists of the deposition of a patwari who was appointed two years after the date of the plaintiffs' possession, and of certain jamabandis, only one of which related to the year 1296 Fasli, the year of plaintiffs' possession. That jamabandi is insufficient to prove that the profits did not amount to Rs. 300 in that year. It shows the whole of the separate land of the plaintiffs as in their cultivation on a nominal rental. It is silent as to any income from the joint land, and from miscellaneous sources such as irrigation, sale of fish, sale of fruit, &c. The evidence adduced by the plaintiffs themselves proves that these latter sources of income do exist. Consequently, the plaintiffs failed to place before the Court such evidence as could justify its coming to the conclusion that the profits did not amount to Rs. 300 in the year of the plaintiffs' possession. As for the claim for damages on account of resistance to mutation of names, that can be shortly disposed of. It appears from the 5th paragraph of the plaint that objection was raised to mutation of names on the ground that the full amount of consideration money had not been paid. The plaintiffs assert that that ground was unfounded. We have the fact that in the civil suit brought by the vendors for recovery of the balance of consideration money they obtained a decree against the plaintiffs. So that their [163] objection to mutation of names must be taken to have been a valid one. We dismiss this appeal with costs.

Appeal dismissed.

18 A. 163 = 16 A.W.N. (1896) 18.

REVISIONAL CIVIL.

Before Mr. Justice Knox and Mr. Justice Blair.

GHULAM SHABBIR (*Objector*) v. DWARKA PRASAD AND OTHERS
(*Opposite parties*).^{*} [21st December 1895.]

Civil Procedure Code, sections 287, 318, 319—Execution of decree—Executing Court delivering possession of property not specified in sale certificate—Revision—Practice.

In execution of a decree against several joint judgment-debtors certain immovable property was proclaimed for sale. The sale proclamation described the property as so many biswas and biswansis in certain villages amounting to a certain area. The judgment-debtors possessed property in those villages over and above that sought to be sold. The property as above described was sold and certificates of sale were granted which in terms followed the description contained in the proclamation of sale. The decree-holders purchased the property so sold and applied for possession thereof, but in their application they inserted a detail of the specific shares of property held by the several judgment-debtors over which they prayed for possession. The Court executing the decree went into the question of the specification of shares and ordered possession to be delivered over certain specific shares of the several judgment-debtors.

Held that, under the circumstances described above, the High Court would interfere in revision under section 622 of the Code of Civil Procedure, although it

^{*} Civil Revision No. 23 of 1895.

was possible that the matters complained of might be grounds for a separate suit. *Guise v. Jaisraj* (1). *Gopal Das v. Alaf Khan* (2) and *Prosunno Kumar Sanyal v. Kali Das Sanyal* (3), referred to.

[R., 32 A.623=7 A.L.J.741 (742)=6 Ind. Cas. 831; 8 Ind. Cas. 613; 8 Ind. Cas. 876 (877)=13 O. C. 341; 80 P.L.R. 1901.]

THE facts of this case are fully stated in the judgment of the Court. *Munshi Madho Prasad* and *Maulvi Ghulam Mujtaba* for the appellants.

Babu Jogindro Nath Chaudhri and *Babu Devendro Nath Ohdedar* for the respondents.

JUDGMENT.

KNOX and BLAIR, JJ.—On the 20th of June 1892, and 20th of August 1892, certain properties in mauza Bhadoli and in [164] mauza Loharli were sold in execution of a decree. The decree-holders were Dwarka Prasad and others, and the judgment-debtors were Maulvi Ghulam Kambar and Ghulam Shabbir and others. The amount of the property sold was described as consisting of so many biswas, biswansis, &c., and it was purchased by the decree-holders. Beyond the description of biswas and biswansis and the area which those biswas and biswansis covered there was no specification of the property showing what particular shares of the several judgment-debtors were being sold by auction, and it is admitted that the judgment-debtors did possess property in those villages over and above the property sold by auction. Certificates of sale were granted which followed in terms the description of the property as published for sale. On the 26th of September 1893, the auction-purchasers applied to the Court for delivery of possession over the property purchased by them, and in this application they inserted, what had not been set out either in the sale proclamation or sale certificates, namely, the specific shares of property held by the several judgment-debtors over which they prayed for possession. On the very same day, and without notice to the judgment-debtors, an order was passed for delivery of possession as prayed for and possession was, as a fact, delivered on the 10th of October 1893, and the case struck off the file. No notice was taken, or, at any rate, no notice was recorded, of the fact that the decree-holders had in their application inserted something over and above what had been entered in the sale proclamation and sale certificates. On the 16th of November 1893, and again on the 12th of December 1893, the judgment-debtors, Gulzari Lal and others and Ghulam Shabbir, applied for a review of the order of the 26th of September 1893. On the 9th of March 1894 the Court set aside its previous orders and the judgment-debtors filed the objections they had to the possession prayed for by the decree-holders. On the 10th of March and the 19th of March 1894, respectively, the Subordinate Judge went into the prayer for possession and objections and passed an order, dated the 12th of May 1894, by which he directed that possession should be [165] delivered to auction-purchasers over the shares held by the judgment-debtors in mauzas Bhadoli and Loharli, and specified at great length the particular shares of each particular judgment-debtor over which possession was to be delivered. It is from this order that the present application for revision has been filed.

The grounds taken are that the Judge had no jurisdiction to direct delivery of possession contrary to the terms of the sale certificates. There

(1) 15 A. 405.

(2) 11 A. 383.

(3) 19 C. 683.

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were several other objections set out, and they are more or less details of and flow out of the main objection, that in directing the delivery of possession as he did, the Subordinate Judge acted without jurisdiction or acted illegally in the exercise of jurisdiction.

Sections 318 and 319 of the Code of Civil Procedure are the sections which lay down what is the duty of the Court on receiving an application from a purchaser at one of its sales asking for delivery of possession over the property purchased. In neither section is there any reference made to the necessity for an inquiry of any kind. What those sections contemplate is that the Court shall proceed at once to deliver possession in accordance with and over the property specified in the sale certificate. By s. 319 delivery is directed to be made by simply affixing a copy of the certificate of sale in some conspicuous part of the property and by proclaiming to the occupant of such property that the interests of the judgment-debtor have been transferred to the purchaser. It is moreover obvious that at such a time there should be no room given for any doubt or question as to what is the property which the purchaser has acquired. All such matters are matters which should be determined, and for the determination of which provision is made, when the property is under attachment and before sale takes place. Section 287 of the Code lays upon the Court the duty of specifying as fairly and accurately as possible the property to be sold, the revenue assessed upon it, the incumbrances and every other thing which the Court considers material for the purchaser to know in order to judge of the nature and value of the property the Court is selling and he is purchasing. Ample powers are given to a Court to arrive at the precise nature [166] and value of the property to be sold; and for a decree-holder to allow property to be sold, and still more for a Court to proceed to sell property, without arriving at its nature and value, is contrary to the spirit of the law and not to be justified. The regret is that, as in the present case, too often the provisions of s. 287 are not made use of and Courts adopt the slovenly procedure of selling to purchasers what may be valuable property or what may be simply matter for endless litigation. In the course of the argument in this case we came across many disputes that have arisen around this property and make it probable that the purchasers before they obtain quiet possession will have to wade through a sea of litigation.

For the opposite parties, the decree-holders, it was first contended that in inquiring into the various titles and incumbrances connected with the property of the judgment-debtors in mauzas Loharli and Bhadoli the Subordinate Judge was merely acting in the exercise of his jurisdiction and that in no way he had acted illegally or with material irregularity. To this contention we cannot accede. The application for delivery of possession gave the Subordinate Judge jurisdiction to put the purchaser in possession of the property covered by the sale certificate. If in the application the purchaser asked for property which was not included in the sale certificate, or if his application contained any other prayer contrary to the terms of the sale certificate, the Subordinate Judge had jurisdiction to brush aside such matters and to direct delivery of possession only in accord with and over the property specified in the certificate of sale. It did not give jurisdiction to the Subordinate Judge to enter upon any inquiry over titles and matters which were contained, as in the present case, neither in the decree out of which the sale arose, nor in the sale proclamation, nor in the sale certificate. The moment he entered upon such enquiry he was, although the case was within his jurisdiction, acting illegally and with material irregularity.

It was next contended that as the judgment-debtors had another form of remedy in the shape of a regular suit to recover property or properties of which they have been dispossessed, that is, if there was property of which they were illegally dispossessed, the powers [167] granted by s. 622 of the Code of Civil Procedure should not be exercised by this Court, and in support of this contention we were referred to the case of *J. J. Guise v. Jaisraj* (1). Special stress was laid upon the words—"that the recognized rule of this Court is that if a party in a civil proceeding applies to us to exercise our powers under s. 622 he must satisfy us that he has no other remedy open to him under the law to set right that which he says has been illegally, irregularly, or without jurisdiction done by a Subordinate Judge." This was the dictum of Mr. Justice Straight applied by our brother Burkitt to a particular case, the case before him being one in which under s. 283 of the Code of Civil Procedure a special remedy by way of regular suit was granted. We agree that in such a case the Court should not grant an extraordinary remedy by way of revision where a special and conclusive remedy is granted by law. The case of *Gopal Das v. Alaf Khan* (2), in which this dictum of Mr. Justice Straight is to be found, was a case in which the petitioner had two alternatives open to him and availed himself of one of the two. The view taken by Mr. Justice Straight was considered in appeal by the learned Chief Justice and another Judge of this Court, and all that they held was that the Judge whose order was appealed against exercised sound discretion in refusing to interfere, not that he had no jurisdiction to interfere under s. 622 of the Code of Civil Procedure. So far as that case is an authority at all, it is an authority in favour of the power of Court to interfere under s. 622, even though there be an alternative remedy.

Mr. Chaudhri, who also appeared for the opposite party and to whom we gave special permission to raise an argument over and above that put forward by the learned vakil who conducted their case, contended that the judgment-debtors had no *locus standi* before the Subordinate Judge when they asked him to interfere and not deliver possession in the way in which he intended. But this, if sound, adds still more weight to the argument that in considering that objection the Court was acting without jurisdiction. The [168] section of the Code confers upon this Court powers to interfere. We do not say by any means that we should in any and every case interfere in revision; but in a case like this, where it is doubtful, as urged by the learned vakil for the petitioner, whether, on the authority of *Prosunno Kumar Sanyal v. Kali Das Sanyal* (3), a separate suit would lie, and where the Court below has taken upon itself in summary proceedings virtually to decide matters fit for a regular and separate suit, we think it proper under such special circumstances to interfere, and to direct the Subordinate Court to take up the proceedings at the point where it went wrong and to deliver possession to the purchaser strictly in accord with and only over the property set out in the sale certificates. We accordingly set aside the order of the Court below and direct that Court to proceed as indicated above. The petitioner will get the costs of his application.

Application allowed.

(1) 15 A. 405.

(2) 11 A. 383.

(3) 19 C. 683.

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18 A. 168 = 16 A.W.N. (1896) 16.

APPELLATE CIVIL.

*Before Mr. Justice Banerji and Mr. Justice Aikman.*INDARJIT (*Plaintiff*) v. LAL CHAND AND ANOTHER (*Defendants*).^{*}
[23rd December, 1895.]18 A. 168 =
16 A.W.N.
(1896) 16.*Act No. I of 1872 (Indian Evidence Act), s. 92—Evidence to vary or add to the terms of a contract in writing—Evidence to show manner in which consideration was agreed to be paid.*

Section 92 of the Indian Evidence Act, 1872, will not debar a party to a contract in writing from showing, notwithstanding the recitals in the deed, that the consideration specified in the deed was not in fact paid as therein recited, but was agreed to be paid in a different manner. *Hukum Chand v. Hira Lal* (1), *Lala Himmat Sahai Singh v. Llewellyn* (2), *Ram Bakhsh v. Durjan* (3), referred to.

[R., 4 A.L.J. 441 = A.W.N. (1907) 181; 10 C.L.J. 27 (29) = 2 Ind. Cas. 953 (954); 2 Ind. Cas. 13 (14); 1 P.R. 1904 = 41 P.L.R. 1904.]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal* and Babu *Durga Charan Banerji*, for the appellant.
Messrs. *T. Conlan* and *D. N. Banerji* and Babu *Becha Ram Bhattacharji*, for the respondents.

JUDGMENT.

[169] BANERJI and AIKMAN, JJ.—The suit out of which this appeal has arisen was brought by the plaintiff-appellant to recover the balance of the amount of consideration for a sale-deed executed by him in favor of the respondents on the 18th of February 1888.

The plaintiff is the son of the daughter of one Jiwa Ram, and on the death of Musammam Incha Kuar, the widow of Jiwa Ram, he succeeded to Jiwa Ram's estate, which apparently was of large value. That estate had been taken possession of by Balmakund and others, who derived title from Incha Kuar. The plaintiff had no property and no means to defray the expenses of the litigation in which it was necessary for him to embark in order to recover the property inherited by him from Jiwa Ram. He accordingly entered into negotiations with the defendants for the sale to them of half of the property, they undertaking to finance the suit. Accordingly a sale-deed was executed on the 18th of February 1888, and the amount of consideration stated in it was Rs. 30,000. It was recited in the sale-deed that the plaintiff-vendor had received the entire amount of consideration according to the following detail:—

	Rs.	a.	p.
Received in cash at the time of registration	25,000	0	0
Received by setting off against the previous debt due under five <i>Rukkas</i> in favor of Sah Lal Chand	3,000	0	0
Costs to be paid on account of remuneration to Chand Prasad and Jagan Prasad	2,000	0	0

It was further recited in the sale-deed that as regards the receipt of consideration the vendor had not, nor would have, any sort of objection or dispute.

* First Appeal, No. 273 of 1893, from a decree of Babu Baijpath, Subordinate Judge of Agra, dated the 13th June 1893.

(1) 3 B. 159.

(2) 11 C. 486.

(3) 9 A. 392.

It is alleged by the plaintiff in his plaint that the mode of payment of the amount of consideration as recited in the sale-deed was not what was actually arranged between the parties, but it was agreed that the sale consideration should remain with the vendees subject to the condition that they should defray the costs of the suit which would have to be instituted for the recovery of the property [170] and that after the termination of the suit half of those costs should be deducted out of the amount and the balance should be paid to the plaintiff. It was further stated in the plaint that the recital as to payment of consideration in the sale-deed was untrue, and that it was made through apprehension that a plea of champerty might be raised on behalf of the persons who were in possession. It appears that the plaintiff brought a suit for Jiwa Ram's estate jointly with the defendants, and a decree was made by the Court of first instance in their favor on the 10th of December 1888. That decree was affirmed by this Court on the 26th of May 1891. The present suit was filed on the 6th of December 1892. The plaintiff further alleged in his plaint that he had not received any part of the consideration and that his share of the costs of the litigation amounted to about Rs. 2,000. He accordingly claimed the balance of Rs. 28,000 and the interest on that amount.

The defence raised in the written statement of the defendants was that the consideration entered in the sale-deed had been paid in full, that no part of it was fictitious and that nothing was due to the plaintiff. The lower Court disbelieved the evidence adduced on behalf of the defendants as to the payment of consideration. But it also disbelieved the statement of the witnesses examined on behalf of the plaintiff, and was of opinion that the plaintiff had failed to prove that the amount of consideration was agreed to be paid in the manner alleged in the plaint. On this ground the Court below dismissed the plaintiff's suit. The plaintiff has appealed.

At the outset of the argument it was objected by learned counsel for the respondents that the plaintiff could not adduce evidence to prove that the consideration for the sale was agreed to be paid in the manner set forth in the plaint. The objection was based on the provisions of s. 92 of the Indian Evidence Act, 1872, which are to the effect that no evidence of any oral agreement or statement shall be admitted for the purpose of contradicting, varying, adding to or subtracting from, the terms of a written contract. It is true that the evidence referred to above was admitted by the Court below, and that no objection was raised in that Court as to its admission, [171] but we agree with the contention of the learned counsel for the respondent that when evidence has been improperly received in the Court below it is the duty of the Court of appeal to reject that evidence if in its opinion the evidence was legally inadmissible, even though no objection was raised to the admissibility of the evidence in the Court below. We have therefore to consider whether the objection raised by the learned counsel for the respondents is a valid objection. We are of opinion that the evidence which is now objected to was legally admissible. The allegation in the plaint, if true, was not an allegation which contradicted or varied the terms of the sale-deed. The terms of the contract as agreed upon in the sale-deed were that for a consideration of Rs. 30,000 the plaintiff was to convey half of the property to the defendants. There is no dispute as to these terms. The plaintiff concedes that the amount of the consideration was Rs. 30,000. What he says is that it was not actually received as stated in the sale-deed, but that an arrangement was made between him and his vendees by which the payment was deferred. It is settled law that, notwithstanding an admission in a sale-deed that the

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consideration had been received, it is open to the vendor to prove that no consideration was actually paid. In *Hukum Chand v. Hira Lal* (1) it was held that s. 92 of the Evidence Act (Act No. I of 1872) does not prevent a party to a contract from showing that there was no consideration, or that the consideration is different from that described in the contract. If it is open to a party, as is undoubtedly the case, to show, notwithstanding a recital in the sale-deed, that no consideration passed, or that the actual consideration was different from that stated in the deed, it is, in our opinion, open to a party to prove under what circumstances the payment of consideration was postponed, and what was the mode agreed upon as to the payment of it. We think that to admit such evidence is not allowing evidence to be given to vary or contradict the terms of a written contract. This view is supported by the principle of the ruling of the Calcutta High Court in *Lala Himmat Sahai Singh v. Llewellyn* (2) and of this Court in *Ram [172] Bakhsh v. Durjan* (3). In the case last mentioned, the suit was in respect of a bond payable by instalments, and the question was whether evidence was admissible to prove that at the time of the giving of the bond it was agreed to let the creditor have possession in lieu of instalments. It was held that such evidence was admissible, that the contract alleged did not detract from, add to, or vary the original contract, but only provided for the means by which the instalments were to be paid. Similarly in this case the agreement alleged by the plaintiff did not contradict, vary or add to the terms of the original contract, but only provided for the mode in which the amount of consideration agreed upon in the sale-deed was to be paid. We are of opinion that the Court below rightly admitted the evidence tendered by the plaintiff to prove the allegations made by him in the 4th and 5th paragraphs of his plaint.

[The judgment then went on to discuss facts of the case; but the remaining portion is not material to the purposes of this report.—*Ed.*]

18 A. 172 = 16 A.W.N. (1896), 14.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

PARSIDH RAI AND OTHERS (*Plaintiffs*) v. RAJI NAIN RAI
 AND OTHERS (*Defendants*).^{*} [23rd December, 1895.]

Act No. XIX of 1873 (North-Western Provinces Land Revenue Act), ss. 222 to 231—Arbitration—Award made by one arbitrator only, effect of such award and decision thereon.

The provisions of ss. 222 to 231 of Act No. XIX of 1873 contemplate that the award therein dealt with should be an award made by more arbitrators than one. Where therefore a Settlement Officer had delivered a decision under s. 230 upon what purported to be an award by one arbitrator only, it was held that such so-called award and the decision thereon of the Settlement Officer would not prevent the matters dealt with therein being reopened in a civil suit. *Jhatan Singh v. Mahadeo Singh* (4) distinguished.

[R., 11 C.L.J. 39.]

^{*} Second Appeal, No. 554 of 1893, from a decree of Pandit Rajnath Sabib, Subordinate Judge of Ghazipur, dated the 11th November 1892, reversing a decree of Babu Bris Chandra Bose, Munsif of Ghazipur, dated the 30th June 1892.

(1) 3 B. 159. (2) 11 C. 486. (3) 9 A. 392. (4) 6 A.W.N. (1886) 180.

THE facts of this case sufficiently appear from the judgment of the Court.

[173] Mr. T. Conlan, Pandit Sundar Lal and Munshi Gobind Prasad, for the appellants.

Munshi Ram Prasad, for the respondents.

JUDGMENT.

EDGE, C. J., and BURKITT, J.—This was a suit for a declaration of title, and for possession, in the event of the plaintiffs being found not to be in possession. One of the grounds upon which the suit was resisted was that the matter had been concluded by the decision of the Settlement Officer on an award, and that s. 231 of Act No. XIX of 1873 applied. The Munsif found for the plaintiffs, finding that there had been no award. The defendants' appeal was heard by the Subordinate Judge, who decided that there had been a reference and an award and a decision thereupon to which s. 231 of Act No. XIX of 1873 applied. The plaintiffs have appealed.

We were pressed in appeal with a decision of this Court in the case of *Jatan Singh v. Mahadeo Singh* (1), and it was contended that according to that decision there could be a good reference under s. 222 of Act No. XIX of 1873 to one arbitrator alone. The learned Judges in that case do not appear to have decided that precise point. They held that there was nothing in s. 222 to prohibit a reference to one arbitrator. Whether they considered that, in that case, the reference was good as being a private reference by consent of parties or not we cannot say. In the present case the only question before us is :—Was the decision of the Settlement Officer on the award of 1884 (assuming that the document was an award) a decision within the meaning of s. 231? It is not suggested that there was any reference to two or more arbitrators, or any award of two or more arbitrators, on which the Settlement Officer could decide under s. 230. Reading ss. 222 to 230, we are of opinion that the reference contemplated by that group of sections, and on which the decision referred to in s. 231 could be made is a reference to certainly more than one arbitrator. We are bound to hold that if this report of 1884 was an award, it was not an award on which the Settlement Officer could make a decision [174] under s. 230 of Act No. XIX of 1873, and consequently that section 231 of that Act did not bar this suit.

We set aside the decree of the lower appellate Court, so far as it affects the interests of parties to this appeal, who have been served with notice and who are alive; and we remand this case under s. 562 of the Code of Civil Procedure to the lower appellate Court for trial upon the merits. The decree below will stand so far as the representatives of deceased parties are concerned where such representatives are not upon this record. Costs will abide the result.

Appeal decreed.

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(1) 6 A.W.N. (1886) 180.

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18 A. 174

(F.B.) =

16 A.W.N.

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18 A. 174 (F.B.) = 16 A.W.N. (1896) 20.

FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox,
Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burkitt and
Mr. Justice Aikman.*

IN THE MATTER OF RAJENDRO NATH MUKERJI.*

[3rd January, 1895.]

Letters Patent, section 8—Conviction of vakil for criminal offence—Vakil called upon to show cause why he should not be struck off the roll—Argument not allowed to show that conviction was wrong.

A Vakil practising in the High Court was convicted by a Court of Session of the offence punishable under s. 471 of the Indian Penal Code, and the conviction was affirmed by the High Court on appeal. The vakil was subsequently called upon to show cause why he should not in consequence of such conviction be struck off the roll of vakils of the Court. On appearance in answer to this rule it was held that the vakil was not entitled to question the propriety in law or in fact of the conviction, but that it was open to him to show, if he could, that his conduct in the matter in respect of which he had been convicted was not such as to render him an unfit person to be retained on the roll of vakils of the Court.

THIS was a proceeding under s. 8 of the Letters Patent of the High Court of Judicature for the North-Western Provinces. One Rajendro Nath Mukerji, a vakil practising in the High Court, had been convicted by the Sessions Judge of Allahabad of the offence punishable under s. 471 of the Indian Penal Code and sentenced to three years' rigorous imprisonment. He appealed to the High Court, where his appeal was heard by a Division Bench and dismissed, the conviction being affirmed, but the sentence reduced to two years' rigorous imprisonment.

[175] In consequence of this conviction the Registrar of the Court reported the case for the orders of the Court with a view to proceedings being taken under s. 8 of the Letters Patent. Upon this report a rule was issued to Rajendro Nath Mukerji calling upon him to show cause why he should not be removed from the roll of the vakils and his certificate cancelled in consequence of the offence of which he was convicted by the Sessions Judge of Allahabad on the 9th of August 1895. This rule came on for hearing before a Full Bench of the whole Court on the 3rd of January 1896.

Porter for the vakil argued that he was entitled in showing cause to question the propriety of the conviction of the 9th of August 1895, referring to the following cases—*In the matter of Durga Charan, Pleader* (1), *In the matter of Yad Ali*, (Miscellaneous No. 23 of 1894 decided on the 30th of April 1894); *In the matter of Ghulam Husain* (Miscellaneous No. 77 of 1894, decided on the 30th of June 1894 †), and *In re Weare, Solicitor* (2).

* Miscellaneous No. 425 of 1895.

(1) 7 A. 290.

(2) L. R. (1893), 2 Q.B.D. 439.

† IN THE MATTER OF GHULAM HUSAIN. [30th June, 1894.]

(Miscellaneous No. 77 of 1894.)

Legal Practitioners Act (XVIII of 1879), s. 12—Pleader convicted of criminal offence—Powers of High Court.

(a) The High Court would deprive any pleader of his certificate on its being proved that he had made a false charge, if it appears to the Court that the case involved much criminality.

On this point the following ruling was delivered :—

RULING.

EDGE, C. J., KNOX, BLAIR, BANERJI, BURKITT and AIKMAN, JJ.—
In this case, which is a proceeding under s. 8 of the Letters Patent of this Court consequent on the conviction by the Court of Session of Allahabad of a vakil upon the rolls of this Court of the offence punishable under s. 471 of the Indian Penal Code, which conviction was upheld on appeal to this Court, Mr. *Porter* has contended on the authority of *In*

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(b) But, where a District Judge, on the ground that a pleader was convicted under s. 182 of the Indian Penal Code, in the year 1879, suspended him in the year 1894 and reported the matter to the High Court, under s. 12 of the Legal Practitioners Act (XVIII of 1879), the High Court, being of opinion that it was impossible to ascertain what the facts really were, the particular case against the pleader being an old story, and taking also into consideration the fact that the pleader had borne an honourable character in his profession during the 14 years of his practice (the pleader having been practising since 1880) and that no one had brought such charge against him during that period, set aside the order of suspension and ordered the return of his certificate.

JUDGMENT

The judgment in this case was as follows :—

EDGE, C.J., TYRRELL and BLAIR, JJ.—Ghulam Husain was reported to this Court under the Legal Practitioners Act and was suspended by the District Judge pending the decision of this case. He has been a pleader since 1880. It appears that in 1879, he was convicted under s. 182 of the Indian Penal Code of making a false charge against one Jafar. The charge was one of theft: Jafar was charged with stealing certain ornaments. In the judgment in the case in which Ghulam Husain was convicted, it appears that Jafar was an illegitimate connection of the family and we infer that the Magistrate came to the conclusion, that Jafar had had the ornaments in his possession for the purpose of cleaning them. It was a summary trial, and unfortunately the only record we have of what took place is the judgment. Ghulam Husain has appeared here as a witness in his own behalf. He has been examined and cross examined. He has told us his version of the story, and he has stated that his reason for suspecting that Jafar had committed a theft of the ornaments was that when he spoke to Jafar at the time about them Jafar concealed them in his hand. Jafar was not examined before the Magistrate, and the only other person who could have proved whether or not Jafar did conceal the ornaments in his hand was Ghulam Husain who was the accused on that occasion. The conviction under such circumstances under s. 182 would probably turn on inferences not drawn from any particular evidence that Ghulam Husain either knew or believed the charge against Jafar to be false. We do not know what was the ground of the Magistrate's coming to the conclusion that the charge against Jafar was false to the knowledge of Ghulam Husain. We assume that there was some jurisdiction for the Magistrate's finding that the charge against Jafar was false, but it is another question how far it was clearly made out to have been false to the knowledge and belief of Ghulam Husain. Now Ghulam Husain in 1891 applied to this Court to set aside the conviction. That application was not made by way of appeal, for no appeal lay, the sentence being a fine of Rs 50, but under the revisionary powers of the Court. The application was dismissed, not on the merits, but on the ground that the legal objections to the procedure had not been made out. It is to be borne in mind by us that by preferring that application in revision Ghulam Husain was taking the risk of this Court being informed that a pleader then holding a certificate of the Court had been convicted of an offence under s. 182 of the Indian Penal Code. This Court would undoubtedly deprive any pleader of his certificate on its being proved that he had made a false charge, if it appeared to the Court that the case involved much criminality. The particular case against Ghulam Husain now is an old story, and it is impossible to ascertain what the facts really were. No one has in fourteen years of his practice hitherto brought up this charge against him, and apparently he has borne an honorable character in his profession during the past fourteen years. Under these circumstances we do not think that we should be justified in taking away his certificate or keeping him any longer under suspension. We set aside the order of suspension and he will receive back his certificate which he has deposited.

[N.B.—Though this case has not been reported in extenso in the *I. L. R. Series*, yet it has been given in full for facility of reference.—ED.]

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the matter of Durga Charan, Pleader (1), and *in re Weare, Solicitor* (2), that he was entitled to show that his client the vakil was not guilty of the offence of which he was convicted. If the observation of the Chief Justice on page 290 of the Indian Law Reports, 7 Allahabad, is to be taken as the decision of the Court on that point, we entirely dissent from it. It is to be observed that the Court, in refusing to exercise its power in that case under s. 12 of Act No. XVIII of 1879, did not suggest that the conviction was bad in fact or in [176] law. The case in the Court of Appeal in England does not throw, in our opinion, any light on the question before us.

We cannot in this case question the propriety in law or in fact of the conviction of the Court of Session, which has been maintained by this Court on appeal. It is, however, incumbent on us, under s. 8 of our Letters Patent, to consider whether there exists reasonable cause for removing or suspending from practice the vakil who has been convicted, and for that purpose it is necessary for us to ascertain, as it is not admitted, the degree of culpability involved in the acts which constituted the offence of which he has been convicted.

We hold accordingly that Mr. *Porter* is not precluded from showing, if he can, that the conduct of his client in the matter was not such as to render him an unfit person to be retained on the roll of vakils of this Court.

[The Court then went on to consider the degree of culpability indicated by the conduct of the vakil which led to the conviction above referred to, and in the end passed an order striking him off the roll of vakils of the Court.]

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APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

GAJENDAR SINGH (*Plaintiff*) v. SARDAR SINGH AND ANOTHER
(*Defendants*).^{*} [9th January, 1896.]

Hindu law—Joint Hindu family—Evidence of separation—Shares separately recorded in village papers—Separate purchases by individual members of family out of joint family funds.

Where there has existed a joint Hindu family possessed as such of immoveable property, the presumption is that until the contrary is shown, such family will continue to be joint.

The fact that in the revenue and village papers individual members of a Hindu family once admittedly joint are recorded as holding each a certain specified portion of property is not, standing by itself, sufficient evidence that a separation has taken place, nor is the fact that specific purchases of immoveable property have been made from time to time in the names of individual members of the family, [177] and that the property as purchased was recorded in each case in the name of the nominal assignee.

[F., 22 A. 141; R., 25 A. 546 (566); 11 O.C. 381.]

THE facts of this case are very fully stated in the judgment of the Court.

Messrs. *T. Conlan* and *Abdul Majid* and *Munshi Ram Prasad*, for the appellant.

Pandit Sundar Lal, for the respondents.

^{*} First Appeal, No. 56 of 1894, from a decree of *Pandit Raj Nath Sabib*, Subordinate Judge of Moradabad, dated the 16th November 1893.

(1) 7 A. 290.

(2) L. R. (1893), 2 Q. B. D. 439.

JUDGMENT.

EDGE, C.J., and BURKITT, J.—This is a first appeal from a decree of the Subordinate Judge of Moradabad, dismissing the plaintiff's suit. The plaintiff, to put the case shortly, brought his suit against his cousin, Sardar Singh, Musammat Mewa Kuar, the step grandmother of Sardar Singh, and Musammat Sundar, who was the kept woman of Baldeo Singh, the grandfather of Sardar Singh. He sought possession of the property mentioned in the plaint on the ground that the family to which he and Baldeo Singh, the grandfather of the defendant, Sardar Singh, belonged was a joint Hindu family, and on the further ground that the property in question was the joint property of that family, of which family, if it was a joint family, he was the sole surviving male member. He sought to have it decided that certain gifts, a will and an agreement mentioned in the plaint which were made by Baldeo Singh, were void as against him, the plaintiff. The defence to the suit was that all the descendants of one Chandan Singh, the ancestor, had separated many years ago, in fact, according to the defence, prior to 1836, and that the properties sought to be recovered by the plaintiff were not joint family property, but were properties, some of which had come to Baldeo Singh as a separated Hindu, others of which had been acquired by him as a separated Hindu, and the remainder of which had been purchased by Baldeo Singh as a separated Hindu for and in the name of Sardar Singh. If that defence of separation were made out, there was an end of the suit.

We are relieved from deciding in our judgment the issues between the plaintiff and Sardar Singh. They have filed an agreement which puts an end to this suit and appeal, so far as they are mutually concerned, and which agreement is to be embodied in our [178] decree, and as between them we decree in accordance with the agreement. We may say that, although we hold a very strong opinion on the merits of the suit, the agreement which has been come to between the plaintiff and Sardar Singh, his cousin, is, in our opinion, a very proper and equitable agreement between near relations, and certainly does credit to the plaintiff in this case and to the advisers on both sides. It avoids any chance of future litigation and leaves these close relations, we hope, on good terms with one another.

Musammat Mewa Kuar died during the pendency of the suit and any interest she had died with her.

Musammat Sundar, the third defendant, is still living. The decree below was in her favour, so far as she was concerned. She is a respondent to this appeal. She is not a party to the agreement between the plaintiff and Sardar Singh. It consequently becomes necessary for us to decide this appeal on the merits as between the plaintiff and Musammat Sundar. Musammat Sundar's title depends on the alleged will, and further on the question whether or not the property left to her by that will was joint family property. If it was joint family property, the testator had no disposing power and his will passed nothing.

As we have said, Chandan Singh was the ancestor of the plaintiff and of the defendant, Sardar Singh. When he died is not known, or at any rate is not proved. He left five sons. Hamir Singh, the eldest son, died in 1856 without issue, but leaving a widow, Sheo Kuar, surviving him; Himanchal Singh, the second son, died in 1859, leaving a widow surviving him, Musammat Mohan Kuar, and a daughter, Mulo Kuar,

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who died during the pendency of this suit; Mahtab Singh, the third son, died in 1863, leaving surviving him his widow, Sahib Kuar, who died in 1886, and five daughters, two of whom had each three sons living; Randhir Singh, the fourth son, died in 1836, leaving Baldeo Singh surviving him. Baldeo Singh died on the 27th of April, 1892. He left surviving him his widow, Mewa Kuar, who died during the pendency of the suit. Baldeo Singh also left surviving him his daughter, Gulab Kuar, [179] by another wife. Gulab Kuar was the mother of Sardar Singh, the defendant. Ugar Singh, the fifth and youngest son, died on the 21st of June 1874, and left surviving him his widow and an only son, Gajendar Singh, the plaintiff in this suit. It is necessary to state these facts for a clear conception of how wrong in our opinion the Subordinate Judge went in the conclusions at which he arrived.

It is well-established law in these Provinces that a Hindu and the sons lawfully born to him constitute, until separated, a joint Hindu family, and that the ancestral property, and all property acquired, of which the ancestral property is the source, constitute joint family property of such family. It is also well-understood law in these Provinces that, given a joint Hindu family, the presumption is, until the contrary is proved, that the family continues joint. That presumption is peculiarly strong in the case of the sons of one father. It is also the law as understood in these Provinces that in a Hindu joint family the surviving male members of the family exclude in law from the inheritance widows, daughters and daughter's sons, who are entitled to maintenance only out of the joint family property. It is also well-established law in these Provinces that the widow, the daughter and the daughter's son of a separated Hindu exclude from the inheritance to the separated Hindu, brothers, nephews and other relations separated from the separated Hindu. Now these propositions of law should have been understood by the Subordinate Judge, and if he had borne them in mind and applied them to the consideration of this case, he could not, in our opinion, have come to the conclusion which he did, that the five sons of Chandan had separated and ceased to be members of a joint Hindu family. Further, in our opinion, the Subordinate Judge could not have come to the conclusion at which he arrived if the arguments in the case before him had directed his attention to a number of *wajib-ul-arzes* which are on the record, to the cross-examination of several of the witnesses upon whom he relied, and if he had had experience of the manner in which names of Hindus are entered not uncommonly in revenue and village papers in respect of shares, and also if he had known, as indeed he [180] ought to have known, as a Judge in these Provinces, that a definition of shares in revenue and village papers affords, by itself, but a very slight indication of an actual separation in a Hindu family, and certainly in no case that has ever come before us could we have regarded such a definition of shares standing alone as sufficient evidence upon which to find, contrary to the presumption in law as to jointure, that the family to which such definition referred had separated.

The plaintiff's case is a straight forward one, and in our opinion is consistent with the documentary evidence on the record and with the evidence given in cross-examination by many of the witnesses called on behalf of the defendants. What is the case attempted to be proved on behalf of the defendants? It is a case which violates many of the leading principles of law to which we have referred, and which is absolutely inconsistent with any devolution of property amongst separated Hindus. If

the brothers had separated, or if even in fact Randhir Singh or his son Baldeo Singh had separated from the other members of the family prior to 1856, the devolution of the property sworn to by the witnesses for the defendants and accepted as correct by the Subordinate Judge could not, upon any principle of Hindu law, have taken place. Hamir Singh, the eldest brother, died in 1856. It is the case of the defendants that the interest of Hamir came to the four surviving members of the family, Himanchal Singh, Mahtab Singh, Baldeo the son of Randhir Singh, and Ugar Singh. That would have been the natural and legal devolution if the family in 1856 had been a joint Hindu family. Hamir's interest did in fact devolve on these four surviving members of the family. If these brothers had been separated Hindus, Hamir Singh's widow, Sheo Kuar, would have taken in law and in fact a Hindu widow's estate in Hamir Singh's property. She took nothing of the kind. If the family was separate, Baldeo Singh would have taken nothing. On the death of Hamir Singh, if he left a widow, or on the death of the widow whom he left, Baldeo Singh would have been excluded according to Hindu law from any succession to Hamir Singh, as his uncles [181] Himanchal, Mahtab and Ugar would exclude him. We pass over for the moment what is said to have taken place on the death of Himanchal Singh in 1859, and we come to a later date, *viz.*, 1863, when the third brother, Mahtab Singh, died. It is undisputed, and it is proved beyond doubt, that upon Mahtab Singh's death his interest devolved upon his nephew Baldeo Singh and upon Ugar Singh, his brother, who were the surviving male members of the joint family, if it was a joint family. If the family was joint, Mahtab Singh's interest undoubtedly, according to Hindu law, must have devolved, as it did in fact, on his nephew Baldeo Singh and his brother Ugar Singh. If the family had separated even shortly before 1863, Baldeo Singh and Ugar Singh would have taken not one trace of an interest in the property of Mahtab Singh. Mahtab Singh's widow would have taken a widow's interest in the property of Mahtab, and would have held that interest until her death in 1887. Mahtab's property would then have devolved upon any surviving daughter of his and ultimately on his grandsons, but all these parties were, without question and without raising any claim, excluded from inheritance in 1863 to Mahtab Singh's interest.

The devolution of interest on the death of Hamir Singh in 1856, and on the death of Mahtab Singh in 1863, can only be accounted for on the ground of the family having been and having continued to be joint, and of the property or shares entered in the names of Hamir Singh and Mahtab Singh in revenue and village papers having been joint family property. The facts as to the devolution of interest on the death of Hamir Singh and Mahtab Singh are common ground. It is admitted on both sides that the devolution was as we have said, and if the Subordinate Judge's attention had only been drawn to the cross-examination of many of the defendant's witnesses, he would have seen that the devolution of interest on the deaths of Hamir Singh and Mahtab Singh was absolutely inconsistent and irreconcilable with the defendant's case that the five sons of Chandan Singh had separated.

We shall now refer to what happened on the death of Himanchal Singh in 1859. It is said on behalf of the defendants that [182] Himanchal Singh's property devolved exclusively upon Baldeo Singh. There is in the very nature of the case the strongest reason to doubt the accuracy of that statement. It may very well appear, and does, from the revenue and

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village papers, that Baldeo Singh's name was entered in those papers as that of the successor in title to the share or interest in the property before then recorded in the name of Himanchal Singh. The Subordinate Judge ought to have known, if he has had many of these cases before him, that it is not at all uncommon in these Provinces for the property of a joint Hindu family to be recorded in revenue and village papers sometimes in the name of one member of the family, sometimes in the name of another sometimes in the name of the managing member, sometimes in the name of a junior member of the family—and that without any separation having in fact taken place. The Subordinate Judge ought also to have known that in a joint Hindu family it not uncommonly happens in these Provinces that when property is acquired from the resources of a joint Hindu family the purchase is made in the name of one member of the family, not as his exclusive property, but really on behalf of the family of which he is a member, and that entries in revenue and village papers consequent upon such assignments of interest, as a rule, are made in the name of the nominal assignee. The Subordinate Judge should have known and borne in mind these common facts in deciding this case, and in considering the evidence according to which, if it were accurate, the interest of Himanchal Singh, on his death devolved exclusively on Baldeo Singh. If the family was separate, as the defendant's case is that it was, neither Baldeo Singh nor Mahtab Singh nor Ugar Singh could have taken anything other than a reversionary interest in Himanchal Singh's property as a separated Hindu until the death of Himanchal Singh's widow, and until the death of his daughter Mulo Kuar, Mulo Kuar having lived until after the commencement of this suit; so that, even with regard to the devolution of Himanchal Singh's interest, the case attempted to be set up by the defendants is absolutely irreconcilable with the principles of Hindu law as they are followed in these Provinces.

[183] It might be impossible, owing to the deaths of Baldeo Singh and Ugar Singh, to know exactly why it was that Baldeo Singh's name apparently was entered in the revenue and village papers in respect of the property standing in the name of Himanchal Singh. It would appear to have been the custom in this family, as it has been in others, to enter the names of different members of the family in respect of different portions of the family property. The result is that the evidence on both sides as to the devolution of the interest of Hamir Singh and of Himanchal Singh and of Mahtab Singh is irreconcilable with the idea of a separated family and is consistent only with the presumption that this family remained and continued to be joint.

There are other considerations which lead us to the same conclusion. Ugar Singh died in 1874. The plaintiff, who was his son, was a minor of tender years—some four years old—at that time. Baldeo Singh acted as the guardian of his minor cousin, the plaintiff. He obtained a certificate of guardianship, and from that fact the Subordinate Judge draws the inference that Baldeo and the plaintiff were separate. The Subordinate Judge had either never heard or had forgotten that it had been decided prior to 1874 by the High Court of these provinces that it was a proper and legal act for a member of a joint Hindu family to take out a certificate of guardianship of the person and interest of a minor member of that family. It was believed to be the law that such certificate was required. In fact, as we understand the law, the taking out of such a certificate was not necessary; but that view of the law has been adopted only recently by the High Court at Calcutta, the High Court at Bombay and by this

Court. At any rate, the chances are that any one advising Baldeo Singh would have advised him that he should apply for and obtain a certificate of guardianship for his minor cousin, and that although the family was joint.

In 1282, 1283 and 1284 Fasli a settlement was proceeding. It was the usual thirty years' settlement. One of the most important documents in the settlement of a village is the *wajib-ul-arz*, which contains a statement of the custom or of the agreement come [184] to by the proprietors as to the custom to be observed in the village. At the time of the settlement the two surviving members of this joint family were Baldeo Singh and his minor cousin, the present plaintiff, for whom Baldeo Singh was acting as guardian. Now in a large number of *wajib-ul-arzes*, some twelve or more, which were made at that settlement and which are on the record, there are clauses in which it is positively stated that in the villages referred to in these *wajib-ul-arzes* there was no division of profits and losses because the proprietors were in commensality. These *wajib-ul-arzes* to which we refer were *wajib-ul-arzes* which related to villages in which the proprietary right was vested at the time of the settlement in Baldeo Singh and his minor cousin, the present plaintiff, as appears from *khewats* which are upon the record. These entries in these *wajib-ul-arzes* are entirely inconsistent with the defendant's case that the *defendant* and Baldeo Singh were separate. Such an entry as to commensality would never have been made by a member of a separated family, and we know from the evidence on the record that these *wajib-ul-arzes* were prepared with the knowledge and cognizance of Baldeo Singh and his agents; and in fact these statements must have been made at the instance of Baldeo Singh. There are some *wajib-ul-arzes* of that settlement relating to some of the properties in dispute here which contain statements that profits and losses were divided by the proprietors. So far as we can ascertain, there is only one of such *wajib-ul-arzes* which relates to a village in which the sole proprietors at the date of settlement were Baldeo Singh and the present plaintiff. Some of these *wajib-ul-arzes* undoubtedly related to villages in which there were as co-proprietors persons of a different caste, of a different religion and in no way related to Baldeo Singh and the present plaintiff, and in these cases the *wajib-ul-arz* also would necessarily state that profits and losses were divided amongst the proprietors. There is, again, a third class of *wajib-ul-arz*, certainly one, perhaps more, in which the proprietors of one *patti* of the village were members of this joint family and the proprietors of another *patti* of the village [185] were strangers *inter se*, and in that class it is stated with great precision that the members of this family in their *patti* do not divide profits or losses by reason of commensality, while as to the proprietors of the other *patti* it is stated that they do divide profits and losses. In our opinion, drawing all reasonable references from the *wajib-ul-arzes*, and considering them with reference as to who were at or about the time of the settlement proprietors in the village or in the *patti*, we can only come to the conclusion that Baldeo Singh at that time admitted in these public documents that the family to which he and the present plaintiff belonged was joint. There is no doubt in our minds that after the time of that settlement Baldeo Singh, in order to provide for his grandson Sardar Singh and to advance him in the world, began, whilst he was guardian of his minor cousin, the present plaintiff, to prepare evidence which might subsequently be put forward, as it has been, to indicate a separation in the family. During Ugar Singh's lifetime there is absolutely nothing

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that we can see which is inconsistent with the family being joint. There are, however, indications, the result of things done by Baldeo Singh or his karindas, whilst he was acting as guardian for the present plaintiff, which, although standing alone they are not strong, certainly hint at a separation, and there are further indications that Baldeo Singh was, during the minority of the present plaintiff, laying the ground for a subsequent claim to be entitled to a larger share in some of these villages than the plaintiff. It must be borne in mind in looking at anything which took place between 1874, when Ugar Singh died, and 1889, when the present plaintiff came of age, that during that period Baldeo Singh was the master of the situation, and that there was no one to protect the interest of the present plaintiff effectively except Baldeo Singh, his guardian. In our opinion Baldeo Singh betrayed his trust as far as he could. We cannot regard anything unfavourable to the plaintiff which was done by or at the instance of Baldeo Singh during the plaintiff's minority as of any weight in the determination of this suit; but, on the other hand, we are entitled to regard all these acts of Baldeo Singh which were adverse to the [186] theory of a separated family and contrary to the interests of Sardar Singh, whose interests he was seeking to promote, as of the very greatest importance as showing what the true facts were. In this view we find the documentary evidence as to what took place after the death of Ugar Singh and during the minority of the present plaintiff affords the strongest presumption, in fact proof, that Baldeo and the present plaintiff were joint. It is not pretended by the defendants that a separation of their pleadings took place in recent years. The separation took place prior to the death of Randhir Singh in 1836. They tried to prove that the family was separated from that time down to the present. It was never pretended by the defendants that a separation had first taken place between Baldeo Singh and his minor ward. Such a separation taking place between a guardian and his ward in a joint Hindu family and adversely to the interests of the ward would naturally be scouted by any Court of justice.

Now, in conclusion, we have only to refer to a few of the remarks of the Subordinate Judge. We have indicated that in our judgment the Subordinate Judge has misunderstood the evidence; possibly through no fault of his; possibly through the time at his disposal for the arguments in this case being short. The arguments before this Court have taken eight days. Before the Subordinate Judge they took two days, and he had before him a large mass of evidence, to many important points in which it is evident that his attention was not directed.

The first observation to which we refer is that which imputes practically to the plaintiff that he stole the account books of the estate. If the Subordinate Judge had given careful attention to the evidence, he would have found that it was impossible for the plaintiff to steal these account books. He would have found that when the documents in the outer office came to the number from time to time of fifteen or twenty sheets they were removed into the *zanana* apartment of Baldeo Singh's house and were kept there. The documents which the plaintiff took, and was entitled to take, as a member of this joint Hindu family, for his information from [187] the office, were what we may call the granary accounts; that is to say, the accounts of wheat, seed, oil and other matters brought into the joint storehouse for the consumption of the family, the servants and the horses, and showing how they were distributed from day to day. There was no pretext for holding, as the Subordinate Judge did, that the plaintiff

secretly took the accounts. The only accounts which the plaintiff took away were taken openly. It is ridiculous to suggest that the plaintiff had any opportunity or could have taken the estate accounts without every one being well aware of it. The mass of estate accounts which must have accumulated and been in existence in the *zanana* apartments of Baldeo Singh relating to the management, profits, losses, rent, &c., of the numerous villages belonging to this estate must have been such that it would not be too much to say that one man could not remove them, but that it would have required a cart or two to carry away the accounts of all those years.

The Subordinate Judge in our opinion put an entirely wrong construction on the evidence relating to the petitions of the 13th of September 1883,* and the 16th of April 1892. The Subordinate Judge does not believe the plaintiff as to his evidence that he had not authorised the petition of the 16th of April 1892. He considers that the plaintiff in that respect is contradicted by the evidence of Maulvi Ibadat-ullah. In our opinion there is no contradiction. Ibadat-ullah stated that he had, on instructions of a karinda of the plaintiff and some one who accompanied him, filed that application. It is not certain whether that karinda was not also the karinda of Baldeo Singh. However, that matter is immaterial. Ibadat-ullah says that subsequently to the 16th of April 1892 the plaintiff sent for him and asked him, as we read the evidence, if he had filed a petition on his behalf, and what had been done on it, and told him to withdraw it. That does not lead us to the inference that the plaintiff had authorised the filing of that petition, and we are fortified in that conclusion by the evidence given in cross-examination by Sardar Singh, the principal defendant in this suit. He said:—"Baldeo Singh did not cause any application [188] to be filed, but the karindas who had the management in their hands used to file applications after having them drafted. The karindas used to watch and conduct the Court proceedings as they liked without the permission of Baldeo Singh." That shows that, at least so far as the elder member of the family, Baldeo Singh, was concerned, his karindas were in the habit of filing applications without consulting him at all. That evidence of Sardar Singh is consistent also with the statements in the evidence of the present plaintiff as to certain petitions for partition which had been filed.

There is a good deal in the judgment of the Subordinate Judge upon which comment adverse to his conclusions might be made. He did not, in our opinion, correctly weigh the evidence, even if he read the whole of it, which we doubt—we refer to the documentary evidence—and we entirely fail to understand how he could have come to the conclusion that, on a reference to the whole deposition of the plaintiff, it could be inferred that Ugar Singh, Baldeo Singh and other ancestors were separate and not joint. In our opinion the plaintiff gave his evidence honestly, truthfully and straightforwardly.

We find that the five sons of Chandan Singh continued to be joint during their lives, and the survivors continued to be joint during their lives; that Baldeo Singh and the plaintiff were joint; that the property in question in this suit was joint family property, and that Baldeo Singh had no power to dispose of that property or any part of it by will. As between the plaintiff and Musammat Sundar, she took nothing, and we allow the appeal and set aside the decree of the Court below, and decree the plaintiff's claim for possession as against Musammat Sundar. It would be

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* For 13th of September 1883 we have 13th of September 1888 in 16 A.W.N. (1896) 23.

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useless to decree costs as against Musammat Sundar, and we accordingly make no order as to costs as between these parties. The plaintiff does not press for a decree as to *mesne* profits as against Musammat Sundar, so we make no decree as to *mesne* profits. As we have already said, the decree as between the plaintiff and Sardar Singh will be in the terms of the agreement filed in Court yesterday.

Appeal decreed.

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[189] APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

MUHAMMAD MAHMUD ALI (*Defendant*) v. KALYAN DAS (*Plaintiff*).^{*}
[23rd December, 1895.]

Act No. IV of 1882 (Transfer of Property Act), s. 74—Mortgage—Prior and subsequent incumbrancers—Right of subsequent mortgagee to redeem prior mortgage—Manner in which subsequent mortgagee's right of redemption is affected by partial destruction of the prior mortgage.

One M. R. was a co-mortgagee under mortgages of the years 1867, 1868 and 1870 of a village called Ahak and shares in certain other villages Surajpur, Raipur, Bamoti and Khera Buzurg. K. D. the plaintiff was the representative of a subsequent mortgagee of the share in Khera Buzurg. K. D. in 1874 brought the share comprised in his mortgage to sale and purchased it himself; but without making M. R. or his representatives parties to his suit for sale. Subsequently, in 1879, M. R. sued for a decree for sale of all the properties mentioned above, but the decree which he obtained was limited to the village Ahak and the share in Khera Buzurg. K. D. was not made a party to this suit. In 1882 one M. M. A. purchased the share in Surajpur which had been subject to the mortgage sued upon by M. R. in 1879, but had been exempted from the decree obtained by M. R. in 1879. In 1892 K. D. sued for redemption of M. R.'s prior mortgage of 1867 and for a declaration of his right, upon such redemption, to bring to sale the property comprised in the mortgage.

Held that, inasmuch as M. R.'s interest in the mortgaged property had been limited by the decree of 1879 to the village of Ahak and the share in Khera Buzurg, the plaintiff was not entitled to a decree for the sale of the share purchased by M. M. A. in Surajpur.

THE facts of this case are fully stated in the judgment of the Court.
Mr. *Abdul Majid*, for the appellant.
Pandit *Sundar Lal*, for the respondent.

JUDGMENT.

BANERJI and AIKMAN, JJ.—The suit in which this appeal has arisen was brought by a second mortgagee to redeem a prior mortgage and to foreclose the right of redemption of the legal representatives of the mortgagors and of subsequent incumbrancers and alienees of the mortgaged property.

The facts are these. Some of the defendants first party and the ancestor of others of those defendants were owners of the village Ahak and of shares in four other villages, namely, Surajpur, Raipur, Bamoti and Khera Buzurg. They mortgaged the aforesaid property to Brij Lal, the predecessor in title of the defendants [190] second party, by three instruments

^{*} First Appeal No. 247 of 1893 from a decree of Babu Ganga Saran, Subordinate Judge of Aligarh, dated the 23rd May 1893.

dated respectively, the 18th April, 1867, the 23rd August, 1868, and the 29th December, 1870, and they mortgaged the share in Khera Buzurg only to the plaintiff's father on the 18th April, 1868; so that the plaintiff became the second mortgagee of the share in Khera Buzurg, the first mortgage being that created in favour of Brij Lal by the instrument of the 18th April, 1867.

On the 9th April, 1879, Maya Ram who is now represented by the defendants second party, brought a suit upon the three mortgage deeds in favour of Brij Lal mentioned above, and claiming what he declared to be his share of the mortgage money prayed for the sale of the five villages mortgaged under those deeds. The Subordinate Judge of Aligarh made a decree in his favour on the 16th December, 1879, for sale of two only out of the five villages, namely, of Abak and Khera Buzurg. The plaintiff was not joined as a party to that suit.

The appellant is the purchaser of a portion of the share in Surajpur mortgaged to Brij Lal. The date of his purchase is the 11th of January, 1882.

On the 18th of September, 1874, the plaintiff obtained a decree on his mortgage of the 18th of April, 1868, for the sale of Khera Buzurg, and in execution of that decree he has purchased that village. Neither Maya Ram nor his representatives were parties to the plaintiff's suit for sale.

The plaintiff's case is that, as he was not a party to Maya Ram's suit, the decree obtained by Maya Ram is not binding on him, and he has still the right to redeem the prior mortgage of the 18th of April, 1867. He claimed the following reliefs in his plaint.

"(1) That out of the balance of the principal amount of the bond, dated the 18th of April, 1867, comprised in the decree dated the 16th of December, 1879, the rateable sum chargeable on the 10 biswas share of *mauza* Khera Buzurg may be ordered to be paid by the plaintiff to the defendants second party, and the aforesaid property may be declared on such payment to be free from their lien.

[191] "(2) That, if the Court should consider the rateable distribution of liability to be unfair, the whole amount may be ordered to be paid by the plaintiff to the defendants.

"(3) That, if the whole amount mentioned above is made payable, it may be declared as against all the defendants, that the properties specified (namely all the five villages mortgaged in the bond of the 18th April, 1867) are liable to be sold in satisfaction of the said amount and of the balance of the plaintiff's decree dated the 18th of September, 1874.

"(4) That, if rateable payment is ordered, it may be declared as against the defendants third party, that the ten biswas share of *mauza* Khera Buzurg is not liable to be sold in satisfaction of the rateable sum to be determined by the Court and the sum due on the plaintiff's decree as prior liens."

The Court below has declared the amounts due on the mortgage bonds of the 18th of April, 1867, and the 18th of April, 1868, and it has made a decree to the effect that the plaintiff should pay to the defendants second party the amount due on the mortgage of the 18th of April, 1867; that the defendants first and third parties should pay to the plaintiff the said amount, as also the amount due to the plaintiff on his mortgage of the 18th of April, 1868; that in the event of the aforesaid defendants failing to pay the amounts abovementioned the whole of the property

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mortgaged under the instrument of the 18th of April, 1867, should be sold for realization of the amount due upon that mortgage.

The only contention raised on behalf of the appellant is that, inasmuch as the decree obtained by Maya Ram on the 16th of December, 1879, was limited to the villages Ahak and Khera Buzurg, Maya Ram ceased to have a mortgage lien on the share in Surajpur after the date of that decree; that the appellant therefore purchased a part of that share free from any lien, and that, as there was no subsisting mortgage on that share in favour of Maya Ram for the plaintiff to redeem, the Court below has erred in making a decree for the sale of that share.

[192] On the other hand Mr. *Sundar Lal* has contended on behalf of the plaintiff that, as the plaintiff was not a party to the suit in which Maya Ram obtained his decree, the plaintiff was, under the provisions of section 74 of Act No. IV of 1882, entitled to redeem the prior mortgage of the 18th of April, 1867; that on redeeming that mortgage he would acquire all the rights which existed in the first mortgagee on the date of his mortgage and would be entirely unaffected by what might have happened in the interval in respect of the first mortgage, and that the plaintiff would therefore have the right to bring to sale all the properties comprised in that mortgage, and this notwithstanding the fact that the prior mortgagee himself had no such right by reason of the dismissal of a part of his claim.

We are unable to accede to this contention. It is beyond question that the rights of a prior mortgagee are superior to those of a puisne incumbrancer. It is also beyond doubt that a second or subsequent mortgagee cannot in the absence of fraud control the action of the first mortgagee in respect of the mortgage held by the latter. It cannot be disputed that the right of redemption presupposes the existence of a mortgage on certain property which at the time of redemption is security for the money due to the mortgagee. It therefore follows that the only property which a second or other subsequent mortgagee may redeem is the property on which the first mortgagee is entitled to enforce his security. From the very necessity of things the right of redemption can be exercised in respect of such property only as is subject to a mortgage capable of enforcement.

That being so, when a second or other subsequent mortgagee redeems a prior mortgage he relieves from liability for that mortgage such property only as is under such liability at the date of redemption, and under the provisions of section 74 of Act No. IV of 1882 "he acquires in respect of the property all the rights and powers of the prior mortgagee as such." There can be no doubt that the property referred to in the section is the property redeemed from the prior mortgage, and not property which may originally [193] have been comprised in the mortgage, but on which the mortgage had ceased to exist. This is evident from the fact that the section confers on the person redeeming the mortgage the rights and powers of the first mortgagee, and, as those rights and powers could not be exercised by the first mortgagee in respect of property other than that on which his mortgage subsisted, it is clear that a second or subsequent mortgagee by redeeming a prior mortgage acquires the prior mortgagee's right in respect of that property only which is redeemed by him. He cannot, in our judgment, acquire any higher right than that of the mortgagee whom he redeems, and therefore he cannot claim that he can recover the money paid by him in order to discharge the first mortgage by sale of all the property originally comprised in that mortgage, notwithstanding that portions of that property may have, at the time of redemption,

ceased to be subject to that mortgage. In our opinion the position of a puisne incumbrancer who redeems a prior mortgage is not analogous to that of a surety who pays a debt due by his principal and acquires the benefit of all the security held by the creditor against the principal at the date of the contract of suretyship. There can be no doubt that a mortgagee is competent to release a portion of the mortgaged property on receipt of part payment of the mortgage money. It was held by this Court in *Lachmi Narain v. Muhammad Yusuf* (1) that such a release has not the effect of breaking up the mortgage security. Where a portion of the mortgaged property has thus been released by the mortgagee his rights and powers under his mortgage are to realise the balance due to him by sale of the remainder of the mortgaged property. As, under s. 74 of Act No. IV of 1882, a puisne incumbrancer by redeeming a prior mortgage acquires only the rights and powers of the prior mortgagee, all that he becomes entitled to by virtue of the redemption is the right and power to recover the amount paid by him for redemption by sale of the property on which the prior mortgagee, could enforce his mortgage. In our opinion any other view would be [194] inconsistent with the rights of a prior mortgagee, which are undoubtedly superior to those of a second or other subsequent mortgagee, and the provisions of section 74 of Act No. IV of 1882 negative rather than support the contention of learned vakil for the respondent.

In this case the decree passed in favour of Maya Ram on the 16th of December, 1879, on the basis of the mortgages held by him limited his right of sale only to the two villages Ahak and Khera Buzurg. Whether that limitation was made advisedly, or was the result of an oversight on the part of the Judge who made the decree, it is not necessary for us to consider. We have the fact that the decree did not confer on Maya Ram the right to bring any other property to sale; so that after the date of the decree Maya Ram lost the right to enforce his mortgage on any of the mortgaged villages other than Ahak and Khera Buzurg. The statement contained in the plaint that the decree of the 16th of December, 1879, declared Maya Ram's lien on all the five villages comprised in his mortgage is erroneous, and the Subordinate Judge's assumption that the omission of other villages from the decree was a verbal error was wholly gratuitous. As we have said above, Maya Ram was not entitled after the date of that decree to fall back on his original mortgages and to bring to sale any of the villages excluded from the operation of the decree. The fact of the plaintiff's not being a party to the suit in which the decree was passed did not place him in a better position. The only effect of the omission to join him as a party was to preserve to him the right to redeem the prior mortgage. By such redemption he acquired, under section 74 of Act No. IV of 1882, the rights and powers of Maya Ram, and as those rights and powers did not extend beyond the right to sell up the two villages against which the decree was passed, the plaintiff cannot claim to bring to sale any of the three villages in respect of which Maya Ram's suit must be held to have been dismissed. As the share in Surajpur purchased by the appellant was a part of the property on which Maya Ram had ceased to have a mortgage lien, the plaintiff was not entitled to a decree for the sale of the [195] share and the decree granted to him by the Court below cannot be sustained.

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It was urged by Mr. *Sundar Lal* that Rs. 913, part of the interest due on the bond of 1867, was included in Brij Lal's bond of the 23rd of August, 1868, and as the heirs of Brij Lal other than Maya Ram obtained a decree for the sale of all the mortgaged property under the bond last mentioned, the plaintiff should be granted a decree for the sale of Surajpur for the realisation of that amount at least. The simple answer to this contention is that the claim as laid in the plaint is limited in terms to what was due to Maya Ram and to the amount comprised in the decree dated the 16th of December, 1879, and it is this claim only with which we have to deal.

We may observe that we are glad that we have been able to arrive at the above conclusion. The amount of the mortgage of the 18th of April, 1867, became payable, and the plaintiff's right to redeem that mortgage accrued, on the 18th of April, 1870. For a period of twenty years he took no steps to redeem that mortgage, and even after the decree of the 16th of December, 1879, he remained silent. The appellant purchased the share of Surajpur now in question in 1882. At that time had he, like a man of ordinary prudence, made inquiries, as we must presume he did, as to the previous incumbrances on the property, he could only have discovered that the mortgages created on it by the bonds executed in favour of Brij Lal had merged in the decree of 1879, and that under that decree no liability was imposed on the share in Surajpur.

If with such information before him he purchased the property, it would, in our opinion, be a hardship to him were he to be compelled, ten years after his purchase, to discharge a mortgage which the original mortgagee was incompetent to enforce against him, and which the plaintiff did not choose to redeem for such a length of time.

We allow this appeal, and, in modification of the decree below, we dismiss that portion of the plaintiff's claim which is directed against the appellant and the share in Surajpur purchased by him, with costs here and in the Court below.

Decree modified.

18 A. 196 = 16 A.W.N. (1896) 39.

[196] APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Blair.

IN THE MATTER OF THE PETITION OF KHWAJA MUHAMMAD YUSUF.* [6th January, 1896.]

Civil Procedure Code, s. 596—Application for leave to appeal to Her Majesty in Council—Value of property affected by decree.

In an application for leave to appeal to Her Majesty in Council the value of the property ostensibly affected by the decree sought to be appealed was below Rs. 10,000; but it appeared that the suit in appeal in which the said decree had been passed was connected with another suit relating to the same property in which a decree had been passed which was the subject of another similar application and that the aggregate value of the two decrees was much above Rs. 10,000 and that it could not be known which of such decrees would affect which specific portion of the property in question. *Held* that under the above circumstances the application under consideration should be granted under the last paragraph of s. 596 of the Code of Civil Procedure.

[R., 16 C.L.J. 591 (593) = 17 C.W.N. 526 (527) = 15 Ind. Cas. 897 (898).]

* Privy Council Application No. 18 of 1895.

THESE were two applications for certificates of leave to appeal to the Privy Council in two First Appeals, which had been disposed of by the High Court on the 17th of June 1895. The suits out of which those appeals arose were brought by different plaintiffs on different causes of action to recover debts from the estate of one Etkad Ali deceased, but in each of the suits the plaintiffs sought as against the defendant Muhammad Yusuf to have two documents said to have been executed by Etkad Ali in favour of Muhammad Yusuf set aside. The first of these documents was a document called an instrument of trust or hypothecation bond executed by Etkad Ali in favour of Muhammad Yusuf on the 25th July 1886. By that deed Etkad Ali, acknowledging a debt of Rs. 15,632-3-9 as due to Muhammad Yusuf, hypothecated certain landed property to him as security for the debt, and other property was also made over to Muhammad Yusuf in trust to pay off certain debts specified in the bond. The second deed which it was sought to set aside was a hypothecation bond for Rs. 7,000 executed in favour of Muhammad Yusuf by Etkad Ali on the 8th of August 1886.

These two suits were heard together by the Court of first instance and so far as the claim for the avoidance of the bonds in favour of the present applicant Muhammad Yusuf were concerned, were dismissed.

The plaintiffs appealed to the High Court, again urging that the deeds of the 25th of July 1886 and the 9th of August 1886, were void as against them.

[197] In each case the High Court made a decree declaring that the deeds in question were null and void as against the plaintiff appellants. The defendant Muhammad Yusuf thereupon applied for leave to appeal to Her Majesty in Council.

Pandit *Sundar Lal*, for the applicant.

Mr. *Amiruddin*, for the opposite parties.

JUDGMENT.

KNOX and BLAIR, JJ.—Khwaja Muhammad Yusuf applies for a certificate showing that his case is a fit one for appeal to Her Majesty in Council. The value of the subject-matter of the suit and the value of the matter in dispute on appeal to Her Majesty in Council is Rs. 5,769 odd. Upon notice being served upon the opposite parties counsel appeared to show cause, and contended that, as the case was one which did not fulfil the requirements of s. 596 of the Code of Civil Procedure, the certificate asked for should not be granted. In reply it was brought to our notice that this application is not the only one to be considered; there are before us in fact two applications, one being Privy Council application No. 17 of 1895 and the other Privy Council application No. 18 of 1895. In the first of these applications the value of the matter in dispute on appeal to Her Majesty in Council exceeds Rs. 5,810. The property affected by both these applications is the same property. No distinction can be drawn as to which part of it will be affected by the application No. 17 and which part by the application No. 18. Khwaja Muhammad Yusuf is petitioner in both the cases. The other parties in each case are, it is true, different persons. They were plaintiffs in the Court of first instance, and they sought to enforce their respective claims upon the property in dispute and to obtain a declaration from the Court that, so far as that property was concerned, certain deeds put forward by Khwaja Muhammad Yusuf setting up claims of Rs. 25,000 and more and of Rs. 7,000 over the same property might be declared null and void. On these grounds it was urged

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that the case was one in which the decrees already passed and those which would have to be passed by Her Majesty in Council would be decrees which must involve directly or indirectly claims or questions to or [198] respecting property the value of which was ten thousand rupees or upwards. In the Court below, and also in appeal in this Court, though there appears no consolidating order in distinct terms, the suits were practically treated as one. Formal and detailed judgment was delivered in one only; in the other all that the judgment set out was that upon the principles treated in the judgment in the first case a similar decree be issued in the second. It seems to us that the case is one which we ought to certify as being a fit one for appeal to Her Majesty in Council on the ground that the decree to be passed is one which must involve directly or indirectly claims or questions to or respecting property exceeding ten thousand rupees in value. We grant the application with costs, and direct that a certificate be issued in these terms.

Application granted.

18 A. 198 (F.B.) = 16 A.W.N. (1896) 28.

FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox,
Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burkitt and
Mr. Justice Aikman.*

MUHAMMAD YUSUF (*Defendant*) v. THE HIMALAYA BANK, LIMITED
(*Plaintiff*).^{*} [15th January, 1896.]

Act No. VI of 1882 (Indian Companies Act), s. 144—Suit by Official Liquidator—Description of plaintiff—Civil Procedure Code, s. 53—Amendment of plaint—Limitation—Act No. XV of 1877 (Indian Limitation Act), s. 22.

In a suit to recover a debt due to a Company which had gone into liquidation the plaintiff was described in the plaint as "The Official Liquidator, Himalaya Bank, Limited, in liquidation," and the plaint was signed and verified in the same terms. On objection taken by the defendant, the plaint was allowed to be amended, but after the period of limitation prescribed for the suit had expired, so as to read "The Himalaya Bank, Limited, in liquidation, plaintiff." Held by the Full Bench that the plaint as originally filed was in substantial compliance with the provisions of Act No. VI of 1882; and that even if it might be considered that the amendment made was necessary, such amendment did not introduce a new plaintiff into the suit so as to let in the operation of s. 22 of Act No. XV of 1877. *Ghulam Muhammad v. The Himalaya Bank, Limited* (1) overruled; *In re Winterbottom* (2) distinguished.

[Appr., 7 C.W.N. 817 (821).]

[199] THE suit out of which this appeal arose was brought by the Official Liquidator of the Himalaya Bank, Limited, to recover a sum of Rs. 885, with interest and costs, alleged to be due on a promissory note which had been discounted by the Bank. The due date of the note was the 16th of December 1887; but there had been a payment of Rs. 600 made on account of the debt by the defendant on October the 22nd, 1889.

The plaint as originally framed was headed—"The Official Liquidator, Himalaya Bank, Limited, in liquidation.....plaintiff," and the

* Second Appeal No. 558 of 1895, from a decree of H. Bateman, Esq., District Judge of Saharanpur, dated the 8th February 1895, confirming a decree of B. Lindsay, Esq., Subordinate Judge of Dehra Dun, dated the 1st October 1894.

(1) 17 A. 292.

(2) L.R. 18 Q.B.D. 446.

signature to the plaint itself and to the verification ran as follows :—" W. D. Henry, Official Liquidator, the Himalaya Bank, Limited, in liquidation."

On objection taken by the defendant a clause was subsequently added to the plaint by permission of the Court, stating that the Himalaya Bank went into liquidation on the 8th of July 1891, and that Mr. W. D. Henry, had been appointed official liquidator by the District Judge of Saharanpur acting under s. 142 of Act No. VI of 1882, on the 13th of June 1892.

The defendant further objected that the suit was wrongly brought in the name of the official liquidator instead of in the name of the Bank. The Court on this objection allowed the plaint to be amended, which was done on the 23rd of August 1893, by striking out the words " Official liquidator "; so that the heading of the plaint then ran :—" The Himalaya Bank, Limited, in Liquidation, plaintiff."

When the suit came up for final disposal, the defendant pleaded that in the plaint as originally framed the plaintiff was wrongly described as the official liquidator instead of the Bank, and that the amendment of the plaint made on the 23rd of August 1893, constituted the addition or substitution of a new plaintiff, in consequence of which, applying section 22 of the Indian Limitation Act, 1877, the suit was barred by limitation.

The Court of first instance (Subordinate Judge of Dehra Dun) overruled this objection, holding that there was no introduction of a new plaintiff, even if the original heading of the plaint amounted [200] to anything more than an immaterial misdescription. The Court also found against the defendant on the merits and decreed the plaintiff's claim.

The defendant appealed, and the lower appellate Court (District Judge of Saharanpur) dismissed the appeal.

The defendant appealed to the High Court. The appeal came before a Division Bench, by order of which, dated the 11th January 1896, it was referred to the Full Bench.

Mr. J. Simeon, for the appellant.

Mr. W. K. Porter, for the respondent.

JUDGMENT.

EDGE, C.J.—This is an appeal from the decree of the District Judge of Saharanpur dismissing the defendant's appeal from the decree of the Subordinate Judge of Dehra Dun. The suit was brought to obtain payment of a debt due upon a note which had been discounted by the Himalaya Bank, Limited. Before the suit was brought the Himalaya Bank, Limited, had gone into liquidation, and Mr. W. D. Henry had been appointed official liquidator. As the plaint was filed originally the plaintiff was thus described :—" Official Liquidator, Himalaya Bank, Limited, in liquidation, plaintiff." An objection was subsequently taken on behalf of the defendant that the official liquidator was not entitled to sue describing himself as plaintiff. The plaint was subsequently amended, and the plaintiff was by the amendment thus described :—" The Himalaya Bank, Limited, in liquidation, plaintiff."

In this appeal on behalf of the appellant it has been contended that the plaint as originally filed was not in compliance with section 144 of Act No. VI of 1882, which, so far as is material, is as follows :—" The official liquidator shall have power, with the sanction of the Court, to do the

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[* This appeal was referred to the Full Bench in consequence of the decision in 17 A. 292.—ED.]

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following things—(a) To bring and defend any suit or prosecution or other legal proceeding, Civil or Criminal, in the name and on behalf of the Company." It was also contended that the alteration in the description of the plaintiff by the amendment constituted a new plaintiff in the suit within the meaning of section 22 of Act No. XV of 1877, and the judgment of this Court in *Ghulam Muhammad v. The Himalaya Bank, [201] Limited* (1) and of the Queen's Bench Division in England in *In re Winterbottom* (2) were relied on.

Section 144 of Act No. VI of 1882 is for practical purposes, so far as this case is concerned, the same as section 95 of 25 and 26 Vict., Cap. 89. In the English case the notice which had been served was headed as follows:—"In the matter of John Winterbottom, *ex parte* Henry Grove Nicholson, liquidator of the Manchester and Oldham Bank, Limited." It was held there that although, looking at the body of the notice, the liquidator evidently was proceeding on behalf of the Company in liquidation, and although it appeared to those Judges that there was a substantial compliance with the law, a formal compliance was necessary and the notice was bad. It appears to me that in that case there was not a substantial compliance with law. The notice was expressly in violation of section 94 of 25 and 26 Vict., Cap. 89, which corresponds to section 143 of Act No. VI of 1882, and which prohibited the official liquidator describing himself by his individual name and required that when he acted he should describe himself by his official name, which was 'official liquidator.' Here Mr. Henry did use his official description and that only. In my opinion there was here certainly substantial compliance with the Act. It appears to me that if the plaintiff had been thus described:—"The Himalaya Bank, Limited, in liquidation, by the official liquidator, plaintiff,"—the description would have been unobjectionable. The objection to the plaint as originally framed seems to me to be a purely technical objection. The intention was obviously to comply with the requirements of the Act. Mr. Henry avoided using his individual name. Now who could have brought this suit? The Bank certainly of its own motion could not have brought the suit. Section 143 of Act No. VI of 1882 provides that the official liquidator "shall take into his custody or under his control all the property, effects and actionable claims to which the Company is, or appears to be, entitled, and shall perform such duties in reference to the winding up of the Company as may [202] be imposed by the Court." Under section 144 it is the official liquidator who is entitled to bring or defend a suit. It is true that under cl. (a) of section 144 when the liquidator does bring or defend a suit he must do so in the name and on behalf of the Company. Although the description in the heading of the plaint as originally framed probably was not quite accurate, still the suit was a suit brought by the official liquidator on behalf of the Company. Now, when the amendment was made, was any new plaintiff brought upon the record? As I have said, the Himalaya Bank, Limited, in liquidation of its own motion could not sue. The plaintiff, that is the person who was pursuing a remedy, was the official liquidator. Although the description of the plaintiff may have been incorrect, as the plaint was originally framed, in my opinion there was one and the same plaintiff all through. It strikes me that the case is somewhat similar to the hypothetical case which I am going to put. We will assume that a promissory note is made payable to John William

(1) 17 A. 292.

(2) L.R. 18 Q.B.D. 446.

Smith. Now unless John William Smith has parted with the note he is the only person who can sue on it. He brings a suit on the note describing himself simply as John Smith. The defendant objects that the plaintiff is improperly described, and the plaint is amended. It appears to me that the amendment by inserting the name William would not alter the plaintiff and would not add or substitute a new plaintiff to the suit. In conclusion, in my opinion, if there was a defect in the description of the plaintiff in the suit originally, the amendment did not bring a new plaintiff into the suit, and did not bring into operation section 22 of Act No. XV of 1877. It is not objected in appeal that the amendment is in itself objectionable; in fact the argument for the appellant has been that the amendment was necessary and provided the proper description of the plaintiff in the suit. I consequently would hold that this appeal should be dismissed.

KNOX, J.—As one of the Judges who decided the case of *Ghulam Muhammad v. The Himalaya Bank, Limited, in liquidation, through the Official Liquidator, plaintiff*, I think it necessary to add that, as we then stated, the decision at which [203] we arrived in that case was one to which we came unwillingly. I am now satisfied that in the present suit the plaintiff has been throughout one and the same person and that the pleas taken in appeal fail. The suit was not barred by limitation. At the time of the filing of the suit the official liquidator was the only person who had power to bring the suit. I would dismiss the appeal.

BLAIR, J.—I concur in the judgment of the Chief Justice and in the reasons by which that judgment is supported.

BANERJI, J.—I also concur in the judgment of the Chief Justice and in the reasons by which that judgment is supported.

BURKITT, J.—I also concur in the judgment of the Chief Justice and in the reasons by which that judgment is supported, and have nothing to add.

AIKMAN, J.—As one of the Judges who decided the case of *Ghulam Muhammad v. The Himalaya Bank, Limited*, I wish to add a few words. I concur with the learned Chief Justice in thinking that the plaint, as framed, substantially complied with the provisions of section 144 of the Indian Companies Act, 1882, but in the English case which has been referred to it was held that a substantial compliance with the law was insufficient, and that there must be formal compliance. In this view an amendment of the plaint was necessary, and that amendment was made in this case. I am satisfied on further consideration that when the plaint was amended no new party was brought upon the record so as to make the suit liable to defeat with reference to the provisions of section 22 of the Limitation Act, 1877. I concur with the learned Chief Justice and my colleagues in thinking that the appeal should be dismissed with costs.

Appeal dismissed.

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REVISIONAL CRIMINAL.

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Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

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BALWANT SINGH (*Applicant*) v. UMED SINGH (*Opposite party*).^{*}
[18th January, 1896.]

18 A. 203 =

16 A.W.N.

(1896) 31.

Criminal Procedure Code, s. 195—Sanction to prosecute—Necessary contents of application for sanction.

An application for sanction to prosecute for forgery or perjury must indicate precisely the document in respect of which forgery is said to have been committed, [204] or must set forth in detail the statements alleged to be false, showing the place where and the occasion on which such alleged false statements were made.

[F., 11 C.W.N. 119 (121) = 4 Cr. L.J. 454; R., 27 A. 468 (469) = (1905) A.W.N. 65; 36 C. 808 (813) = 9 C.L.J. 690 (693) = 13 C.W.N. 942 = 10 Cr. L.J. 150 = 2 Ind. Cas. 697 (699); 1913 U.B.R. 166 (167).]

THE facts of this case sufficiently appear from the judgment of the Court.

Messrs. T. Conlan and C. Ross Alston, for the applicant.

Mr. A. H. S. Reid and Babu Durga Charan Banerji, for the opposite party.

JUDGMENT.

EDGE, C.J., and BANERJI, J.—This is an application for the sanction of a prosecution of a party to an appeal in the High Court for using a forged document and for giving false evidence. The appeal was disposed of by a Full Bench of this Court on the 18th of February 1895. The application was made on the 23rd of November 1895, and to-day an affidavit, which was sworn on the 23rd of December 1895, was filed, the object of the affidavit being to account for the delay.

The second and third paragraphs of the application are as follows:—
“That in the judgment of the said Bench delivered on the said date it was found that the suit brought by the plaintiff-respondent was a false suit, based on a forged document and supported by false oral and documentary evidence.

“3. That circumstances are detailed in the body of the said judgment which furnish strong *prima facie* ground for the belief that the promissory note, the basis of the suit, was a forged document, and that the plaintiff's books of account filed by him as evidence to support his case were fabricated.” Then follows the prayer.

It appears to us that there are two objections to our granting sanction. It is not intended that a Court should grant an indefinite sanction to a prosecution for perjury or for using a false document. If it was intended by the Legislature that persons who considered themselves aggrieved by the use of forged documents or by perjury should be given a free hand to prosecute for any assignments of perjury or for the use of any document which they might choose to say was forged, there would have been no necessity for the Legislature to have enacted that an order for sanction should be required. Now, so far as the alleged perjury is [205] concerned, this application does not disclose one single assignment of perjury. It should have stated that sanction was asked for the prosecution of the respondent for perjury committed by him on a date named in

^{*} Criminal Revisional No. 681 of 1895.

stating falsely so and so, and so and so, and so and so. That is to say, the assignments of perjury for which sanction to prosecute was asked should be distinctly stated in the application. Again, where sanction is asked to prosecute for the use of a forged document, the document should be clearly earmarked on the face of the application. It should not be left to the Court which is asked to grant the sanction or to the Court which is to act on that sanction to find out by reference to another record what the document is in respect of which sanction is sought or given. In this case the application should have stated that the forged document, for example, was a document alleged to be a promissory note, for so much, bearing such a date, and purporting to be signed by so and so. These particulars would be necessary for an application of a similar kind in England, and where an order for sanction in this country may not only involve the liberty of the subject, but may put that subject to very great expense in defending himself, it is right that a Court should see that the application is in form, and gives full information, so that the order for sanction drawn up upon the application may set out precisely what the document is and what the assignments of perjury are for which sanction to prosecute is given.

On that ground alone we would dismiss the application. Applications for sanction to a prosecution for perjury, or for the use of false documents, should be made promptly or the delay should be satisfactorily accounted for. Where there is great delay in making the application, as in this case, a Court cannot help suspecting that the applicant is acting, not in the interests of justice, but for an indirect motive, possibly to worry, annoy and persecute his opponent. Orders for sanction to prosecute in these cases are made, not with the object of gratifying the applicant, but of securing the due administration of justice. We dismiss this application.

18 A. 206 = 16 A.W.N. (1896) 33.

[206] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

ABBASI BEGAM (*Plaintiff*) v. NANHI BEGAM AND OTHERS
(*Defendants*).^{*} [21st January, 1896.]

Civil Procedure Code, s. 403, et seqq—Application for leave to sue in forma pauperis—Subsequent payment of Court fees as for a regular suit—Limitation—Act No. XV of 1877 (Indian Limitation Act), s. 4, sch. ii, art. 104.

A. B. applied for leave to sue as a pauper for the recovery of certain dower alleged to be due to her. Upon her right to sue as a pauper being disputed by the persons proposed by her in her application for leave to sue as a pauper as defendants to the suit, A. B. paid into Court, the Court fee necessary for a regular suit to recover the amount claimed, and prayed that her original application might be treated as the plaint in the suit and the suit proceeded with in the ordinary manner. In the meantime, however, the period of limitation prescribed by art. 104 of sch. ii of Act No. XV of 1877 for a suit to recover deferred dower had expired. Held that the suit was barred by limitation, and that s. 5 of Act No. XV of 1877 could not be applied. *Skinner v. Orde* (1) distinguished. *Balkaran Rai v. Gobind Nath Tiwari* (2), *Jainti Prasad v. Bachu Singh* (3) and *Naraini Kuar v. Makhan Lal* (4), referred to.

[*Diss.*, 28 C. 427; *R.*, 24 C. 889; 4 O.C. 250; *D.*, 26 C. 925 (931).]

[*N.B.*—In 16 A.W.N. (1896) 33, the date of the judgment is given as January 31, 1896.—*Ed.*]

* First Appeal No. 294 of 1893, from a decree of Maulvi Jafar Husain, Subordinate Judge of Bareilly, dated the 5th September 1893.

(1) 2 A. 241 = 4 C.L.R. 331. (2) 12 A. 129. (3) 15 A. 65. (4) 17 A. 526.

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18 A. 203 =
16 A.W.N.
(1896) 31.

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THE facts of this case are fully stated in the judgment of the Court. Babu *Jogindro Nath Chaudhri* and *Maulvi Ghulam Muftaba*, for the appellant.

Mr. *A. H. S. Reid*, for the respondents.

JUDGMENT.

18 A 206=
16 A.W.N
(1896) 33.

EDGE, C. J., and BURKITT, J.—This is the plaintiff's appeal from the decree of the Subordinate Judge of Bareilly dismissing the plaintiff's suit for dower. The plaintiff's case was that she and Muhammad Mohib Ali Khan, who was generally known as Nabba Sahib and who was a member of the Rampur family, went through the ceremony of marriage in the *nikah* form some fifteen or sixteen years prior to 1893, that is to say, in 1877 or 1878. The plaintiff's case further was that it was agreed at the time of the *nikah* ceremony that her dower should be a lakh and [207] twenty-five thousand rupees. Nabba Sahib is dead: the dower has not been paid: hence this suit.

Nabba Sahib died on the 17th of October 1889. The period of limitation for a suit for deferred dower is prescribed by art. 104 of the second schedule of the Indian Limitation Act, 1877, and that period is three years from the date, in this case, when the marriage was dissolved by death. On the 16th of October 1892, the three years' period of limitation expired, but the Civil Court at Bareilly being closed for the Dasehra vacation prior to the 17th of October 1892, and remaining closed until the 25th of October in that year, the period of limitation was extended until the opening of the Court. That is the result of the first paragraph of s. 5 of the Act. On the 25th of October 1892, Musammât Abbasi Begam, who claims the dower, presented, under s. 403 of Act No. XIV of 1882, an application for permission to sue as a pauper. The application was in the form of a plaint with the prayer that she might be allowed to sue as a pauper. On the 25th of October 1892, when that application was presented, the Court ordered a notice to issue to the proposed defendants to show cause, and on the same 25th of October a notice was issued to the proposed defendants requiring them to show cause on the 10th of December following why Abbasi Begam should not be allowed to sue as a pauper. That notice was issued under s. 408 of Act No. XIV of 1882. On the 10th of December 1892, the Court passed an order adjourning the case until the 4th of February 1893. We may say that the application for leave to sue as a pauper had been entered as a miscellaneous case and not registered as a suit. When the 4th of February came, the defendants, who appeared under the guardianship of the Collector of Moradabad, filed a written statement, in which it was alleged that Abbasi Begam was in possession of clothes and gold and silver ornaments worth thousands of rupees; that the Collector had redeemed certain jewelry of hers worth Rs. 3,550, and had handed it over to her, and that she had in her possession jewelry, ornaments and goods worth about Rs. 22,000. That written statement was apparently filed as the [208] defendant's case on which they would rely at the hearing of the miscellaneous application of Abbasi Begam for permission to sue as a pauper. It had the desired effect, for on the same day, namely the 4th of February 1893, Abbasi Begam prayed for an adjournment, as she was not prepared to go on. The adjournment was granted on the terms of her paying the pleader's fee for the day. That fee was paid, and the case stood adjourned to the 6th of February, which was the next Court day. On the 6th of February Abbasi Begam presented a petition praying that her

petition of the 25th of October 1892, might be treated as her plaint in the suit, and she brought into Court court fee stamps to the value of Rs. 1,549-8-0, which were the stamps necessary for filing a regular suit. She alleged in her petition that her friends with difficulty had raised the money for her. If her case had been a true one, and she was a pauper, there was no necessity to put her friends to the trouble of raising the Rs. 1,549-8. But in fact her case as regards pauperism was false. There is evidence upon the record, and there has been no attempt made to contradict it, which shows that the woman was not a pauper. Mirza Muhammad Husain, who had been the general attorney of Nabba Sahib, tells us that he had told the Collector that Abbasi had goods and furniture worth about Rs. 25,000. She herself says that she had presented a petition to the Collector, apparently to have some ornaments redeemed, and that the Collector having redeemed them had made the ornaments over to her. The facts and dates to which we have referred are sufficient to show that Abbasi had no intention of paying court fees, and had every intention to persist in her application for leave to sue as a pauper, until the Collector, as the agent of the Court of Wards and the guardian of the defendants, on the 4th of February filed his answer to her petition, and that answer no doubt Abbasi Begam could not meet and did not attempt to meet. The Subordinate Judge on the 6th of February 1893, misunderstood and misapplied the principle of the decision in *Skinner v. Orde* (1), and made an order by which the petition for permission to sue as a pauper was to be treated as the plaint in the suit. The Subordinate Judge did not observe that the case of *Skinner v. Orde* was decided on a prior Code of Civil Procedure, and that it was decided apparently to some extent on the belief that there was a practice in the Courts in India which justified what had taken place in that case. We have to deal with the present Code of Civil Procedure, and we know of no practice existing in these Provinces by which the Courts recognise any infringement of the specific provisions of the Court-fees Act. The present Code of Civil Procedure provides for the procedure to be followed on the presentation under s. 403 of a petition for leave to sue as a pauper. It provides for an inquiry into the alleged pauperism, and enacts in s. 409 that the Court having held that inquiry "shall then either allow or refuse to allow the applicant to sue as a pauper." Under s. 410 if the application be granted, it shall be numbered and registered and shall be deemed to be the plaint in the suit. It was not necessary for the Legislature to enact that, if the Court did not grant permission to sue as a pauper, the proceedings could not be continued on the basis of the petition being numbered and registered and treated as a plaint. On the refusal to allow an applicant to sue as a pauper the application would be dismissed and there would be an end of it. Section 413 shows that on a refusal under s. 409 to allow an applicant to sue as a pauper the refusal shall be a bar to any subsequent application of a like nature, but the applicant shall be at liberty to institute a suit in the ordinary manner, provided that he first pay the costs incurred by the Government. Instituting a suit in "the ordinary manner" includes the risk of s. 4 of the Indian Limitation Act, 1877, applying to the suit at the date of its institution. It is not contemplated in the Code of Civil Procedure that a person may present a petition for leave to sue as a pauper, and, after the law of limitation

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(1) 2 A. 241 = 4 C.L.R. 331.

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has become a bar to any suit, elect to dispauperise himself and to proceed as if his petition for leave to sue as a pauper was a regular plaint in an ordinary suit at the date when it was filed. It has been decided by this Court that the effect of the Court-fees Act is [210] that a plaint if not properly stamped within limitation is not a good plaint to prevent the law of limitation from applying to the suit. We may refer to the following decisions of this Court on the points which we have just been discussing—viz., *Balkaran Rai v. Gobind Nath Tivari* (1); *Jainti Prasad v. Bachu Singh* (2); *Naraini Kuar v. Makhan Lal* (3). On this ground alone we would dismiss this appeal. When the stamps in this case were paid into Court, any suit by Abbasi Begam for dower was already time barred. The Subordinate Judge had no power under section 5 of the Indian Limitation Act, 1877, to extend the period of limitation beyond the 25th of October 1892: consequently his order of the 6th of February was ineffectual.

[The judgment then went on to consider the appeal upon the merits, but the remaining portion is not material for the purposes of this report.—ED.]

18 A. 210 = 16 A.W.N. (1896) 30.

APPELLATE CIVIL.

Before Mr. Justice Knox.

TULSI PRASAD (*Objector*) v. MATRU MAL AND ANOTHER
(*Applicants*).^{*} [24th January, 1896.]

Act No. XIX of 1873 (*N.-W.P. Land Revenue Act*), ss. 111, 112, 113, 114, 214, 219—*Decision of question of title by a Court of Revenue—Ex-parte decision—Appeal—Objection filed after time limited by Court but before action taken under s. 113.*

Held that the provisions of ss. 214 and 219 of Act No. XIX of 1873 do not apply to an *ex parte* decision of a question of title by a Court of Revenue acting under s. 113 of the said Act.

Held also that a Court of Revenue acting under s. 113 of Act No. XIX of 1873 was not precluded from dealing with an objection brought before it merely by reason of such objection not having been filed within the time limited by the Court for filing objections, the Court not having up to that time taken any action under s. 113 of the said Act. *Muhammad Abdul Karim v. Muhammad Shadi Khan* (4) distinguished.

[R., 17 C.P.L.R. 10; 5 Ind. Cas. 107 (108).]

THE respondents Matru Mal and Behari Lal applied on the 14th of September 1891, under s. 108 of the North-Western Provinces Land Revenue Act, 1873, for perfect partition of their joint share in Kasba Purdilnagar. On this application the Assistant Collector fixed the 1st of December for filing objections under s. [211] 111 of the said Act. Objections were filed by Tulsi Prasad and another on the 2nd December 1891, the objections being mainly to the effect that the share of the applicants if partitioned ought to be made liable for a proportionate part of a certain *malikana* allowance alleged to be payable from the whole mahal. At the hearing, which took place on the 23rd of November 1892,

^{*} Second Appeal No. 113 of 1895, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 13th December 1894, confirming an order of W. Tudball, Esq., Assistant Collector of Aligarh, dated the 23rd November 1894.

(1) 12 A. 129.

(3) 17 A. 526.

(2) 15 A. 65.

(4) 9 A. 429 = 7 A.W.N. (1887) 81.

the objectors were not present and the matter was dealt with *ex parte*. The Assistant Collector granted the prayer for partition, disallowed the objections and decided that the applicants' share should not be made liable to payment of malikana.

Against this order in respect of the payment of malikana the objector, Tulsi Prasad, appealed to the District Judge. The District Judge found that the decision of the Assistant Collector was a decision of a purely executive nature, and dismissed the appeal on the ground that no appeal lay to him. From this dismissal Tulsi Prasad appealed to the High Court.

Pandit *Sundar Lal*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondents.

JUDGMENT.

KNOX, J.—This is a second appeal from an order passed by the District Judge of Aligarh, confirming an order passed by an Assistant Collector of Aligarh. The Assistant Collector had before him certain partition proceedings. In the course of these proceedings the appellant raised a claim to the effect that the land which was being partitioned should be made subject to the payment of certain *malikana* and not be released from the payment of that *malikana*. The Collector decided that he was entitled to make any record which seemed to him just and proper under the circumstances and decided that the share of the respondent should not be burdened with any portion of the *malikana* in question. The District Judge held that this order of the Assistant Collector was an order not of a judicial character but of an executive character, and therefore not open to an appeal to the District Judge.

In appeal before me it is urged that the order was one from which an appeal lay to the lower appellate Court. In reply the learned vakil who holds the brief of the counsel for the respondents did not [212] merely contend that the order was an order of an executive nature, but he further attempted to sustain the order on two other grounds. The first of these grounds was that the order in question was an order passed *ex parte*, and that by s. 214 read with s. 219 no appeal lay. Sections 214 and 219 are sections which govern proceedings of a judicial nature in Revenue Courts. We have, however, held in this Court that when a Revenue Court proceeds to determine questions of title under s. 113 of the North Western Provinces Land Revenue Act of 1873, it is in effect, and must be deemed to be for that purpose, a Court of Civil Judicature. Section 113 expressly lays down, and is followed by s. 114 in laying down, that to all such proceedings the procedure laid down in the Code of Civil Procedure for trial of original suits and regarding the right of appeal applies. This contention therefore fails.

It was next urged that the objection of the appellant in these partition proceedings was not an objection contemplated by s. 113 of the North-Western Provinces Land Revenue Act, inasmuch as it was not filed in the Revenue Court on or before the day specified for the filing of such objection, namely the 1st of December. It was filed on the 2nd of December, before the Revenue Court took action under s. 113, and I was referred to a case, *Muhammad Abdul Karim v. Muhammad Shadi Khan* (1), in support of this contention. In that case, however, the objections dealt with were objections filed after action had been taken by the Court

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under s. 113. I cannot believe that that case was intended to include objections which were filed before the Court took action under s. 113, and specially objections which were dealt with by the Court acting under s. 113.

This contention therefore also fails. As regards the merits I have no doubt whatever that the question whether land to be partitioned is subject to the payment of *malikana* is a question of title. I therefore decree this appeal, set aside the order of the Court below and remand the case under s. 562 of the Code of Civil [213] Procedure with directions to the lower appellate Court to readmit the case upon its file of pending appeals and dispose of the case upon its merits. Costs to abide the result.

Appeal remanded.

18 A. 213=16 A.W.N. (1896) 32.

REVISIONAL CRIMINAL.

Before Mr. Justice Aikman.

IN THE MATTER OF THE PETITION OF BANARSI DAS.*
[27th January, 1896.]

Criminal Procedure Code, s. 195—Sanction to prosecute—Sanction granted by Court without application being made by the person to whom it is granted.

A sanction to prosecute under section 195 of the Code of Criminal Procedure presupposes an application for sanction, and where no such application is made a Court ought not to take upon itself to grant sanction, but should take action in the manner provided by section 476 of the Code *Empress of India v. Gobardhan Das* (1) referred to.

[F., 2 C.L.J. 619 (621)=10 C.W.N. 222=3 Cr.L.J. 112; R., 34 C. 351=9 C.W.N. 277 (280); U.B.R. (1907) Cr. P. C. 1 (2)=6 Cr. L.J. 25; 13 Cr. L.J. 4 (5)=13 Ind. Cas. 97.]

[N.B.—In 16 A.W.N. (1896) 32, the date of the judgment is given January 25, 1896.—Ed.]

THE facts of this case sufficiently appear from the judgment of Aikman, J.

Mr. C. Ross Alston and Babu Jogindro Nath Chaudhri. for the applicant.

Munshi Madho Prasad, for the opposite party.

The Government Pleader (Munshi Ram Prasad), for the Crown.

JUDGMENT.

AIKMAN, J.—This is an application for the revision of an order of the Sessions Judge of Gorakhpur. From the record submitted it appears that one Lalla was sent up by the Police for trial on a charge of attempt to commit house-breaking by night. He was convicted by Mr. Lemaistre, Deputy Magistrate, and sentenced to six months' rigorous imprisonment. On appeal he was acquitted by the Sessions Judge. The following are the concluding words of the Sessions Judge's appellate judgment:—"The appeal is allowed and the conviction and sentence of Lalla are quashed. He will be immediately released, and is at liberty to prosecute Banarsi Das under sections 211, 193, Penal Code, or other sections applicable, for getting up

* Criminal Revision No. 685 of 1895.

(1) 3 A. 62.

and falsely testifying in this case." This order was passed on the 27th of April 1895. On the 23rd of October following Lalla filed a complaint against Banarsi Das the applicant, for offences punishable under sections [214] 211 and 193 of the Indian Penal Code. An objection was taken that there was no sanction for the prosecution. The Magistrate overruled this objection. The applicant then petitioned the Sessions Judge, who passed the following order:—"The application is rejected. The sanction is perfectly adequate, and I intended it to be a sanction." It is this order the revision of which is prayed for.

It is urged that the so-called sanction is not a proper sanction. It appears that no application was made for sanction. In my opinion, this being the case, the Sessions Judge, if he considered that there was ground for inquiring into an offence referred to in section 195 of the Code of Criminal Procedure, ought to have himself taken action under the provisions of section 476 of the Code, and not to have left it to a private person to take proceedings if he felt so inclined. In the case *Empress of India v. Gobardhan Das* (1), which was decided under the former Code of Criminal Procedure, Pearson, J., remarked that section 468 of the then Code, which corresponds to section 195 of the present Code, presupposed a complaint or at least an application for sanction for a complaint. S. 468 of that Code differs, it is true, from section 195 of the present Code. The former section provides that a complaint of offences against public justice shall not be entertained in the Criminal Courts except with the sanction of the Court before or against which the offence was committed or some other Court to which such Court is subordinate. S. 195 provides that no Court should take cognizance of such offences except with the previous sanction or on the complaint of the Court or some Court to which it is subordinate. It has been held that "sanction" here refers to cases in which a prosecution is instituted by some private person, whilst the word "complaint" refers to cases in which the Court itself takes action under section 476. The learned Government Pleader contends that sanction may be given, even though no application for sanction has been made. The question is not free from difficulty, but I am inclined to think [215] that a sanction presupposes an application for sanction, and that where no such application is made, a Court ought not to take upon itself to grant sanction, but should take action in the manner provided by section 476. I cannot agree with the Sessions Judge in thinking that his sanction in this case was "perfectly adequate." It did not comply fully with the provisions of section 195.

As to the merits of the case, it is urged that there is no ground for the institution of a prosecution against the applicant. I have read through carefully all the evidence which was recorded in the case for both and against Lalla, and I am clearly of opinion that this is not a case in which the complainant, Banarsi Das, should be prosecuted. If the concluding remark of the Sessions Judge in his judgment can be looked upon as a sanction, I revoke that sanction and direct that any proceedings instituted upon it be stayed and abandoned.

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(1) 3 A. 62.

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16 A.W.N.
(1896) 39.

18 A. 215 = 16 A.W.N. (1896) 39.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Blair.

R. WALL AND ANOTHER (*Applicants*) v. J. E. HOWARD AND OTHERS
(*Opposite parties*).^{*} [25th January, 1896.]

Act No. VI of 1882 (*Indian Companies Act*, ss. 162, 169, 214—*Appeal—Limitation*—*Act No. XV of 1877 (Indian Limitation Act)*, s. 12.

Held that no appeal lay from an order made under section 162 of Act No. VI of 1882, by a Court under the supervision of which proceedings in liquidation were being conducted declining to continue an investigation commenced by it under that section.

Held also that, whether or not the service of notice of appeal within three weeks provided for by section 214 of Act No. VI of 1882, implies that all the formalities prescribed for the presentation and admission of an appeal by the Code of Civil Procedure must first be gone through before notice of appeal can be served, a person appealing under the said section cannot avail himself of the provisions of section 12 of Act No. XV of 1877.

[F., 4 Ind. Cas. 872 (873) = 19 M.L.J. 511; R., 33 A. 641 (644) = 8 A.L.J. 719 (722) = 10 Ind. Cas. 908; 95 P.R. 1908 = 165 P.W.R. 1908.]

THE facts of this case are as follows :—

On the 13th of March 1894, a petition signed by R. Wall and others as contributories and creditors of the Agra Savings Bank, then in process of liquidation under the supervision of the Court, was presented to the District Judge of Allahabad. The petition purported to be made under sections 162 and 214 of the Indian Companies Act, 1882, and by it the petitioners asked for an inquiry into the conduct of certain officers of the bank, with the ultimate [216] object that a decree might be passed against the said officers, or such of them as might be found liable, under section 214 of the Act.

Upon this petition the then District Judge passed orders on the 16th of March 1894, to the effect that an inquiry would be held by the Court into the matters complained of in the petition, and fixing certain issues to limit and define the scope of the inquiry. On these issues the petition came up for hearing, before a different Judge from the Judge who had admitted the petition. After the hearing had lasted two or three days, on the 30th of April 1894, the District Judge passed an order dismissing the application so far as it was an application under section 214 of the Act, and awarding costs against the applicants, but allowing the hearing to proceed under section 162. On the 19th of May 1894 the latter portion of the application also was dismissed. On the same day a dispute as to the specification of the costs allowed under the order of the 30th of April was settled by an order of the Court, and a formal order or decree was ultimately drawn up, bearing date the 19th of May, and embodying the results of the orders of the 30th of April and the 19th of May.

Against the dismissal of their application, two of the petitioners appealed to the High Court. The memorandum of appeal was worded as an appeal against the orders of the District Judge of the 30th of April 1894 and the 19th of May 1894. This appeal was filed on the 2nd of June 1894, and notice was served on the last of the respondents on the 7th of June.

* First Appeal from Order No. 79 of 1894 passed by the District Judge of Allahabad.

Mr. W. K. Porter, for the appellants.

Mr. D. N. Banerji, Mr. W. Wallach, and Babu Satya Chandar Mukerji, for the respondents.

JUDGMENT.

KNOX and BLAIR, JJ.—This is a first appeal from an order passed by the District Judge of Allahabad. In the memorandum of appeal it is stated that the appeal is brought from an order dated the 30th of April 1894 and the 19th of May 1894. A memorandum of appeal can only deal with one particular order, but, as will be seen hereafter, part of the contention of the appellants is that the learned Judge gave an order on the 30th of April 1894 and [217] completed that order on the 19th of May 1894. The proceedings before the Judge out of which the order appealed against arose consisted of an application praying the Judge to grant an inquiry under section 162 and section 214 of the Indian Companies Act, 1882. Both the orders mentioned in the memorandum of appeal were as a fact passed upon the proceedings which arose out of that application. On the 30th of April, the Judge dismissed the application so far as any inquiry under section 214 of the Act was concerned. On the 19th of May he dismissed the application so far as it related to an inquiry under section 162 of the same Act. A third paper over and above the copies of the orders of the above-mentioned dates is attached to the memorandum of appeal. It is a paper about which much contention has arisen, partly because the Judge has not taken due care to comply with the form set out in the Civil Procedure Code, 1882, as the form according to which decrees should be drawn up, and partly because, after passing a formal order that the application, so far as the inquiry under s. 214 was concerned, should be dismissed with costs, he went on afterwards to hear the parties touching the question of what particular sums under the detail of costs should be allowed. Still, so far as we are concerned, the order or orders with which we have to deal can only be the orders dated the 30th of April and the 19th of May.

The counsel for the respondents took certain preliminary objections, contending that no appeal lay from these orders. If the order concerned was the order dated the 30th of April 1894, the notice required by section 169 of the Indian Companies Act, 1882, had not been given within three weeks after the order complained of had been made. If the order appealed from was the order of the 19th of May 1894, it was an order from which no appeal was allowed by law. It was not an order within the meaning of section 169 of the Indian Companies Act, 1882. In support of this contention we were referred to the precedents *in re Gold Company* (1) and *in re Imperial Continental Water Corporation* (2). We have no hesitation in saying that in our opinion an appeal does [218] not lie from an order like the present made under section 162 of the Act. The section in question gives the Court extraordinary powers which at its discretion it may or may not exercise. Proceedings taken under it are not proceedings to which of necessity there are parties. They may be begun, continued and ended by the Court at its discretion and without any parties before it. So far then as the order of the 19th of May is concerned, if that be the order appealed against, it is an order from which no appeal lies.

(1) L.R. 12 Ch. D. 77.

(2) L.R. 33 Ch. D. 314.

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18 A. 215=

16 A.W.N.

(1896) 39.

There remains the order of the 30th of April. Notice of the intention to appeal was not given until the 7th of June 1894. This is admitted by the parties. The appellants, however, contend that they are still in time. They could not, they say, give notice of their appeal against the order complained of in any manner other than that in which notices of appeal are ordinarily given under the Code of Civil Procedure. One of the necessary requisites before an appeal can be filed under the Code of Civil Procedure is that the memorandum of appeal must be accompanied by a copy of the decree appealed against. The learned Counsel drew our attention in support of this argument to a precedent of this Court—*In re Official Liquidator, Uncovenanted Service Bank, Limited, in liquidation*, (Miscellaneous No. 1 of 1891, decided on the 10th of April 1891). The case cited is undoubtedly an authority for holding that the words contained in section 169—"Manner in which notices of appeal are ordinarily given under the Code of Civil Procedure"—include the accompaniment of the memorandum of appeal by the documents required by the Code of Civil Procedure to be filed along with the memorandum of appeal. We give no opinion concerning this precedent, and we confine ourselves to the words set out in section 169. As the order complained of was dated the 30th of April 1894, and notice of appeal was not given until the 7th of June 1894, it is obvious that, unless the appellants can pray in aid some law by which the period of three weeks can be extended, their appeal, which is by statute subject to this restriction, cannot now be heard. The learned Counsel felt this difficulty and asked us to apply section 12 of the Indian [219] Limitation Act, 1877, and to exclude from the period of three weeks the time that was requisite for obtaining a copy of the order appealed against. He cited to us several precedents in which the provisions of this section or of the Limitation Act generally had been applied to periods of limitation prescribed under special laws. In each of these cases, however, the particular papers or proceedings in which this section was applied were papers or proceedings of the nature distinctly specified in section 12. The paper or proceeding to which we are now asked to apply this section is not a suit, not an appeal, not an application. It is a paper or proceeding distinct from all these, and we are unable to extend the provisions of section 12 to a paper or proceeding which is not distinctly named, or does not from its nature fall within the distinct terms of that section. We are therefore of opinion that notice of the appeal from the order complained of was not given within three weeks after such order had been made. We have repeatedly expressed from this Court the difficulties which attend the application of section 169 to proceedings in this country. There is great risk of considerable hardship arising, and we have therefore most carefully considered in the present proceedings whether, if such hardship has occurred in the present case, there was any alternative open to us other than that of dismissing this appeal. One loophole which the section gives is the power to extend the time which it permits Courts of appeal to apply. In this case that power of extension has been specifically asked for. It has been refused by this Court, and we can only apply the law and dismiss this appeal with costs.

Appeal dismissed.

18 A. 219 = 16 A.W.N. (1896) 33.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

RAHIM BAKHSH (*Defendant*) v. AMIRAN BIBI AND OTHERS
(*Plaintiffs*).^{*} [29th January, 1896.]

Misjoinder of causes of action—Suit by one plaintiff claiming by inheritance and another claiming as assignee from the first—Civil Procedure Code, sections 31, 45, 53.

Where two plaintiffs joined in a suit for the recovery of immoveable property, the one claiming a title by inheritance and the other a title by assignment from the [220] first plaintiff, it was held that the suit was bad for misjoinder of causes of action. *Salima Bibi v. Sheikh Muhammad* (1) followed.

[R., 16 Ind. Cas. 623 (624) ; 3 O.C. 215 (218).]

THIS was a suit for the recovery of immoveable property. The plaintiffs alleged that one Muhammad Shakur-ullah was owner and in possession of the property in dispute, and that he died on the 12th of July 1881, leaving Sakina, his wife, and Fateh Ali, a cousin, as his heirs; that Sakina died on the 25th March 1883; that the defendant Rahim Bakhsh thereafter took possession of the whole property and that Fateh Ali died on the 29th August 1884, whereby the property descended to the plaintiffs, Amiran, the wife, and Abdul Sattar, the nephew of Fateh Ali. Amiran sold a portion of her share to Muhammad Hasan who joined her and Abdul Sattar as a plaintiff in the suit. The plaintiffs prayed for possession and mesne profits.

Rahim Bakhsh, the principal defendant, pleaded *inter alia* that "the amount of share of each of the plaintiffs is specified and separate and one plaintiff has nothing to do with the other, consequently the collective suit on behalf of all the plaintiffs without specification of rights and shares is not entertainable."

Upon this the Court of first instance (Subordinate Judge of Gorakhpur) framed an issue:—"Has the suit been properly framed?"—and, deciding this issue in favour of the plaintiffs, went on to the suit on the merits and ultimately decreed the plaintiffs' claim.

The defendant, Rahim Bakhsh, appealed to the High Court.

Messrs. *D. N. Banerji* and *E. A. Howard*, for the appellant.

Mr. T. Conlan and *Pandit Sundar Lal*, for the respondents.

JUDGMENT.

BANERJI and AIKMAN, JJ.—This appeal was preferred by Sheikh Rahim Bakhsh, one of the defendants to the suit. The suit was brought by three plaintiffs, two of whom claimed to be heirs to one Fateh Ali, who was alleged to have once been the owner of the property claimed. The third plaintiff, Muhammad Hasan, was an assignee from Musammat Amiran, the first plaintiff, of a portion of the share claimed by her. Rahim Bakhsh, among other pleas, raised an objection to the frame of the suit, on the ground [221] that one plaintiff had nothing to do with the others and that a collective suit on behalf of all the plaintiffs could not be entertained.

* First Appeal No. 309 of 1893 from a decree of Syed Siraj-ud-din, Subordinate Judge of Gorakhpur, dated the 22nd May 1893.

[In 16 A.W.N. (1896) 33, this is cited as First Appeal No. 209 of 1893.—ED.]

(1) 18 A. 131.

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18 A. 219 =
16 A.W.N.
(1896) 33.

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(1896) 33.

He evidently meant that there was a misjoinder of plaintiffs and causes of action. The first issue raised in the Court below had reference to this plea and it is evident from the judgment of the Subordinate Judge that he understood the plea to be one of misjoinder of plaintiffs and causes of action. The Subordinate Judge, however, overruled that plea and on the merits found in favour of the plaintiffs. The objection as to misjoinder of causes of action has been raised again in the memorandum of appeal to this Court, and we are of opinion that it must prevail. The same question arose in the case of *Salima Bibi v. Sheikh Muhammad* (1) and it was decided in that case that the cause of action of an assignee, like the respondent, Muhammad Hasan, was not the same as that of his assignor. This case cannot be distinguished from the ruling referred to above. Applying the ruling laid down in that case, we hold that there was a misjoinder of causes of action in this suit and that the three plaintiffs were not entitled to bring or maintain a joint suit in respect of their separate causes of action.

We allow this appeal with costs here and in the Court below, and we set aside the decree below, and direct the Court below to return the plaint to the plaintiffs for amendment, so that the plaintiffs may elect which of them will proceed with the suit.

Appeal decreed.

18 A. 221=16 A.W.N. (1896) 35.

REVISIONAL CRIMINAL.

Before Mr. Justice Knox and Mr. Justice Blair.

KESRI (*Applicant*) v. MUHAMMAD BAKHSH (*Opposite party*).^{*}
[31st January, 1896.]

Criminal Procedure Code, s. 200—Examination of the complainant—Complainant merely called upon to attest complaint in writing.

It is not a sufficient compliance with the provisions of section 200 of the Code of Criminal Procedure where a complainant, who has presented a written complaint, is merely called upon to attest the complaint on oath, no separate sworn statement of the complainant being recorded by or under the orders of the Magistrate to whom the complaint is presented. *Queen-Empress v. Murphy* (2) distinguished.

[R., 6 Bom.L.R. 662; 15 C.L.J. 517=16 C.W.N. 1105 (1134)=16 Ind Cas. 257 (298)=13 Cr.L.J. 609 (650).]

[222] THIS was a reference under s. 438 of the Code of Criminal Procedure made by the Additional Sessions Judge of Moradabad. The facts of the case sufficiently appear from the judgment of the Court.

JUDGMENT.

KNOX and BLAIR, JJ.—This case has been very properly referred to us by the learned Additional Sessions Judge of Moradabad. A complaint was instituted before a Magistrate of the first class. That Magistrate took cognizance of it, and under s. 200 of the Code of Criminal Procedure, it was imperative upon him to at once examine the complainant upon oath and also to reduce the substance of that examination to writing. The learned Magistrate did not examine the complainant and did not reduce the substance of the examination or have it reduced to writing. He contented himself with taking the complaint as it was

^{*} Criminal Revision No. 758 of 1895.

(1) 18 A. 131.

(2) 9 A. 666.

filed in his Court and asking the complainant to swear to it and sign it. He defends this procedure by reference to the precedent of *Queen-Empress v. Murphy* (1). That case was of an exceptional character. The complaint was made by an Englishman against an Englishman. The contents of the complaint, which was drawn up in English, had evidently been drawn up with a great deal of care, and not in the way in which complaints are so often prepared for the Courts of Magistrates. With all due respect to the learned Judge who decided that case, we are of opinion that the Legislature does require that every complainant shall, as soon as he has prevailed upon the Magistrate to take cognizance of his complaint, be examined upon oath. The substance of that examination is by law required to be reduced to writing, and it is obvious that that writing must be and was intended to be distinct from the complaint.

The learned Magistrate committed another irregularity. The case before him was what is technically known as a summons case. The procedure that the law requires Magistrates to observe in the trial of summons cases is laid down in Chapter XX of the Code of Criminal Procedure. Presumably the accused appeared and did not admit that he had committed the offence of which he was accused. In such cases the Magistrate is bound to hear the [223] complainant and take all the evidence that he produces in support of the prosecution. He is then bound to hear the accused and take such evidence as the accused may produce. Until all this has been done he has no power and no jurisdiction to record an order of acquittal. In the present case the Magistrate acquitted the accused, as he was pleased to call his procedure* without taking the evidence produced in support of the prosecution. The order was passed without jurisdiction. It was not an order of acquittal, and we set it aside. So far as we can judge of the case at all from the record, which is very meagre, there would appear to have arisen a dispute which might or might not have resulted in a breach of the peace. Seeing that Magistrates are responsible that public peace is not broken, it would have been well if the Magistrate had considered it necessary to send for the accused, gone thoroughly into the evidence of both sides and ascertained whether, apart from the assault, there was or was not danger of a breach of the peace. The learned Magistrate says that his time would have been wasted if he had heard the whole of the evidence. He will find, as his experience extends, that the greatest safeguard against time being wasted is a proper, diligent and thorough examination of the complainant made by the Magistrate himself in an intelligent manner and not in a perfunctory way. A Magistrate by a disinterested inquiry is often able to satisfy himself that the complaint is imaginary or unnecessary, and by dismissing it as he can, and only can on being so satisfied before he calls upon the accused to appear, prevent much needless harassment and irritation. The order of the Magistrate is set aside.

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(1896) 35.

* [For the words "his procedure" we find in 16 A.W.N. (1896) 35 (36), "it." The substitution of the latter term expresses the meaning clearly.—ED.]

(1) 9 A. 666.

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18 A. 223 = 16 A.W.N. (1896) 43.

APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox and
Mr. Justice Blair.*JAGGAR NATH PANDE (*Opposite party*) v. JOKHU TEWARI (*Appli-
cant*).^{*} [6th February, 1896.]18 A. 223 =
16 A.W.N.
(1896) 43.*Civil Procedure Code, section 214—Pre-emption—Effect of an appeal from a decree for
pre-emption on the time limited for paying in the pre-emptive price.*

A decree was given in favour of the plaintiff in a suit for pre-emption. The plaintiff paid in a portion only of the pre-emptive price within the time limited by [224] the decree. The defendant appealed. Long after the time prescribed by the original decree for payment had expired, the defendant's appeal was dismissed, but the time for payment was not extended by the Appellate Court's decree. The plaintiff then, after the lapse of a period from the date of the appellate decree in excess of that which had been given him for payment by the decree of the first Court, paid in the balance of the pre-emptive price, which was accepted by the Court. On appeal by the defendant from the Court's order directing the balance of the pre-emptive price to be received, it was held that the order of the Court allowing the payment was without jurisdiction, the decree having, on the expiration of the time limited, without payment by the plaintiff, become a decree in favour of the defendant.

[F., 18 A. 455 (457); R., 28 A. 676 = 3 A.L.J. 804 = A.W.N. (1906) 198; 31 M. 28 = 17 M.L.J. 495 = 3 M.L.T. 26; 11 C.P.L.R. 115; L.B.R. (1893—1900) 420; 7 O.C. 359; 8 O.C. 241 (243); 48 P.R. 1906 = 104 P.L.R. 1906.]

THIS was an appeal against an order allowing execution of a decree for pre-emption under the following circumstances:—

The respondent, Jokhu Tewari, obtained a decree for pre-emption on the 26th of March 1892 conditioned on his paying into Court on or before the 1st of June 1892 Rs. 7,450 the pre-emptive price. On the 23rd of April 1892, the defendant vendee, Jaggar Nath, appealed to the High Court against the decree of the 26th of March. On the 1st of June 1892, the plaintiff decree-holder applied to deposit in Court Rs. 4,150, part of the pre-emptive price; and the money was actually deposited on the 2nd of June. On the 6th of November 1894, the High Court dismissed the defendant's appeal with costs and confirmed the decree of the first Court. On the 12th January 1895, that is to say, on the last day of a period from the date of the decree in appeal equal to that allowed for payment by the decree of the Court of first instance, the decree-holder applied to be allowed to deposit the balance of the pre-emptive price. The 13th of January was a Sunday, and on the 14th the money was paid into the Treasury, and the Court granted execution of the decree. The lower Court relied on the ruling of the High Court in *Rup Chand v. Shamsh-ul-Jehan* (1) and held the pre-emptive price must be considered to have been deposited within time.

From this order the defendant vendee appealed to the High Court. The Hon'ble Mr. Colvin and Pandit Sundar Lal, for the appellant. Munshi Ram Prasad, for the respondent.

JUDGMENT.

[225] EDGE, C. J., KNOX and BLAIR, JJ.—This is an appeal from an order in execution proceedings. The suit was one for pre-emption. The

^{*} First Appeal No. 35 of 1895, from a decree of Pandit Rai Indar Narain, Subordinate Judge of Mirzapur, dated the 4th February, 1895.

(1) 11 A. 346.

Court of first instance made a decree under s. 214 of Act No. XIV of 1882, specifying the 1st of June 1892, as the day on or before which the purchase money should be paid. It further decreed that if the purchase money was not paid on or before the 1st of June 1892, the suit should stand dismissed with costs. It was a decree exactly in the terms of s. 214. The purchase money decreed was Rs. 7,450. The decree was made on the 26th of March 1892. On the 1st of June 1892, the plaintiff paid into Court, that is, into the Treasury, Rs. 4,150. On the 23rd of April 1892, the defendant had appealed to the High Court from the decree of the 26th of March. On the 6th of November 1894 the High Court dismissed the defendant's appeal with costs and confirmed the decree of the first Court. The next thing which happened was that on the 12th of January 1895, the plaintiff applied to the first Court for permission to pay into Court the balance of the decreed pre-emptive money, the balance being Rs. 3,300. On that application the first Court granted permission to make payment of the balance, holding that as the original time allowed when calculated out amounted to sixty-eight days, and as the 12th of January 1895, was the sixty-eighth day from the High Court's decree of the 6th of November 1894, the plaintiff was entitled to pay in the balance of Rs. 3,300 and to execute the decree for pre-emption. The next thing that happened was that the plaintiff did not pay Rs. 3,300 on the 12th of January 1895. He had come to Court so late in the day that the Treasury was closed, and he was unable to make the payment. Having some hazy idea perhaps that the Indian Limitation Act of 1877 applied, the 13th of January being a Sunday, he made the payment into the Treasury on Monday the 14th of January 1895, of the balance of the pre-emptive money. The appeal before us is an appeal from the order allowing the payment and the execution of the decree for pre-emption.

On behalf of the respondent it has been contended that when there is an appeal from a decree for pre-emption, the time within [226] which the purchase money had been ordered to be paid is extended, and the appellate Court's decree in such appeal, although it says nothing about extending the time, has the effect of giving the plaintiff, whether he is appellant or respondent, the corresponding period of time from the date of the appellate Court's decree for the payment of the pre-emptive price to that which he had from the date of the decree of the Court of first instance. In support of that proposition we have been referred to the decisions in *Rup Chand v. Shams-ul-jehan* (1), *Noor Ali Chowdhuri v. Koni Meah* (2), and *Daulat and Jagjivan v. Bhukandas Manekchand* (3), and in the course of the argument we were also referred to *Mulu Singh v. Rahim Kuar* (4), *Jairam Singh v. Sri Kishen* (5), *Kodai Singh v. Jaisri Singh* (6) and *Wazir Khan v. Kale Khan* (7).

Section 214 of Act XIV of 1882 is precise. The Court acting under that section, if it acts in compliance with it, specifies and fixes a day certain as the day on or before which the pre-emptive price is to be paid, and decrees that if the pre-emptive price is not paid on or before that day fixed, the suit shall stand dismissed with costs.

Now there is no doubt that a plaintiff who has obtained a decree under s. 214 can appeal within the period prescribed by the Indian Limitation Act, 1877, for his appeal, whether or not he has made the payment on

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(1) 11 A. 346.

(2) 13 C. 13.

(3) 11 B. 172

(4) 8 A.W.N. (1888) 22.

(5) 10 A.W.N. (1890) 92.

(6) 13 A. 376.

(7) 16 A. 126.

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18 A. 223 =
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(1896) 43.

or before the day fixed, and on his appeal the appellate Court, if it sees fit so to do, may extend the time within which the pre-emptive price is to be paid and fix a day itself. But it would be, in our opinion, frustrating the intention of the Legislature in s. 214, if we were to hold that a plaintiff merely by appealing from a decree in pre-emption could extend the time to an uncertain and unspecified day. We cannot believe it to have been the intention of the Legislature that a plaintiff in pre-emption could have a power of his own accord to effect the stay of the execution of a decree which, by reason of the pre-emptive price [227] not having been paid on or before the day fixed, had become a decree in favour of the defendant. The contention on behalf of the respondent even went so far as to suggest that an appeal by a defendant in pre-emption had of itself the effect of extending the time fixed by the first Court for payment of the pre-emptive price. No doubt the defendant in pre-emption is entitled, within limitation and before the decree in pre-emption has become a decree in his favour dismissing the suit with costs, to appeal. But when his appeal would come on for hearing we fail to see what relief he could be entitled to, if the pre-emptive price had not been paid within the time fixed by the first Court, as in that event the only operative decree subsisting at the time of the hearing of the appeal would be a decree entirely in favour of the appellant.

Now on principle we hold that the full pre-emptive price not having been paid on or before the 1st of June 1892, the decree became operative as a decree dismissing the plaintiff's suit with costs, and the Court of first instance had no jurisdiction to pass an order allowing the plaintiff to pay the balance of the pre-emptive price into Court and to execute a decree which could only be executed against the plaintiff by the defendant. We allow this appeal with costs and set aside the order in execution with costs.

Appeal decreed.

18 A. 227 = 16 A.W.N. (1896) 37.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

SHEORATAN KUNWARI (*Plaintiff*) v. RAM PARGASH AND OTHERS
(*Defendants*).^{*} [13th February, 1896.]

Act No. XX of 1863 (Religious Endowments Act), s. 14—Bengal Regulation No. XIX of 1810—Civil Procedure Code, s. 539—Trust—Suit to remove trustees of Hindu religious endowments—Jurisdiction—Hindu law—Right of representative of founder of trust to nominate trustee.

The Maharaja of B in 1862 assigned certain lands situated in Bengal for the maintenance of a temple at Chauria in the Gorakhpur district, and appointed certain trustees of the endowment. Those trustees dealt with the property in a manner inconsistent with the trust by making alienations thereof as if it were their own private property. In 1893, the representative in title of the original settlor sued in the Court of the District Judge of Gorakhpur to have certain alienations made [228] by the said trustees set aside and the property restored to its original uses, and for the appointment of a new trustee or new trustees in place of the trustees defendants to the suit.

^{*} First Appeal No. 322 of 1893 from a decree of T. Benson, Esq., District Judge of Gorakhpur, dated the 6th October 1893.

Held that such a suit was rightly brought under s. 14 of Act No. XX of 1863, and that it was not essential for the application of that Act that the endowment should ever have been taken under the control of the Board of Revenue. *Ganes Singh v. Ramgopal Singh* (1) and *Dhurrum Singh v. Kissen Singh* (2) approved. *Raghubar Dial v. Kesho Ramanuj Das* (3), *quoad hoc*, overruled.

Held also that s. 539 of the Code of Civil Procedure was not applicable to the above suit. *Lakshmandas Parash Ram v. Ganpatrav Krishna* (4) and *Jawahra v. Akbar Husain* (5) referred to.

Held also that there being no special provision in the endowment for the appointment of trustees the right of nomination remained vested in the founder of the endowment and that the right to nominate continued to his heirs. *Gossamee Sree Greedharreejee v. Rumanlolljee Gossamee* (6) referred to

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[*Diss.*, 24 C. 418 (426); F., 19 A. 104; 34 C. 587 (594); 22 M. 223 (238); 11 C.L.J. 2=3 Ind. Cas. 408 (413); 17 Ind. Cas. 270 (273)=216 P.L.R. 1912=181 P.W.R. 1912; 18 Ind. Cas. 232 (234); *Rel.*, 14 C.W.N. 1104=7 Ind. Cas. 164 (165); *Appr.*, 28 A. 689=A.W.N. (1906) 173; R., 29 A. 663=4 A.L.J. 565 (568)=A.W.N. (1907) 210; 33 C. 789=10 C.W.N. 581; 31 M. 212=18 M.L.J. 205; 5 A.L.J. 191 (192)=A.W.N. (1908) 101; 2 C.L.J. 431.]

THIS was a suit brought by the Raja of Bettiah under following circumstances. The plaintiff alleged that certain land in the village of Barwa in the district of Champaran, which was ancestral property of the plaintiff, had been placed under the management of the ancestor of some of the defendants that he might apply the profits thereof to the keeping up of the Thakur temple of Chauria in the district of Gorakhpur; that subsequently the defendants ceased to apply the profits of the land to the purposes of the temple, and by an award of the 19th of September 1886 had divided the land amongst them and had alienated some of it and generally dealt with it as if it were their own private property. The plaintiff accordingly prayed that the award above referred to and certain alienations made by the defendants might be set aside; that the defendants might be ejected, and the lands the subject of the trust made over to the plaintiff for the appointment of a new trustee.

The suit was defended not by the persons alleged to be the trustees whose ejectment was sought by the plaintiff, but by one Sheo Baran Rai, who had profited most by the alienations made by the trustee defendants. Sheo Baran Rai pleaded a title adverse to [229] that of the plaintiff and denied that the lands were ever the plaintiff's ancestral property. He also pleaded that under Act XX of 1863, the Court of the District Judge of Gorakhpur had no jurisdiction to try the case.

The Court of first instance found that the endowment in question did come within the provisions of Act No. XX of 1863; but that under that Act the Court had only a very limited jurisdiction to grant relief to the plaintiff. Practically the Court held that it could only grant relief against the trustees by setting aside certain alienations made by them, which it did and dismissed the rest of the plaintiff's claim.

From this decree the plaintiff appealed to the High Court.

Pandit Sundar Lal, for the appellant.

Munshi Gobind Prasad, for the respondents.

JUDGMENT.

EDGE, C. J.—This was a suit brought by the plaintiff under s. 14 of Act No. XX of 1863, in the Court of the District Judge of Gorakhpur.

(1) 5 B.L.R. App. 55.
(5) 7 A. 178.

(2) 7 C. 767.

(3) 11 A. 18.

(4) 8 B. 365.

(6) 16 I.A. 137=17 C. 3.

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(1896) 37.

The object of the suit was to remove certain persons from the office of trustees of a temple, to have certain assignments and incumbrances created by the trustees for the time being and affecting lands the subject of the endowment of the temple set aside and declared invalid as against the temple and the trusts, and to obtain the appointment of a new trustee or trustees. There was also a prayer to have an award declared as inoperative and not binding on the trust property. The plaintiff is the successor in title of the Maharaja of Bettia who had endowed the temple at Chauria within the Gorakhpur district with certain lands, which were situated beyond the ordinary jurisdiction of the District Court of Gorakhpur and are in fact in lower Bengal.

The allegations upon which the suit was brought were, if substantiated, allegations of misfeasance. The persons acting as trustees for the time being had dealt with the endowed property as if it were their own private property unaffected by any trust: they had dealt with it regardless of the trusts which affected the lands the subject of the endowment. The Maharaja who created the endowment had, prior to the creation of the endowment, supported the [230] temple at Chauria, and the assignment of the lands for the purposes of the endowment was made as a more convenient method of providing an endowment for the shrine. What was done by the persons for the time being holding the lands in trust for the shrine is fully stated in the judgment of the District Judge. I find as a fact that the assignments, incumbrances, leases and award were the result of breaches of trust on the part of the persons for the time being bound to administer the endowment for the purposes of the temple.

The suit was not defended by those who were charged as trustees. It was defended by Sheo Baran Rai, who was the person who had principally benefited by the breaches of trust complained of. The District Judge granted to some extent some of the reliefs prayed for, but refused the other reliefs, being apparently of opinion that the granting of those reliefs was in this case beyond his jurisdiction.

It was contended on behalf of the respondents that the District Judge had no jurisdiction at all in the matter. That contention was based on the argument that Act No. XX of 1863 did not apply, as it was not shown that the endowment in question was one to which the Board of Revenue had appointed a trustee, and that the nomination of a trustee was not shown to have been vested in the Board of Revenue under Regulation No. XIX of 1810. The jurisdiction of the District Judge was also questioned on another ground, *viz.*, that the shrine in which the Thakurji was had disappeared and the image had been removed to private premises.

As to the latter point, to take it first, I find that, although the temple has disappeared, possibly owing to the breaches of trust of those whose duty it was to administer the endowment for the benefit of the Thakurji, yet as a fact the Thakurji still exists and is worshipped, and I hold that the mere fact that the walls of the original building in which the shrine was have disappeared does not take the case out of the provisions of Act No. XX of 1863. In these cases of endowment it is not the walls which are endowed; it is the [231] Thakurji. I am speaking of course of the case of Hindu endowments.

In the course of the argument we were referred to a number of decisions. Some of them I shall deal with in my judgment. The others, as to which I do not consider it necessary to express an opinion are the

following:—*Ashgar Ali v. Delroos Banoo Begum* (1), *Rajendro Nath Dutt v. Shaikh Mahomed Lal* (2), *Protap Chandra Misser v. Brojo Nath Misser* (3) and *Muthu v. Gangathara* (4).

It appears to me that s. 14 of Act No. XX of 1863 is not confined to those endowments the nomination to which has been exercised by or had vested in the Board of Revenue under Regulation No. XIX of 1810. In my opinion the decision of Norman, J., in *Ganes Singh v. Ramgopal Singh* (5), that in order to bring a suit under Act No. XX of 1863, it is not necessary to show that the temple was one which was formerly under the control of the Board of Revenue, is correct. That question was further considered by Mitter and Maclean, JJ., in *Dhurrum Singh v. Kissen Singh* (6) and, so far as that decision affects the application of s. 14 of Act No. XX of 1863, I agree with it. It is true that in the case of *Raghubar Dial v. Kesho Ramanuj Dos* (7) I expressed a different opinion as to the application of s. 14 of Act No. XX of 1863. In that case, although it was not necessary to consider the point, I expressed an opinion that Act No. XX of 1863 could not apply to any endowed temple which had come into existence after the passing of that Act. The two cases to which I have just referred have satisfied me that in that view I was wrong. In my opinion s. 14 of Act No. XX of 1863, does apply in this case, and that whether or not the Board of Revenue had under Regulation No. XIX of 1810 exercised or had vested in it the right to nominate to the trusteeship or the managership of the temple. Consequently, the Court of the District Judge of Gorakhpur, which was the principal Court of original civil jurisdiction within the [232] limits of which the temple was situated within the meaning of section 2 of Act No. XX of 1863, had jurisdiction to do all the acts which a Civil Court is empowered to do under s. 14 of that Act in this case, and further in my opinion, as ancillary to that jurisdiction, had jurisdiction to make such declarations and pass such orders as might be necessary for the effective application of s. 14 of Act No. XX of 1863, although the lands, the subject of the endowment, were situated beyond the territorial limits of the ordinary jurisdiction of the Court of Gorakhpur.

It was suggested that s. 539 of the Code of Civil Procedure applied in this case. In my opinion it did not. I think that point is answered by the decision in *Lakshman Das Parash Ram v. Ganpatrav Krishna* (8) and by what was said in *Jawahra v. Akbar Husain* (9). To the same effect is an unreported decision of this Court. Taking the view of the facts which I do, which is also held by my brother Burkitt, I am of opinion that the District Judge had, and we in appeal have, ample jurisdiction to set aside these assignments, leases and incumbrances affecting the property the subject of the endowment, and also to declare that the award does not affect in law the endowed property.

It is well accepted law that when a Hindu creates an endowment of a temple or a shrine, or more strictly speaking of a Thakurji, and does not provide by the endowment for the nomination of a trustee or trustees being made by any person other than himself or his heirs, or being made by election amongst the disciples of the Thakurji, the nomination remains vested in the founder of the endowment and the right to nominate continues to his heirs. That was the principle accepted by their Lordships of

1896

FEB. 13.

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APPEL-
LATE
CIVIL.

18 A. 227 =
16 A.W.N.
(1896) 37.

(1) 15 B.L.R. 167 = 3 C. 324.

(4) 17 M. 95.

(7) 11 A. 18 (26).

(2) 8 C. 42.

(5) 5 B.L.R. App. 55.

(8) 8 B. 365.

(3) 19 C. 275.

(6) 7 C. 767.

(9) 7 A. 178.

1896 the Privy Council in *Gossamee Sree Greedharreejee v. Rumanlolljee*
FEB. 13. *Gossamee* (1).

APPEL- We direct the removal of the defendants who are the existing
LATE trustees or managers of the temple; and acting on the petition of
CIVIL. the plaintiff, who has nominated Rameshwar Misr, we appoint
[233] him to be trustee of the endowed property for the purpose of carry-
ing out the intention of the founder. We declare that the award, the
18 A. 227 = leases, the assignments and the incumbrances referred to in the plaint do
16 A.W.N. not affect the endowed property or any part of it, and are not and will
(1896) 37. not be binding on the trustee for the time being appointed. We give the
plaintiff a decree for possession in order that Rameshwar Misr, who is not
a party to this suit, may be placed in possession of the endowed property
as trustee. The claim for *mesne* profits is abandoned. To the above
extent we vary the decree below and decree this appeal with costs in this
Court and in the Court below.

BURKITT, J.—I concur in the interpretation put by the learned Chief
Justice on Act No. XX of 1863, and in the order proposed and in the
reasons given therefor.

Appeal decreed.

18 A. 233 = 16 A.W.N. (1896) 84.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Blair.

NARAIN DAS (*Appellant*) v. HAZARI LAL AND ANOTHER (*Respondents*).^{*}
[10th December, 1895.]

*Civil Procedure Code, ss. 328. 331—Execution of decree—Resistance or obstruction
to execution—Complaint—Limitation—Renewal of resistance or obstruction—Fresh
cause of action—Estoppel.*

The period of limitation provided for in s. 328 of the Code of Civil
Procedure is a limitation which governs a cause of action arising out of a parti-
cular resistance or obstruction. So far as that resistance or obstruction is
concerned, the decree holder, if he wishes to take proceedings under s. 328,
must do so within one month from the time of such resistance or obstruction.
But the bar created by the limitation imposed by this section does not extend
to and hold good so as to bar complaints against acts of resistance or obstruction
made upon fresh proceedings taken by the decree-holder. *Ramasekara v. Dharma-
raya* (2) followed. *Balvant Santaram v. Babaji* (3) and *Vinayak Rav Amrit v.
Devrao Govind* (4) distinguished.

[F., 13 C.W.N. 724 = 1 Ind. Cas. 785 (787); D., 28 A. 365 = A.W.N. (1904) 46.]

THE facts of this case are fully stated in the judgment of the Court.

[234] Pandit *Sundar Lal* and Pandit *Moti Lal*, for the appellant.

Mr. *T. Conlan* and Maulvi *Ghulam Mujtaba*, for the respondents.

JUDGMENT.

KNOX and BLAIR, JJ.—The parties to this suit are one Narain Das,
who claims to be proprietor and to be in possession of four shops situated
in Nimak Mandi, a *mohalla* of Cawnpore, and the respondents, Hazari
Lal and Fauji Lal, who are the sons of one Bakhtawar Lal, who has
obtained by purchase the rights and interests of one Nabi Bakhsh. [One

^{*} First Appeal No. 76 of 1895 from an order of J.J. McLean, Esq., District Judge
of Cawnpore, dated the 22nd June 1895.

(1) 16 I. A. 137 = 17 C. 3. (2) 5 M. 113. (3) 8 B. 602. (4) 11 B. 473.

Ram Sahai held a decree against Nabi Bakhsh and Musammat Afzal-un-nissa, and this decree he executed by bringing to sale on the 5th of September 1881 property which consisted of nineteen shops in Nimak Mandi and thirteen shops in Dal Mandi. With the 13 shops in Dal Mandi we are not concerned at all. The whole of the dispute to which this case relates has reference to four shops out of the nineteen shops in Nimak Mandi. One fact further has to be mentioned, and that is that Narain Das, the appellant in this appeal, claims to have purchased the rights of Musammat Afzal-un-nissa, the judgment-debtor in Ram Sahai's decree. As said before, he not only claims the right and title to these shops, but also claims to be in actual possession.] Bakhtawar Lal, the purchaser of the rights and interests of Nabi Bakhsh, brought a suit in 1886 against Kallu Mal, Kanhaiya Lal and others, to obtain possession of the nineteen shops which he considered to be his. He obtained a decree, which was eventually confirmed by this Court on the 30th of November 1888. On the 17th of March 1887 he made his first attempt by execution of that decree to get possession of the nineteen shops. He was resisted by the appellant Narain Das. He at once resorted to the Court in which execution proceedings were pending, and put in a petition. That petition is of importance. It is claimed by the appellant that that petition was one under s. 328 of the Code of Civil Procedure, and that the orders passed upon it were orders passed under s. 331 of that Code. The learned vakil who appears for the respondents asks us to view it, not as a complaint of resistance or obstruction on the part [235] of Narain Das, but as a complaint to the effect that the amin had not carried out the orders of the Court and had not put him in possession of nineteen shops to which he was entitled. There is no allusion whatever in the order to s. 331 or 328 of the Code of Civil Procedure, and the terms in which the order is couched are certainly not those in which an order under s. 331 should run. Briefly, the order is to the effect:—"Let the decree-holder be put in possession of fifteen shops. As for the four shops to which an objection is raised, the decree-holder can proceed according to law." Against this order Bakhtawar Lal appealed, but appealed ineffectually. On the 8th of April 1889 he instituted a regular suit against the appellant, Narain Das and others, and that suit came to an end on the 20th of June 1890 with this order:—"To-day the plaintiff was called for and did not appear. Moreover he has not paid in process fees. It is therefore ordered that his suit be dismissed, and he should pay the costs of the other side." Round this order too dispute prevails. The appellant maintains that it was an order passed under s. 102 of the Code of Civil Procedure. There is no doubt whatever that Bakhtawar Lal attempted to have a rehearing of the suit, but his applications to that effect were dismissed. On the 28th of November 1891 the respondents, who were the sons of Bakhtawar Lal (Bakhtawar Lal in the meanwhile having died), took fresh execution proceedings. They applied that their decree might be executed against the four shops in question. That application was dismissed. They made a second attempt on the 22nd of November 1892, and this time so far with success that orders were issued for possession. Again resistance was made by the appellant, and the amin reported to the effect that he could not give effect to the order for possession with which he charged. Upon this the respondent instituted a complaint under s. 328 of the Code of Civil Procedure, and the Court this time without question took action under s. 331 and numbered and registered the claim as a suit

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18 A. 233=
16 A.W.N.
(1896) 84.

1895 between the respondents as plaintiffs and the appellant as defendant.
DEC. 10. The order passed upon the hearing was to the effect that **[236]**
 — the matter between the parties had, by the order of the 20th of June
APPEL- 1890, become *res judicata*. An appeal was preferred, and the lower
LATE appellate Court, reversing the decision and holding that the matter in
CIVIL. dispute was not *res judicata*, remanded the suit to the Court of first
 — instance for trial, and directed it to decide the case upon its merits. It is
18 A. 233 = from this order that the present appeal has been filed. The grounds taken
16 A.W.N. in the appeal are:—(1) that the order of the 7th of May 1887, never having
(1896) 84. been set aside, the present proceedings are not maintainable, and that
 order concludes the matter in controversy; and (2) that if that order does
 not bar, then the order of the 20th of June 1890 is a fatal bar to the claim
 now brought.

Without entering upon the question as to whether the proceedings which terminated in the order of the 7th of May 1887 were or were not proceedings arising out of a complaint under s. 328, a matter upon which we entertain considerable doubt, and assuming that the order was such an order, we do not accede to the contention which was pressed upon us with much energy and ability, and much show of authority, by the learned vakil for the appellant, and which was to the effect that the present proceedings are barred by reason of not having been instituted within a month of the resistance in 1887. In our opinion the period of limitation provided in s. 328 of the Code of Civil Procedure is a limitation which governs a cause of action arising out of a particular resistance or obstruction. So far as that resistance or obstruction is concerned, the decree-holder, if he wishes to take proceedings under s. 328, must do so within one month from the time of such resistance or obstruction. But the bar created by the limitation imposed by this section does not, in our opinion, extend to and hold good so as to bar complaints against acts of resistance or obstruction made upon fresh proceedings taken by the decree-holder. We were referred to the precedent *Balvant Santaram v. Babaji* (1). The particular matter in dispute in that case was whether the plaintiff, who was taking possession of a room and was resisted **[237]** by one Lakhshman, was bound by previous proceedings between the plaintiff and Lakhshman's brothers. That case differs from the case before us, and it was never held that the limitation provided in s. 328 barred fresh proceedings taken in execution of decree. What is said there is that it was optional with the decree-holder to proceed either summarily or by a regular suit, and that the failure of the plaintiff to avail himself of the remedy under s. 331 of the Code of Civil Procedure did not prevent him from proceeding against the defendant by a regular suit. There is no doubt that limitation was set up, but the decision of the Court was that, as the defendant had been no party and had not been represented in those execution proceedings, he could not in any way be affected by them. The next case cited to us was the case of *Vinayak Rav Amrit v. Devrao Govind* (2). But that case also differs from the present case. The matter decided in that case was that an attempt made by the decree-holder to renew proceedings arising out of a former obstruction was rightly rejected by the lower Court. Those proceedings were held as barred by art. 167 of the second schedule of the Indian Limitation Act, 1877. We have not now to decide whether the proceedings taken by the representatives of Bakhtawar Lal were rightly or wrongly granted by

(1) 8 B. 602.

(2) 11 B. 473.

the Court which had to deal with them. All that we have to consider is whether the resistance made by the appellant does or does not give a fresh cause of action to the respondents so as to give them the right of taking proceedings under s. 328 of the Code of Civil Procedure. The case, which corresponds with the one before us, is that of *Ramasekara v. Dharmaraya* (1). In that case a decree had been returned unexecuted owing to the resistance of the judgment-debtors. Fresh warrant for possession was afterwards applied for and granted, and fresh resistance took place. The learned Judges who decided that case have held that the period of limitation for an application of this nature commences to run from the date of the resistance, obstruction or dispossession, and that resistance, obstruction or dispossession can hardly be any other [238] resistance, obstruction or dispossession than that mentioned as forming the subject of the complaint. They held that such was the plain interpretation of the terms of the Act, and we agree with them in that view. The first plea therefore fails.

Our decision upon the second plea virtually proceeds upon the same ground, assuming that the suit brought in 1890 was dismissed under s. 102 of the Code of Civil Procedure. All that s. 103 enacts is that when a suit is so dismissed, the plaintiff is precluded from bringing a fresh suit in respect of the same cause of action. We hold that, as regards the proceedings of 1890, the cause of action was the resistance made by Narain Das on or about the 5th of April 1887. The cause of action in the present proceedings is the perfectly distinct and separate resistance offered by Narain Das in the separate execution proceedings founded upon a different order passed on or about the 22nd of November 1892. The second plea therefore also fails, and this appeal will stand dismissed with costs.

Appeal dismissed.

18 A. 238 = 16 A.W.N. (1896) 52.

MATRIMONIAL.

Before Mr. Justice Knox and Mr. Justice Blair.

IN THE MATTER OF THE PETITION OF E. MORGAN.*
[10th January 1896.]

Act No. IV of 1869 (Indian Divorce Act), s. 3, clause (5)—Minor children—Age of majority—Alimony—Application for refund of alimony paid by mistake after period during which it was payable had expired.

In 1882 a decree for dissolution of marriage between E. M. and S. M. was passed by the High Court on the wife's petition, and the husband was ordered to pay alimony for the wife and certain minor children of the marriage. On the 26th of August 1895 a petition was presented to the Court on behalf of E. M. stating that S. M. had married again on the 3rd of August 1895; that one of the children in respect of whom alimony was payable had come of age on the 16th of April 1895; and that another of such children had married in April 1893, and it was prayed that certain sums which had been paid into Court after the respective dates mentioned above as alimony in respect of the three persons above referred to might be refunded. *Held* that E. M. was not entitled to any refund of alimony except as to sums, if any, paid into Court after the date of the filing of petition for refund and relating to a period subsequent to that date.

[N.B.—See in this connection 4 A. 306.]

* Application of the respondent in Matrimonial Case No. 1 of 1881.
(1) 5 M. 113.

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DEC. 10.
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APPEL-
LATE
CIVIL.

18 A. 238 =
16 A.W.N.
(1896) 84.

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18 A. 238=
16 A.W.N.
(1896) 52.

THIS was an application for the refund of certain sums paid as alimony under an order of the Court. Sarah Morgan, one of [239] the persons on whose behalf the money sought to be recovered had been paid, had brought a suit for dissolution of marriage against the applicant in the Court of the Judicial Commissioner of Lucknow. The Judicial Commissioner dismissed the suit. The petitioner appealed to the High Court, a Division Bench of which, after overruling the respondent's objection to the jurisdiction, proceeded to hear the appeal, and granted the petitioner a decree *nisi* for dissolution of her marriage with the respondent, which decree also provided for alimony to be paid to the petitioner and the minor children of the marriage. (See I.L.R., 4 All. 306, *Morgan v. Morgan*.) The remaining facts of the case sufficiently appear from the order of the Court.

Babu *Satya Chandar Mukerji*, for the applicant.

Mr. *H. T. Coleman*, for the opposite parties.

JUDGMENT.

KNOX and BLAIR, JJ.—This is an application presented by one Morgan setting out that Sarah Morgan, to whom alimony had been decreed under the orders of this Court, had married one Sergeant Fox, and that Irene Morgan, for whose maintenance an order had been made, had attained majority on the 16th of April 1895. There was a further allegation that a daughter, Clara, for whose maintenance an order had been made, had married in April 1893. The petitioner prayed for refund of all the moneys paid under the orders of this Court to the three persons, Sarah Morgan, Irene Morgan and Clara Morgan, after the date on which Sarah Morgan had been remarried, Clara Morgan had married and Irene Morgan had attained majority. It was contended on behalf of Irene Morgan that she was still a minor. The authority for this contention was based on s. 3 of the Indian Majority Act of 1875. The Indian Divorce Act contains in s. 3, clause (5), the interpretation which is to be placed on the words "minor children" wherever they occur in that Act. It is admitted that on that interpretation Irene Morgan can no longer be considered a minor. With reference to the prayer that the sums already paid be refunded, we know of no authority for such a proposition, and we confess to feelings of surprise at such a request being made on the [240] part of the father. The application was presented to this Court on the 26th of August 1895. All sums which under our previous orders were payable to Sarah Morgan and Irene Morgan, and all sums which were paid into Court before that date, will be made over to the parties to whom under our previous orders they were due and payable. Any sums paid after that date and for a term subsequent to the 26th of August 1895, if there be any such, will be refunded to the petitioner. We give no costs.

18 A. 240 = 16 A.W.N. (1896) 55.

APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Aikman.*GHANSHIAM SINGH (*Plaintiff*) v. DAULAT SINGH (*Defendant*).
[7th February, 1896.]

1896

FEB. 7.

APPEL-
LATE
CIVIL.*Act No. XII of 1881 (North-Western Provinces Rent Act), s. 34, clause (a)—Act No. IX of 1872 (Indian Contract Act), s. 73—Thekadar—Liability of defaulting thekadar to pay interest.*18 A. 240 =
16 A.W.N.
(1896) 55.

The non-application of clause (a) of s. 34 of Act No. XII of 1881 to a "thekadar" does not exempt the *thekadar* from his liability under s. 73 of Act No. IX of 1872. Hence where a *thekadar* makes default in payment of his rent he is liable to be charged with interest on the sums due up to the date of payment.

[*Rel. on*, 16 C.L.J. 264 (270) = 16 Ind. Cas. 246 (249); *Appr.*, 3 O.C. 22 (29); *R.*, 26 A. 299 = 6 Bom.L.R. 505 = 8 C.W.N. 521 = 14 M.L.J. 190 = 31 I.A. 116 = 8 Sar. P.C.J. 628; *D.*, 1 O.C. 94, 6 O.C. 89.]

THE plaintiff in this case, Raja Ghanshiam Singh, sued the defendant, Daulat Singh, as lessee (*thekadar*) of a village, Nagla Kashi, to recover certain sums alleged to be due by him under his lease, with interest to date of suit, together with future interest and costs. The defendant claimed certain deductions from the principal amount sued for, and further pleaded that by virtue of the explanation to s. 34 of the N.-W.P. Rent Act he was not liable to pay interest on the arrears of rent.

The Court of first instance (Assistant Collector of Aligarh) found all the issues in favour of the plaintiff and decreed the claim with interest to date of suit and future interest.

On appeal the lower appellate Court (District Judge of Aligarh) modified the decree of the first Court by disallowing the claim for interest, holding that the allowance of interest was precluded by s. 34 of Act No. XII of 1881.

[241] The plaintiff appealed to the High Court.

Mr. T. Conlan, for the appellant.

The respondent was not represented.

JUDGMENT.

EDGE, C. J., and AIKMAN, J.—The only question in this appeal is:—Is the plaintiff entitled to have interest upon the rent decreed to him? The defendant being a *thekadar*, clause (a) of s. 34 of Act No. XII of 1881 did not apply. The non-application of clause (a) of s. 34 did not exempt the *thekadar* from his liability under s. 73 of the Indian Contract Act of 1872. Illustration (n) of s. 73 shows that where a person breaks his contract to pay another a sum of money on a day certain or specified, he is liable for the principal sum due together with interest up to the day of payment. We decree the appeal with costs, and restore the decree of the first Court with costs in all the Courts.

Appeal decreed.

* Second Appeal No. 1139 of 1891, from a decree of W. Blennerhassett, Esq., District Judge of Aligarh, dated the 9th July 1891, modifying a decree of Pandit Kamta Prasad, Assistant Collector of Aligarh, dated the 30th October 1890.

1896

FEB. 15.

APPEL-

LATE

CIVIL.

18 A. 241 =
16 A.W.N.
(1896) 47.

18 A. 241 = 16 A.W.N. (1896), 47.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Blair.

CHAUDHRI RAJ KUMAR (*Applicant*) v. JUGAL KISHORE AND
ANOTHER (*Opposite parties*).^{*} [15th February, 1896.]

Civil Procedure Code, ss. 100, 108—*Ex parte* decree—"Appearance," *what*
constitutes.

A summons was issued to a defendant in a civil suit. The serving officer, being unable to find either the defendant or any person empowered to accept service for him at the address given, affixed a copy of the summons to the outer door of the defendant's house and returned the original to Court. On the day notified in the summons the case was called on, and upon its being called on a pleader presented himself in Court with a power of attorney, executed not by the defendant himself but by a third person on his behalf, and stated that the defendant had no notice of the time fixed for the hearing of the case, and prayed for an adjournment to a date upon which a proper answer to the claim could be filed. The application was refused, but the case was adjourned to the day following. On that date no one appeared for the defendant and a decree was passed against him.

Held that there was no appearance on behalf of the defendant within the meaning of s. 100 of the Code of Civil Procedure, and that the decree passed on the adjourned date was therefore an *ex parte* decree. *Hira Dai v. Hira Lal* (1) and *Ram Tahal Ram v. Rameshar Ram* (2) referred to. *Fazal Ahmad v. [242] Bahadur Singh* (3), *Ganqa Das v. Indarman* (4) and *Sahibzada Zainulabdin Khan v. Sahibzada Ahmed Raza Khan* (5) distinguished.

[R., 1 S.L.R. 115; D., U.B.R. (1897—1901) 240.]

THE facts of this case are fully stated in the judgment of the Court. Pandit *Moti Lal*, for the appellant.

The Hon'ble Mr. Colvin and Mr. T. Conlan, for the respondents.

JUDGMENT.

KNOX and BLAIR, JJ.—Chaudhri Raj Kumar appeals against an order passed by the Subordinate Judge of Farakhabad. In the order appealed against the Subordinate Judge rejected an application presented by the appellant praying that a decree which had been passed *ex parte* against him might be set aside. The Subordinate Judge held that the decree in question had not in fact been passed *ex parte*, and the contention raised in this appeal is that the decree was indeed an *ex parte* decree, there having been no appearance in the suit by or on behalf of the appellant.

It appears from the record that a summons was issued in the original suit for service on Chaudhri Raj Kumar; that the serving officer went to the place indicated in the summons, and made a return setting out that he could not find the defendant; that there was no agent empowered to accept the service of the summons and no person on whom service could be made. He therefore affixed a copy of the summons on the outer door of the house in which Raj Kumar ordinarily resided. On the day notified in the summons the case was called on and upon its being called on a pleader presented himself in Court with a power of attorney and stated that Chaudhri Raj Kumar had no notice of the time fixed for the hearing of this case and prayed for an adjournment to a date upon which a proper answer to the claim could be

^{*} First Appeal No. 83 of 1895, from an order of Babu Jai Lal, Officiating Subordinate Judge of Farakhabad, dated the 27th of April 1895.

(1) 7 A. 538.

(2) 8 A. 140.

(3) 13 A.W.N. (1893) 25.

(4) 13 A.W.N. (1893) 208.

(5) 5 I.A. 293.

filed. The application was refused, but the case was adjourned to the day following. On that date no one presented himself in Court on behalf of Raj Kumar and a decree styled an *ex parte* decree was passed in the suit. There is one fact further which might be stated here, and that is that in the return made by the serving officer mention is made by him of a [243] statement made to him to the effect that Chaudhri Raj Kumar was ill and had gone to Cawnpore for medical treatment. It is upon these facts that it is contended before us that there has never been any appearance in the proper sense of the word by or on behalf of Raj Kumar, and that the decree passed in the suit has therefore been properly styled an *ex parte* decree.

In support of this contention we were referred to the case of *Hira Dai v. Hira Lal* (1). In that case, though it is not exactly on all-fours with the present case, it was held that by the appearance referred to in s. 100 of the Code of Civil Procedure of 1882 is meant appearance in answer to a summons to appear and answer the claim on a day therein specified. The fact that the defendant had appeared by a pleader in the case on a previous occasion to contest an application for attachment before judgment was not considered a sufficient ground for holding that there had been such an appearance in the suit itself as would prevent the decree which followed in the suit on the day fixed for hearing when the defendant did not appear from being an *ex parte* decree. We were also referred to the case of *Ram Tahal Ram v. Rameshar Ram* (2), in which it was decided that appearance by a pleader who had been instructed by the two principal defendants at the beginning of the case and who had filed a *vakalatnamah*, but who had no instructions as to the facts of the case or as to the evidence to be adduced, and who was not provided with any of the means of conducting the defence, did not amount to an appearance by the defendants as contemplated in s. 108. There is also the case of *Fazal Ahmad v. Bahadur Singh* (3) in which this Court following the ruling of the Bombay High Court in *Ram Chandra Pandurang Naik v. Madhav Purushottam Naik* (4) held that where the only appearance was by a pleader who had instructions from his client, but was unable to support the plaintiff's case because of the absence of the plaintiff's witnesses, and the suit was dismissed, that the dismissal was not a dismissal for default of appearance. In the present case it is true that the Subordinate [244] Judge in his judgment says that the pleader who put in appearance acted upon the power of attorney apparently granted by Chaudhri Raj Kumar, but we do not find on the record warrant for this holding. The power of attorney was signed in the name of Raj Kumar, but by one Sant Kumar, on behalf of Raj Kumar. The very fact that immediate mention was made that Sant Kumar's appearance was due to his having to answer another case is in our opinion sufficient ground for an inference that Sant Kumar did act upon this occasion without any instructions from Raj Kumar, and that he put forward the pleader, not to enter an appearance in the case, but solely to obtain an adjournment to a date upon which such appearance could be made. It is this fact which distinguishes the present case from that of *Fazal Ahmad v. Bahadur Singh* (3) and that of *Ganga Das v. Indarman* (5).

The only case relied upon by the other side was that of *Sahibzada Zainulabdin Khan v. Sahibzada Ahmed Raza Khan* (6). That case

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(1) 7 A. 538.
(4) 16 B. 23.

(2) 8 A. 140
(5) 13 A.W.N. (1893) 208.

(3) 13 A.W.N. (1893) 25.
(6) 5 I.A. 293.

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was a case decided under s. 119 of Act VIII of 1859, when the procedure was different from that which now prevails under the present Code.

We are of opinion that the appearance in the present case cannot be deemed to be an appearance by the defendant, and that the decree passed was an *ex parte* decree. Before, however, the Subordinate Judge could set aside the decree *ex parte* he had to be satisfied that the summons was not duly served or that the defendant was prevented by sufficient cause from appearing, and stress was laid by the respondent upon this point of the case. The contention was that the summons had been duly served, and that the allegation of illness was not supported by any evidence; was never made at any prior stage of this case, and was now put forward at the last moment upon the bare statement said to have been made to the serving officer. The appellant, on the other hand, strenuously urged that there had been no due service of summons, and referred us to the case of *Cohen v. Nursing Das Auddy* (1) [245] and also to the case of *Nusur Mahomed v. Kazbai* (2). We are not prepared to hold that it was the duty of the serving officer, who was a peon attached to the District Court of Farakhabad, either to follow the defendant out of the jurisdiction of Farakhabad upon the mere allegation that he was to be found in Cawnpore, or to refrain from affixing the copy of the summons on the outer door of Chaudhri Raj Kumar's ordinary residence. We have no means to say how far effort was made by the serving officer to find Chaudhri Raj Kumar. Under the Code of Civil Procedure it is the duty of the Court which makes the return to a summons to declare that the summons has been duly served or to order such service as it thinks fit. This most important provision of the law was entirely overlooked in the present case by the Subordinate Judge of Farakhabad, the Court which had issued the summons. There is a certificate by the Munsif of Chibramau, but the summons did not issue from the Court of the Munsif of Chibramau, and the jurisdiction of the Subordinate Judge of Farakhabad extended over the village in which Chaudhri Raj Kumar resided and to which the summons was issued for service. In the absence of the declaration which the Subordinate Judge of Farakhabad should have made, there is no room for presumption that the summons was duly served.

For these reasons, we decree this appeal and set aside the order of the Subordinate Judge of Farakhabad. We also set aside the decree *ex parte* and direct that Court to grant a re-hearing of the original suit. Costs hitherto will be costs in the cause.

Appeal decreed.

(1) 19 C. 201.

(2) 10 B. 202.

18 A. 246 = 16 A.W.N. (1896) 48.

[246] APPELLATE CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

QUEEN-EMPRESS v. DALIP AND OTHERS.* [18th February, 1896.]

Act No XLV of 1860 (Indian Penal Code), ss. 99, 147, 332, 323—Criminal Procedure Code, ss. 55, 56, 114—Public servant in the execution of his duty as such—Arrest without sufficient authority, but in good faith—Assault on police making arrest—Right of private defence.

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18 A. 246 =
16 A.W.N.
(1896) 48.

A warrant was issued by a Magistrate for the arrest of one Dalip under s. 114 of the Code of Criminal Procedure. The warrant was sent to a certain thana to be executed. It was there, after being copied into a book kept for that purpose at the thana, made over to a particular constable for execution. When the constable to whom the warrant had been made over had left the thana it was discovered that Dalip was in a village other than that in which he had been supposed to be. Thereupon the officer temporarily in charge of the thana made a copy from the book at the thana, endorsed on the back the names of one Nazir Husain and some other constables, and having signed the endorsement, sent Nazir Husain and the others out with this paper to arrest Dalip. Nazir Husain and his companions arrested Dalip; but, as they were returning with him in custody, some of Dalip's friends, aided by Dalip himself, attacked them, rescued Dalip and caused hurt to the Police.

Held, that the Police officers concerned in arresting Dalip under the circumstances above described were not acting in the lawful discharge of their duty within the meaning of s. 332 of the Indian Penal Code, so as to render the accused liable to conviction under that section; but, inasmuch as they were acting in good faith under the colour of their office, s. 99 of the Indian Penal Code applied, and Dalip and his associates might be properly convicted under ss. 147 and 323 of the Code.

The words "in the discharge of his duty as such public servant" in the earlier portion of s. 332 of the Indian Penal Code mean in the discharge of a duty imposed by law on such public servant in the particular case, and do not cover an act done by him in good faith under colour of his office. *The Queen v. Roxburgh* (1) referred to.

[F., 2 C. 411 (414) = 5 C.W.N. 134; Rel., 16 C.L.J. 264 (270) = 16 Ind. Cas. 246 (249); R., 14 Cr.L.J. 142 = 18 Ind. Cas. 894 = 155 P.L.R. 1913; D., 24 C. 324 (329); 11 Cr.L.J. 221 (222) = 6 Ind. Cas. 12 = 7 M.L.T. 386; 11 Cr.L.J. 423 = 6 Ind. Cas. 956 = 18 P.R. 1910 Cr. = 104 P.L.R. 1910 = 32 P.W.R. 1910 Cr.]

THE facts of this case are fully stated in the judgment of the Court.

Mr. D. N. Banerji and Babu Badri Das, for the respondents.

The Public Prosecutor (Mr. E. Chamier), for the Crown.

JUDGMENT.

EDGE, C. J., and BURKITT, J.—This is an appeal by the Government from an acquittal on appeal of certain accused persons [247] who had been convicted by a Magistrate of the offences punishable under ss. 147, 332 and 225B of the Indian Penal Code. A Magistrate had issued his warrant under s. 114 of the Code of Criminal Procedure for the arrest of one Dalip in respect of the matters specified in the first paragraph of s. 110 of the Code of Criminal Procedure. That warrant had been addressed to and sent to the officer who was in charge of a particular thana for execution. The warrant was copied at the thana. The original

* Criminal Appeal No. 1162 of 1895, from an order of A.M. Markham, Esq., Sessions Judge of Meerut, dated the 13th of July, 1895.

(1) 12 Cox. Cr. Ca. 8.

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FEB. 18. warrant was handed to a particular constable to be executed. After the constable who had the warrant in his possession had left the thana to execute it, it was ascertained that Dalip was in a different village. Thereupon the officer who was temporarily in charge of the thana, wrote on the back of a copy of the warrant the names of Nazir Husain and some other constables, whom he orally ordered to proceed to the village where Dalip was and to arrest him. The officer temporarily in charge signed his name to the endorsement on the copy of the warrant and handed the copy to Nazir Husain. Nazir Husain proceeded to the village where Dalip was, arrested Dalip, and was proceeding with Dalip in custody to the thana, when the other accused persons assembled, attacked the constables and rescued Dalip. In that attack two of the constables received hurts from the rescuing party and also from Dalip.

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The Sessions Judge in appeal was of opinion that no offence had been committed. He held that, as Nazir Husain and his companions had not got the original warrant in their possession at the time of the arrest of Dalip and his rescue, they had no legal authority to arrest him, and that the assault committed upon them in the rescue was not within the purview of s. 332 of the Indian Penal Code, the officers not being at the time in the discharge of their duty. He also held that the officer in charge of the thana could not legally issue an order in writing for the arrest of Dalip, as the Magistrate by issuing his warrant had assumed jurisdiction in the case. There appears to have been some confusion in thought or argument in the Court below, as s. 99 [248] of the Indian Penal Code was considered in reference to s. 332. The Sessions Judge found that Nazir Husain had not been acting in the matter in good faith.

It is quite clear what the law in England would be in a case of this kind. In England a Police officer cannot arrest an accused person for an offence in respect of which a warrant is required, unless he has the warrant actually in his possession at the time of the arrest. We are not referring, of course, to cases in which in England a Police officer is entitled to arrest for an offence committed in his presence, and such like cases. We are referring to cases in which a warrant is required as a justification for the arrest, and in those cases the Police officer must have in his possession his authority, namely, the warrant. It is a reasonable view of the law to take, at least in England, where a subject who has committed no offence at all and is not ostensibly preparing to commit an offence is justified in demanding from the Police officer that officer's authority for arresting him.

In the present case Nazir Husain and his companions had no authority for making the arrest or detaining Dalip in custody except such authority, if any, as the endorsed copy of the warrant afforded. We have no doubt in this case that it was perfectly competent to the officer in charge of the thana, if he had felt so disposed, to have issued to Nazir Husain an order in writing under s. 56 of the Code of Criminal Procedure for the arrest of Dalip. The Magistrate, having issued his warrant for the arrest of Dalip, did not exclude the jurisdiction of the officer in charge of the thana and prevent him issuing his written order under s. 56. It might be different if the Magistrate had decided that no warrant should issue against Dalip and that a summons only should issue, but that was not the case here. In order to clear the ground, we may say that in our opinion the writing of the names of Nazir Husain and his fellow-constables on the back of the copy of the warrant and the signing of that endorsement by the officer in charge of the thana did not constitute the copy of the warrant an order in writing within the meaning of s. 56 of

the Code [249] of Criminal Procedure. If the officer in charge of the thana had written on the copy of the warrant words to the following effect:—"Arrest Dalip, the person within named, for the offence within named," and had put the names of the constables on the copy of the warrant and had signed such endorsement, he would have made an order in writing within the meaning of s. 56. It is obvious from the endorsement itself in the present case and from the evidence of the officer in charge of the thana that he did not conceive that he was making an order under s. 56 when he endorsed the copy of the warrant. If he had made such an order as we suggested, these accused persons would certainly have been liable to punishment under s. 332 of the Indian Penal Code in respect of the hurt inflicted by them jointly on these Police officers. As the Police officers were not acting under an order in writing made under s. 56 of the Code of Criminal Procedure, we must consider whether in arresting Dalip and in detaining him in custody under the copy of the warrant they were acting in the discharge of their duty within the meaning of s. 332 of the Indian Penal Code.

An officer in our opinion cannot be said to be acting in the discharge of his duty if it is not his duty as a Police officer to do the particular act. In the case of the *The Queen v. Roxburgh* (1) a Police officer whilst assisting a householder to eject a person from his house was assaulted. It was there held by Cockburn, C. J., that the person who assaulted the Police officer was not liable to be convicted, under s. 38 of 24 and 25 Vict., Cap. 100, of an assault on an officer in the due execution of his duty, that learned Chief Justice holding that the Police officer was not acting, strictly speaking, in the execution of his duty as a Police officer, since he was not actually obliged to assist in ejecting the accused person from the house; but the Chief Justice further held that, although the person who assaulted the Police officer was not liable to be convicted of the graver offence of assaulting an officer in the execution of his duty, he was liable to be convicted of a [250] common assault, as the Police officer in rendering assistance to the householder was acting lawfully.

It was pressed upon us in argument that the earlier portions of s. 332 of the Indian Penal Code should be read, not as if the words were—"in the lawful discharge of his duty," but as if the words were—"in the lawful or unlawful discharge of his duty," and for that contention reliance was placed upon the introduction into the latter portion of s. 332 of the word "lawful" before the words "discharge of his duty." Reliance was also placed on the decision of this Court in *Queen-Empress v. Nand Kishore* (2).

In our opinion the words "in discharge of his duty" can have only one meaning, and that is that the officer has a duty to discharge and is discharging it at the particular time. They cannot mean that the officer is acting under colour of his office. He must be acting at the time as a Police officer and in the particular matter discharging a duty incumbent upon him as a Police officer. A Police officer may of course occasionally exceed what his duty requires of him when in the discharge of his duty, or may in the course of the discharge of his duty be guilty of an act unlawful in itself and not required to be done by the Police officer for the purpose of performing the duty which he is then engaged upon. It is to cover acts which the Police officer may have to do when in the discharge of his duty that in our opinion the words "lawful

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(2) 12 A.W.N. (1892) 1.

1896 discharge" are introduced in the concluding portion of s. 332. We can
 FEB. 18. best explain our meaning by an illustration. A warrant is handed to a
 — Police officer for the arrest of a particular person. That warrant on the
 APPEL- face of it does not direct him to break open premises, for instance, in
 LATE order to effect the arrest, and yet it may be necessary for the
 CRIMINAL. officer in discharge of his duty in arresting the accused under the
 — warrant to break into the accused's house, or to do some other act
 18 A. 246= without the doing of which the warrant could not be executed.
 16 A.W.N. Such acts would be properly described as done or attempted to be
 (1896) 48. [251] done by the Police officer in the lawful discharge of his duty. If
 it was unnecessary to do such an act and yet it was done, the act would
 not be done by the Police officer in the lawful discharge of his duty, and
 therefore would not be covered by the concluding portion of s. 332.
 The Legislature has provided the procedure to be followed in making
 the arrest of a person to whom s. 110 of the Code of Criminal Procedure
 applies. The Legislature does not contemplate that a warrant should
 be issued for the arrest unless the circumstances bring the case within
 the proviso to s. 114 of the Code of Criminal Procedure. The procedure
 intended to be followed in such cases is that of summons. In our
 opinion, as the warrant in this case for the arrest of Dalip was not
 endorsed to Nazir Husain or his companions, and was not in the
 possession of any of them, and was in fact in the possession of a constable
 who had been directed to execute it and who was not with Nazir Husain,
 Nazir Husain and his companions were not in the discharge of their
 duty at the time when they arrested Dalip and detained him in custody.
 There is very good reason why the officer executing a warrant issued by a
 Magistrate or an order in writing under s. 56 of the Code of Crimi-
 nal Procedure should have in his possession at the time of the arrest the
 warrant or order in writing. If he has a warrant or order in writing in
 his possession, no doubt a Court would take a very serious view of an
 assault on the officer or of a rescue or attempt to rescue. In this case
 neither Nazir Husain nor his fellow constables had in their possession
 any warrant or order in writing under which it was their duty to arrest
 Dalip. We consequently hold that the constables were not in the dis-
 charge of their duty at the time when the rescuers of Dalip assaulted
 them, and that the case does not come within s. 332 of the Indian
 Penal Code.

Dalip and his companions are, however, liable, in our opinion, to be
 convicted under s. 323 of the Indian Penal Code. That they inflicted
 hurt on the two constables in pursuance of a common object, namely,
 that of using violence if necessary in effecting the [252] rescue of Dalip,
 there cannot be a doubt, and s. 99 of the Indian Penal Code applies in
 this case. That is a section which, if the arguments for the prosecution
 in this case were correct, would be entirely superfluous in the Code, that
 is, if a case came within s. 332 of the Indian Penal Code, when hurt
 was inflicted on a Police officer, whether he was lawfully or unlawfully in
 discharge of his duty, there would have been no necessity for the enact-
 ing of s. 99. The first clause of s. 99 was enacted to meet cases which
 would not fall within s. 332 by reason of the public servant in s. 332
 not being at the time when the assault was committed on him in dis-
 charge of a duty imposed on him by law. The first clause of s. 99 applies
 to those cases in which the public servant is acting in good faith under
 colour of his office, though the particular act being done by him may
 not be justifiable by law. In this case we entirely disagree with the

Sessions Judge in his finding that Nazir Husain acted otherwise than in good faith. The officer in charge of the thana was carrying out the intention of the Magistrate, who had no feeling in the matter, in causing the arrest of Dalip. Nazir Husain and his fellow constables were carrying out the informal orders of the officer in charge of the thana, and although under the circumstances of the case their arrest and detention of Dalip were not strictly justifiable by law, Nazir Husain and his fellow constables were, in making the arrest and in removing Dalip in custody, acting in good faith under colour of their office. We have no doubt that they believed that they were justified by law in making the arrest and in removing Dalip in custody. They may well have believed that s. 25 of Act No. V of 1861, applied to the verbal order, it was not an order in writing, which they had received from the officer in charge of the thana. There was no case here under s. 225-B of the Indian Penal Code. We do not interfere with the order of the Sessions Judge in setting aside the convictions under that section. Dalip and his companions, when they assaulted the Police officers, were undoubtedly members of an unlawful assembly within the meaning of s. 141 of the Indian Penal [253] Code. Their common object at that time was to commit an offence, namely, the offence of using criminal violence to the constables in order to effect the rescue of Dalip. Dalip joined with the rescuers in carrying out their common object, and he himself used violence. In our opinion all the accused were rightly convicted of the offence punishable under s. 147 of the Indian Penal Code, and of that offence we convict them. We set aside so much of the order of the Sessions Judge as quashed the convictions under s. 147. Dalip and his companions also committed the offence punishable under s. 323 of the Indian Penal Code and of that offence we convict them. The acquittal by the Sessions Judge of the offence charged under s. 2332 of the Indian Penal Code was right, and we do not interfere with his order in that respect. For the offence under s. 323 we sentence the respondents to this appeal severally to twelve months' rigorous imprisonment. For the offence punishable under s. 147 of the Indian Penal Code we sentence the respondents severally to one day's rigorous imprisonment. Warrants will issue for the arrest of the respondents. The sentences will be concurrent.

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APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

BALWANT SINGH (*Defendant*) v. ROSHAN SINGH (*Plaintiff*).^{*}
[18th February, 1896.]

Hindu Law—Joint Hindu family—Rights of illegitimate member of the family—Mortgage—Redemption—Suit by legitimate son of illegitimate member of family to redeem a mortgage made by previous legitimate owner.

The right of an illegitimate son in a Hindu family to receive maintenance from the family property is a purely personal right and does not descend to his son.

Held that the legitimate son of an illegitimate member of a Hindu family, who, as such illegitimate son, might have had a right to maintenance from the

^{*} First Appeal No. 113 of 1894, from a decree of Babu Ganga Saran, B.A., Subordinate Judge of Aligarh, dated the 31st March 1894.

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property of his father, had no such interest in the estate belonging to the family as would entitle him to redeem a mortgage made by a previous rightful and legitimate owner of the estate.

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THE facts of this case sufficiently appear from the judgment of the Court.

18 A. 253=

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[254] Mr. T. Conlan, Mr. D. N. Banerji, Babu Jogindro Nath Chaudhri, Pandit Sundar Lal, Babu Bishnu Chandar and Babu J. N. Chatterji, for the appellant.

Mr. A. H. S. Reid, Munshi Ram Prasad, Pandit Moti Lal and Munshi Gobind Prasad, for the respondent.

JUDGMENT.

BANERJI and AIKMAN, JJ.—The plaintiff brought the suit in which this appeal has arisen to redeem a mortgage. The facts, so far as it is necessary to state them, are briefly these:—The Husain estate, which originally belonged to Raja Mittar Singh, descended to his grandson Raja Narain Singh, and was mortgaged by Raja Narain Singh to the predecessor in title of the defendant. Raja Mittar Singh had a son, Kuar Sanwant Singh, whose son was Kuar Indarjit Singh. The plaintiff's father Bhoj Singh, it is alleged, was the illegitimate son of Indarjit Singh, although the plaintiff does not admit the fact of illegitimacy. After the death of Raja Narain Singh the estate was in the possession of his widows. The last of the widows having died, the plaintiff brought the present suit on the ground that he was entitled to the estate. Another ground of his claim, as alleged in his plaint, was that, even if his father Bhoj Singh was illegitimate, he, Bhoj Singh, had a right of maintenance for which the estate of Raja Mittar Singh was liable, and the plaintiff being the son of Bhoj Singh had a similar right which entitled him to redeem the mortgage. The plaintiff's right of redemption was denied by the defendant. The Court below has held that the question of the illegitimacy of Bhoj Singh, the plaintiff's father, is *res judicata*, it having been decided in 1868, in a suit brought by Bhoj Singh against the predecessors in title of the defendant, that Bhoj Singh was illegitimate. This conclusion of the Subordinate Judge has not been challenged by the respondent in this appeal. The Subordinate Judge has held, by a process of reasoning which we are unable to follow, that the plaintiff has a right to redeem the mortgage in question although his father was illegitimate. What we understand the Subordinate Judge to hold is this:—That the plaintiff's father Bhoj Singh was entitled to maintenance from the Husain estate; that he had a charge on that [255] estate for maintenance, but in lieu of that charge he was entitled to a *malikana* allowance; that the plaintiff as the legitimate son of his illegitimate father is entitled to the same *malikana* allowance, and consequently he is a person who has an interest in or charge upon the mortgaged property and hence is entitled to redeem the mortgage. Now assuming that the plaintiff is entitled to maintenance from the Husain estate, that right to obtain maintenance cannot, in the absence of a contract or of a decree of Court making the maintenance a lien on the estate, be regarded as a charge on the estate within the meaning of ss. 91 and 100 of Act No. IV of 1882, as was held in *Kuar Shiam Singh v. Raja Balwant Singh and others*, F. A. No. 295 of 1893, decided by this Court on the 11th of June 1895. It is urged before us that, although the plaintiff may not have a charge on the property in question, he has an interest in it, inasmuch as

his father Bhoj Singh was entitled to a *malikana* allowance in lieu of his maintenance. There is nothing before us to show that, if Bhoj Singh was entitled to maintenance, or to a *malikana* allowance in lieu of maintenance, that allowance was one which was not limited to the term of his life, but was heritable by his son. According to Hindu Law an illegitimate son of a person belonging to one of the three regenerate classes is entitled, if docile, to obtain maintenance from his father. No authority has been shown to us for holding that this is anything but a personal right. Therefore, even if it be assumed that Bhoj Singh was granted a *malikana* allowance in lieu of his maintenance, it would not follow that that allowance would pass to his son. The Subordinate Judge was clearly in error in holding that the plaintiff was entitled to the *malikana* allowance which Bhoj Singh is said to have enjoyed. Consequently the plaintiff has no right to redeem the mortgage in question. This is sufficient to dispose of this suit. The plaintiff having no right of redemption his suit should have been dismissed. We allow the appeal and dismiss the plaintiff's suit with costs here and in the Court below. As the plaintiff brought his suit *in forma pauperis*, and the suit has failed, the amount of court-fee payable by him should be paid [256] to Government by him. In the decree of this Court the amount of the court-fee which would have been paid by the plaintiff if he had not been permitted to sue as a pauper, and which has been wrongly stated in the decree of the Court below, will be correctly specified.

Appeal decreed.

18 A. 256 = 16 A.W.N. (1896) 52.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

AHMAD-UD-DIN KHAN (*Defendant*) v. SIKANDAR BEGAM (*Plaintiff*).^{*}
[20th February, 1896.]

Civil Procedure Code, s. 44, Rule (b)—Misjoinder of causes of action—Suit by assignee of Muhammadan widow for part of her dower and part of the estate of the widow's deceased husband.

Held that a suit by the assignee of a Muhammadan widow for the recovery of part of the assignor's dower and of part of the estate of the assignor's late husband did not contravene the provisions of s. 44, Rule (b) of the Code of Civil Procedure. *Ashabai v. Haji Tyeb Haji Rahimtulla* (1) dissented from.

[R., 31 B. 105 = 8 Bom. L.R. 734.]

MUSAMMAT Sughra Begam claimed as widow of, and heir to, her deceased husband, Mumtaz Husain Khan, a certain sum as her dower debt and a certain fractional share of the estate left by her deceased husband. On the 17th of June 1893 Sughra Begam assigned to the plaintiff in the suit out of which this appeal arose, *viz.*, Musammat Sikandar Begam, one-half of her dower debt and one-half of the share in Mumtaz Husain's estate which she claimed by inheritance. On this assignment Sikandar Begam sued for possession of the property assigned. Sughra Begam also sued for the unassigned portion of her claim for dower and inheritance. The defendants were the son and the daughters of Mumtaz Husain. The

^{*} First Appeal No. 100 of 1894, from a decree of Pandit Raj Nath Sahib Subordinate Judge of Moradabad, dated the 7th February 1894.

(1) 6 B. 390.

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- 1896** defendants raised various pleas, but principally contended that Sughra
FEB. 20. Begam was, in fact, never married to Mumtaz Husain, and that the suit
 — was bad for multifariousness and misjoinder of causes of action. Both
APPEL- suits were tried together, and both were decreed by the Court of first
LATE instance (Subordinate Judge of Moradabad). The defendant, Ahmad-
CIVIL. ud-din Khan, appealed to the High Court, [257] raising practically the
 — same pleas as had been raised in the Court below.
18 A. 256= Maulvi *Muhammad Ishaq*, for the appellant.
16 A.W.N. Pandit *Moti Lal* and Maulvi *Ghulam Mujtaba*, for the respondent.
(1896) 52.

JUDGMENT.

BANERJI and AIKMAN, JJ.—This appeal is similar to First Appeal No. 101 of 1894, which we have decided to-day. It has arisen out of a suit brought by Sikandar Begam, the assignee of Sughra Begam, plaintiff in the suit in First Appeal No. 101. By an instrument dated the 17th of June 1893, Sughra Begam assigned to Sikandar Begam one-half of the amount of her dower, and also a half share of the property which she claimed to have inherited from her deceased husband Mumtaz Husain Khan. Sikandar Begam by virtue of her assignment claimed Rs. 4,000 on account of Sughra Begam's dower, and an eighth share of the estate said to have been left by Mumtaz Husain Khan. Ahmad-ud-din, the appellant here, denied that Sughra Begam was married to Mumtaz Husain Khan; he raised other objections to the claim, which have been repeated in this appeal. As for the objection that Sughra Begam was not the wife of Mumtaz Husain Khan, we hold, for reasons given in our judgment in First Appeal No. 101 of 1894, that it must fail. In our opinion it has been established that Sughra Begam was married to Mumtaz Husain Khan and that the amount alleged, namely, Rs. 60,000 and twenty-five gold mohurs,* was the amount of her stipulated dower.

Mr. *Muhammad Ishaq*, who has argued this case very ably, contended that there was a misjoinder of defendants and of causes of action, and that the plaint was defective by reason of such misjoinder. This contention was founded on the fact that a portion of the claim was directed against the defendants Nos. 2, 3 and 4, who had no concern with the remainder of the claim, which was advanced against the first defendant alone.

We have been relieved of the necessity of determining this question, by reason of the learned counsel for the respondent applying to us to allow his client to withdraw her claim against [258] defendants Nos. 2, 3 and 4, with liberty to bring a fresh suit for the portion of the claim so withdrawn. We have granted him permission to withdraw the claim as against those defendants, and we make an order under s. 373 of the Code of Civil Procedure permitting the plaintiff to withdraw the claim against the defendants Nos. 2, 3 and 4, with liberty to bring a fresh suit in respect of the portion of the claim so withdrawn, on condition that the plaintiff pay to the said defendants their costs in the Court below, proportionate to the value of the claim directed against them.

The next contention of Mr. *Muhammad Ishaq* raises a question of some difficulty. He argues that the suit offends against the provisions of Rule (b) of s. 44 of the Code of Civil Procedure, inasmuch as the dower of Sughra Begam was claimed as due to her in her personal capacity and

* [In 15 A.W.N. (1896) 52 we have Rs. 1,25,000 and two gold mohurs for Rs. 60,000 and twenty-five gold mohurs.—ED.]

the remainder of the property in suit was claimed by virtue of her right as heir to Mumtaz Husain. In support of this contention he has referred to *Ashabai v. Haji Tyei Haji Rahimtulla* (1). That case is undoubtedly in favour of his contention, but with due deference to the learned Judge who decided that case, we are unable to adopt the same view of *Rule(b)* that he did. That rule forbids the joinder of claims by or against an executor, administrator or heir, as such, with claims by or against him personally unless the personal claims have reference to the estate in respect of which he sues or is sued as executor, administrator or heir. As we understand the rule, it prohibits the joinder of a claim by or against a person in his representative capacity with a claim which is advanced by or against him in his personal capacity. This is evident from the concluding words of the rule, which permit the joinder of such claims as a person "is entitled to or liable for jointly with a deceased person whom he represents." The words italicized clearly indicate that the intention of the Legislature in enacting *Rule(b)* was to draw a distinction between the personal capacity of a plaintiff or defendant and his capacity as representing the estate of some deceased person. *Rule(b)* of s. 44 reproduces the provisions of rule 5 of Order XVII [259] framed under the English Judicature Act with the addition of the word "heir." It was necessary to add that word in the Indian Act because in this country it is not an executor or administrator alone who represents the estate of a deceased person. An heir who has obtained a certificate under Act No. XXVII of 1860, to collect the debts due to a deceased person or a succession certificate under Act No. VII of 1889, is as much a representative of a deceased person for the purpose of collecting debts due to him as an executor or an administrator. It seems to us that it is in this sense that the word "heir" is used in *Rule(b)* of section 44, and that it is the object of the rule to forbid, save under certain conditions mentioned in the rule, the joinder of claims brought by or against persons who occupy two different capacities. Reading *Rule(b)* as a whole, and having regard to the reason for the rule, it is, in our opinion, impossible to hold that it precludes a person from joining a claim for property acquired by himself, with a claim for property inherited by him from another, when he does not represent persons other than himself. Both of such claims are advanced by him in his personal capacity. It is true that in the latter case he claims as an heir, but he claims it in his own right, and not on behalf of anyone else. In our judgment the "heir" referred to in s. 44, *Rule(b)*, is an heir suing or being sued in his representative capacity, who, like an executor or administrator, represents the estate of a deceased person. In this view the joinder of the claim for the dower due to Sughra Begam with the claim for the inheritance is not obnoxious to the prohibition of the rule contained in s. 44, *Rule(b)*.

The next objection raised by Mr. Muhammad Ishaq was that s. 135 of Act No. IV of 1882 applied to this case. He contended that there was no consideration for the assignment to Sikandar Begam, and yet he argued that Sikandar Begam was only entitled under s. 135 to the amount of consideration actually paid by her. If there was no consideration for the transfer to Sikandar Begam it was not a sale, and consequently s. 135 would not apply. Even if there was no consideration, it was [260] clearly an assignment of a portion of her rights by Sughra Begam to Sikandar Begam. The assignment is admitted by Sughra Begam, and it does not lie in the appellant's mouth to dispute its validity on the ground

1896
FEB. 20.
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18 A. 256 =
16 A.W.N.
(1896) 52.

(1) 6 B. 390.

1896
FEB. 20.

APPEL-
LATE
CIVIL.

18 A. 256 =
16 A.W.N.
(1896) 52.

of absence of consideration. No other plea has been pressed before us. In our judgment this appeal fails. We dismiss it with costs.

Appeal dismissed.

18 A. 260 = 16 A.W.N. (1896) 44.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

KANHAIYA LAL AND OTHERS (*Defendants*) v. MUNNI (*Plaintiff*).^{*}
[20th February, 1896.]

Act No. V of 1881 (Probate and Administration Act)—Will of a Hindu—Probate—Suit by legatee before taking out probate.

Save where the Hindu Wills Act, 1870 is in force, it is not obligatory on a person claiming under the will of a Hindu to obtain probate of the will before instituting his claim. *Krishna Kinkur Roy v. Panchuram Mundul* (1) and *Thakuram v. Ram Charan* (2) followed.

[F., 2 N L.R. 123; R., 2 O.C. 33.]

IN the suit out of which this appeal arose the plaintiff sought to recover certain moveable and immoveable property which had been of her father, Bansidhar, in his lifetime. She claimed in the first instance as heir to Bansidhar, who, as she alleged, was a separated Hindu who had died without leaving either a widow or male issue; and in the second place she claimed under a will alleged to have been executed by Bansidhar on the 6th of March 1892, by which he bequeathed the whole of his property to the plaintiff. The plaintiff also claimed a certain sum as damages on account of the wrongful interference of the defendants with the property in suit.

The principal pleas taken by the defendants were that the property in question was ancestral and the right of the plaintiff in respect of it was no more than a right of maintenance; that the will was invalid, and that the suit was bad by reason of misjoinder of causes of action.

The Court of first instance found that the property in suit was the separate property of Bansidhar; that there was no misjoinder; that the instrument sued upon was properly executed and was of [261] the nature of a will, and that the plaintiff was competent to sue upon it without being under the necessity of taking out probate. The Court also found against the defendants on the minor issues in the case, and decreed the plaintiff's claim.

The defendants appealed to the High Court.

Mr. T. Conlan and Pandit Sundar Lal, for the appellants.

Pandit Moti Lal and Maulvi Ghulam Mujtaba, for the respondent.

JUDGMENT.

BANERJI and AIKMAN, JJ.—The suit in which this appeal has arisen was brought by the respondent to recover possession of the property which once belonged to her father Bansidhar. She alleged that Bansidhar had made a will in writing before his death under which she acquired a right to

^{*} First Appeal No. 108 of 1894, from a decree of Pandit Raj Nath Sahib, Subordinate Judge of Moradabad, dated the 12th February 1894.

(1) 17 C. 272.

(2) 15 A.W.N. (1895) 87.

his property ; she also said that she was Bansidhar's heir according to Hindu law and was, as such, entitled to the property. The defendants claimed to be the heirs of Bansidhar, on the allegation that the property was the joint ancestral property of them and Bansidhar, and they denied the will. The lower Court has found the will to be genuine, it has also found that the property was the separate property of Bansidhar, and it has decreed the claim.

The learned counsel who has appeared here for the defendants appellants has not questioned the finding of the Court below as to the genuineness of the will. What he contends is that the plaintiff, not having obtained probate of the will on which she relies, is not entitled to maintain the suit on the strength of the will.

We are unable to accede to this contention. The only act of the Legislature which provides for the grant of probate of wills of Hindus in these Provinces is Act No. V of 1881. That Act does not contain any provisions similar to the provisions of s. 187 of the Indian Succession Act, which are to the effect that a right as executor or legatee under a will cannot be established in any Court without obtaining probate of the will. That section was extended to Hindus by the Hindu Wills Act of 1870, but the Hindu Wills Act is applicable only to the Lower [262] Provinces of Bengal and to the towns of Bombay and Madras. From the fact that the Probate and Administration Act, 1881, contains no provision similar to that contained in s. 187 of the Indian Succession Act, it must be presumed that, save where the Hindu Wills Act, 1870, is in force, it is not obligatory on a person claiming under the will of a Hindu to obtain probate of the will before instituting his claim. This view was adopted in the case of *Krishna Kinkur Roy v. Panchuran Mundul* (1) and a similar view was taken by this Court in *Thakurain v. Ram Charan* (2). We are accordingly of opinion that the plaintiff was not precluded from maintaining her suit by reason of her not having obtained probate of the will of her father. No other question was raised before us. The defendants' allegation as to the family and the property being joint was negatived by the evidence of Balram, defendant. In our judgment the decree of the Court below was right. We dismiss this appeal with costs.

Appeal dismissed.

18 A. 26 = 216 A.W.N. (1896) 42.

APPELLATE CIVIL.

Before Mr. Justice Burkitt.

BHAGWAN SINGH AND OTHERS (*Objectors*) v.
UMMAT-UL-HASNAIN AND OTHERS (*Decree-holders*).^{*}
[21st February, 1896.]

Civil Procedure Code, s. 543—Application for refund of money paid by a successful pre-emptor, the decree for pre-emption having been upset on appeal—Interest.

A plaintiff in a pre-emption suit obtained a decree and paid into Court the preemptive price as stated in that decree, and the money was drawn out of Court

^{*} First Appeal No. 181 of 1894, from a decree of Babu Kishore Lal, Subordinate Judge of Gbazipur, dated the 26th June 1894.

(1) 17 C. 272.

(2) 15 A.W.N. (1895) 87.

1896
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APPEL-
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18 A. 260 =
16 A.W.N.
(1896) 44.

1896

FEB. 21.

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APPEL-

LATE

CIVIL.

18 A. 262=

16 A.W.N.

(1896) 42.

by the vendor. Subsequently the decree was reversed on appeal, and the plaintiff then applied under s. 583 of the Code of Civil Procedure for a refund of the money paid into Court as above described with interest. *Held*, that the pre-emptor was entitled to a refund of the money together with interest up to date of repayment. *Rogers v. The Comptoir D'Escompte de Paris* (1), followed. *Jaswant Singh v. Dip Singh* (2), referred to. *Hatti Prasad v. Chattarpal Dubey* (3), dissented from.

[R., 20 A. 430; 19 Ind. Cas. 1.]

THE facts of this case are thus stated in the judgment of the first Court (Subordinate Judge of Ghazipur).

[263] "Syed Muhammad Husain Khan, who is now represented by Musammat Ummat-ul-Hasnain, Musammat Ashraf-un-nissa Begam and Musammat Razia Begam, obtained a pre-emption decree from this Court on the 10th of September, 1889. As directed by the decree, they deposited Rs. 6,500 in Court on the 20th of December, 1889. A part of this money was paid to the judgment-debtors. The decree of this Court was set aside by the High Court on the 8th of April, 1891. The decree-holders now apply under s. 583 of the Code of Civil Procedure for recovery of Rs. 6,096-5-0 as principal and Rs. 2,520 as interest on the same at 12 per cent. per annum. The judgment-debtors state that as the decree of the High Court does not order restitution of the money paid by the decree-holders as pre-emptors, the latter cannot recover it in the execution department; that the decree-holders are not entitled to recover any interest, and that the accounts given in the application for execution are not correct."

The Court of first instance found generally in favour of the applicants and gave them a decree for re-payment of the money claimed, with interest at 6 per cent. per annum from the date of payment into Court to the date of the decree of the High Court in appeal.

The judgment-debtors objectors appealed to the High Court, and the decree-holders filed an objection under s. 561 of the Code of Civil Procedure that they were entitled to interest up to the date of payment.

Mr. *Amir-ud-din*, for the appellants.

Munshi *Ram Prasad* and Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

BURKITT, J.—This is an appeal in execution proceedings. It appears that the original suit was one for pre-emption in which the pre-emptor was successful and obtained a decree for pre-emption, conditional on his paying in the sum of Rs. 6,500 to the credit of the defendants by a certain date. That money was paid in, and has been drawn out of the Court by the defendants. Subsequently the pre-emption decree was reversed, and the plaintiff was declared not [264] entitled to pre-empt the property. The present proceedings have been taken under s. 583 of the Code of Civil Procedure for restitution of the amount paid by the defeated pre-emptor and drawn out of Court by the opposite party.

There was a question as to whether the proceedings could be taken under s. 583, and one of the grounds of this appeal touches that question. It has not, however, been pressed. The other point is as to whether the present appellant, the defeated pre-emptor, is entitled to interest on the money which he deposited in Court and which was drawn out by the opposite party. The lower Court has held that he was so entitled. In my opinion that decision is right. The case of *Rogers v. The Comptoir*

(1) L.R. 3 P.C. 465.

(2) 7 A. 432.

(3) 8 A.W.N. (1888) 287.

D'Escompte de Paris (1) is conclusive on that point, and was cited on a former occasion in this Court in the case of *Jaswant Singh v. Dip Singh* (2). It is true that in another case in this Court—*Hatti Prasad v. Chatarpal Dubey* (3)—a single Judge of this Court took a contrary view, but in this conflict of authority I consider that I am bound to follow the authority of their Lordships of the Privy Council. This appeal therefore fails and is dismissed with costs.

I have also to consider an objection under s. 561 of the Code of Civil Procedure by the respondents. The contention in that objection is that the respondents are entitled to a larger sum as interest than has been given to them by the Court below. That Court allowed interest only up to the date on which the High Court reversed the decree for pre-emption and refused interest subsequent to that date. The respondents, objectors, contend that they are entitled to interest up to the date when the money may be actually refunded to them. On the authority of the Privy Council case cited above, I am of opinion that that contention is correct, for it must not be forgotten that the opposite party drew the money out of Court and will have had the use of it until they are compelled to refund it in these execution proceedings. I must therefore allow this objection and direct the lower appellate Court that in [265] further proceedings in executing this decree interest at the usual rate (6%) is to be allowed to the objectors Ummat-ul-Hasnain and others up to the date of payment in execution. The objectors are entitled to costs.

Appeal dismissed.

18 A. 265 (F.B.) = 16 A.W.N. (1896) 80.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burkitt and Mr. Justice Aikman.

SHIB LAL (*Plaintiff*) v. AZMAT-ULLAH AND OTHERS (*Defendants*)*.
[25th February, 1896.]

Act No. IV of 1882 (*Transfer of Property Act*) ss. 130, 135—*Actionable claim—Assignment of simple mortgage before due date.*

The term "actionable claim" as used in s. 130 of Act No. IV of 1882 means a claim in respect of which a cause of action has already matured and which, subject to procedure, may be enforced by suit.

Held that the assignment for value of a simple mortgage before the due date of the mortgage is not a sale of an actionable claim within the meaning of s. 135 of Act No. IV of 1882. *Rani v. Ajudhia Prasad* (4) referred to and explained.

[R., 30 M. 235 = 17 M.L.J. 87.]

THE facts of this case are briefly as follows:—On the 17th of July 1876, one Karim-ullah, the father of some of the defendants to the suit, having borrowed Rs. 2,000 from Baldeo Sahai, husband of one of the other defendants, executed an hypothecation bond in his favour. On the 7th of July 1888, accounts were adjusted between the parties and a fresh bond for Rs. 4,452 was given. This latter bond however was not executed by

* First Appeal No. 4 of 1894, from a decree of Maulvi Aziz-ul Rahman, Officiating Subordinate Judge of Moradabad, dated the 12th October 1893.

(1) L. R. 3 P. C. 465.

(3) 8 A. W. N. (1888) 287.

(2) 7 A. 492.

(4) 16 A. 315.

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FEB. 21.
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APPEL-
LATE
CIVIL.

18 A. 262 =
16 A.W.N.
(1896) 42.

1896
FEB. 25.
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FULL
BENCH.
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18 A. 265
(F.B.) =
16 A. W. N.
(1896) 80.

Karim-ullah, but by one Rustam Khan, under a general power-of-attorney. The latter of the two bonds was payable in a year from its execution. On the 20th of June, 1889, Musammatt Mulia, as heir to Baldeo Sahai, sold to Shib Lal, the present plaintiff, the bond of the 7th July, 1888. The plaintiff, on the 12th July, 1893, brought his suit on this bond in the Court of the Subordinate Judge of Moradabad. The Subordinate Judge dismissed the suit, holding that the execution of the bond was not proved.

[266] The plaintiff appealed to the High Court, and when the appeal came on for hearing, the respondents raised the question whether in any case the appellant was entitled to more than would be due to him under s. 135 of the Transfer of Property Act. This question was thereupon referred to the Full Bench together with the question whether such a defence could be raised for the first time in appeal.

Pandit *Sundar Lal* and Munshi *Gobind Prasad*, for the appellant.

Munshi *Jwala Prasad*, Babu *Bishnu Chandar* and Maulvi *Ghulam Muftaba* for the respondent.

The judgment of the Court [EDGE, C. J., KNOX, BLAIR, BANERJI, BURKITT and AIKMAN, JJ.] was delivered by EDGE, C. J. :—

JUDGMENT.

The suit in which this reference to the Full Bench has arisen was one for sale under s. 88 of the Transfer of Property Act. The plaintiff in the suit was the assignee of an alleged simple mortgage-bond upon which the suit was brought. The execution of the bond was denied. The first Court found that the bond had not been made by the alleged mortgagor and dismissed the suit. On appeal to this Court the suit was decreed in the absence of the defendant-respondent : but, on its being proved that it was through misadventure that the defendant was not represented at the hearing in this Court, the *ex parte* decree of this Court was set aside and the appeal reinstated on the list for hearing. When the appeal came on to be heard the vakil for the respondent claimed that his client was entitled to take advantage of s. 135 of the Transfer of Property Act. Two questions were referred for decision to the Full Bench. The first question was :—“ Is the assignment for value of a simple mortgage before the due date of the mortgage a sale of an actionable claim within the meaning of s. 135 of Act No. IV of 1882 ? ” The second question was :—“ If such assignment is the sale of an actionable claim, can the defendants respondents at this stage of the litigation avail themselves of s. [267] 135 ? ” The assignment in question was made before the mortgage money became payable.

We have been referred in the course of the arguments to the following cases :—*Lala Jugdeo Sahai v. Brij Behari Lal*, (1) *Modun Mohun Dut v. Futtar-un-nissa*, (2) *Rathnasami v. Subramanya* (3) *Singaracharlu v. Sivabai*, (4) *Ramachandra v. Venkatarma*, (5) *Hakim-un-nissa v. Deo Narain*, (6) *Moti Ram v. Jeth Mal*, (7) *Rani v. Ajudhia Prasad*, (8) *Muchiram Barik v. Ishan Chunder Chuckerbutti* (9,) *Ramakrishna v. Kurikal* (10), and *Jamal-ud-din Khan v. Baij Nath* (11).

The answer to the first question must depend in our opinion upon the construction of s. 130 of the Transfer of Property Act. On the one hand it has been contended that that section which is a section of definition applies not only to a claim at present capable of enforcement

(1) 12 C. 505.

(2) 13 C. 297.

(3) 11 M. 56.

(4) 11 M. 498.

(5) 13 M. 516.

(6) 13 A. 102.

(7) 16 A. 313.

(8) 16 A. 315.

(9) 21 C. 568.

(10) 11 M. 445

(11) 10 A. W. N. (1890) 24.

by suit in the Civil Court but also to a claim in respect of which the cause of action has not at present arisen, but which in the future will mature into a claim which will then be enforceable in a Civil Court. The wording of s. 130 is not absolutely free from doubt, but it is impossible for us to hold that a claim is actionable unless it is a claim in respect of a cause of action which has already matured and which, subject to procedure, may be enforced by suit. If it was the intention of the Legislature that Chapter VIII of the Transfer of Property Act should apply not only to claims in respect of which at the time of the transfer a cause of action was complete and ripe, but also to claims in respect of which a cause of action had not already arisen, it would have been easy for the Legislature to have used appropriate language to convey its meaning. We cannot construe the "actionable claim" of s. 130 as co-extensive with the English legal term "chose in action." Chapter VIII of the Transfer of Property Act was presumably passed, so far as its principal provisions are concerned, [268] in order to discourage traffic in litigation. No doubt traffickers in litigation may purchase an unripe claim, or may wait and purchase a ripe claim, but the Legislature may have thought that there was good reason for limiting the application of s. 135 to cases in respect of which at or before the time of sale a suit could have been brought in a Civil Court, and may have thought it inadvisable that s. 135 should be applicable to the transfer of claims which had not matured into claims which were actionable. If a man had a cause of action, or a supposed cause of action, good, if the facts relied on were true, he probably would seek to enforce his cause of action and to derive the utmost benefit from it by bringing his suit on his own behalf in respect of it. Where, however, a man transfers such right as he has to maintain a suit to a third person after his alleged cause of action has arisen (and by cause of action we mean everything necessary to the maintenance of the suit), a suspicion would arise that the purchaser was speculating in litigation. On the other hand, it might be impolitic to attempt to restrain the free transfer of claims which had not matured into causes of action. For instance, a merchant might sell a consignment of goods on the term of a year's credit being given for payment. He might immediately afterwards find it necessary to raise money to carry on his business or to meet his liabilities, and consequently might wish to sell the debt, which would not be due and payable until the expiration of the year. The purchaser of that debt, even assuming that the debtor were a man of credit and responsibility, would not give the full value of the debt at the time when the debt would become payable. He would give at the outside the present value of a debt of that amount payable one year hence. It is obvious that in such a transaction the price actually paid would be the then discount value. The interest which a Court might allow might not be an adequate compensation for the loss to the purchaser of the use of the money paid as the actual price. Again, if s. 135 were to apply to the sale of a claim which had not been actionable at the time of the sale, it would apply in the following case. A man insures his life for Rs. 20,000 [269] payable on his death. Owing to the necessity of finding money for his business he is obliged to assign for value the policy which he holds on his own life. At the time of the sale the present value of the policy might be only Rs. 1,000, and yet, if the purchaser paid Rs. 1,000 for it and s. 135 applied, the Insurance Company could avail themselves of s. 135 at the death of the person insured and discharge their liability by payment of Rs. 1,000 and some interest. There is no case, so far as

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18 A. 268
(F.B.)=16 A.W.N.
(1896) 80.

1896
FEB. 25.
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FULL
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18 A. 265
(F.B.)=
16 A.W.N.
(1896) 80.

we are aware, in which an actionable claim has been held to be a claim in respect of which at the date of transfer an action could not have been brought. In this case, as the assignment of the simple mortgage took place before the debt for which the mortgage was security became due and payable, and consequently before a suit could have been maintained for the payment of that debt and for the enforcement or discharge of the debt by sale of the mortgaged property, we hold that the defendants-respondents could not avail themselves of s. 135.

The Full Bench decision of this Court in the case of *Rani v. Ajudhia Prasad* (1) did not decide this precise point. It was there said by the Court:—"Now there cannot be any doubt in this case that on the facts the original mortgagee had, when he sold to the present plaintiff his rights under the mortgage, a claim against the mortgagors which a Civil Court would recognise as affording grounds for granting the relief contemplated by s. 68 of Act No. IV of the 1882, *plus* the right to ask for the sale of the property in satisfaction of the debt as contracted for by the mortgage." The latter portion of the sentence which we have quoted was probably not sufficiently explicit. It was not intended to suggest that a usufructuary mortgagee as such could obtain a decree for sale on his mortgage of the mortgaged property. What we intended to express in that case was that the usufructuary mortgagee having been kept out of possession might maintain a suit for the mortgage money, and in execution of his money decree in that suit might obtain the sale of the hypothecated property as the whole [270] or part of the property of the judgment-debtor. The Court ordering execution of the decree might order a sale of other property and not of the hypothecated property. We refer to this in order to avoid any mistake as to our meaning.

Under these circumstances it is not necessary to answer the second question referred to the Full Bench. With this answer the appeal will go back for disposal to the Bench which made the reference.

18 A. 270 (F.B.)=16 A.W.N. (1896) 59.

FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox,
Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burkitt and
Mr. Justice Aikman.*

SHEO NARAIN RAI AND OTHERS (*Defendants*) v. PARMESHWAR RAI
AND OTHERS (*Plaintiffs*).^{*} [28th March, 1896.]

Act No. XII of 1881 (N.W.P. Rent Act), ss. 36, 39, 95 (e), 96 (b)—Jurisdiction—Civil and Revenue Courts—Suit in a Civil Court for a declaration on a question of title decided by a Court of Revenue under s. 39 of Act No. XII of 1881—Res judicata.

The defendants served a notice of ejectment under s. 36 of Act No. XII of 1881 on the plaintiffs, alleging the plaintiffs to be their sub-tenants and themselves to be tenants with a right of occupancy. The plaintiffs objected that they, and not the defendants, were the tenants in chief of the land in question. This objection was decided, under s. 39 of the said Act, by a Court of Revenue adversely to the plaintiffs. The plaintiffs thereupon sued in a Civil Court for a declaration that they were tenants with a right of occupancy and for maintenance of possession.

^{*} Second Appeal No. 543 of 1893 from a decree of Pandit Bansidhar, Subordinate Judge of Ghazipur, dated the 17th April 1893, reversing a decree of Babu Srish Chandar Bose, Munsif of Ghazipur, dated the 24th December 1892.

Held that, inasmuch as s. 96 (b) of Act No. XII of 1881 gave to a decision of a Court of Revenue under s. 39 the effect of a judgment of a Civil Court, the hearing of the plaintiffs' present suit by a Civil Court was barred.

The principle of the decision in *Tarapat Ojha v. Ram Ratan Kuar* (1) affirmed.

The jurisdiction of Civil Courts and Courts of Revenue in the North Western Provinces considered.

[F., 4. A.L.J. 35 N; R., 23 A. 360; 27 A 569 = 2 A.L.J. 283 = A.W.N. (1905) 103; 1 O.C. 210 (214); D., L.B.R. (1893—1900) 429; 2 O.C. 28 (32).]

THIS was a reference to the Full Bench made by an order of a Division Bench dated the 30th of May 1894.

The facts of the case sufficiently appear from the judgment of the majority of the Court.

(1) 15 A. 387.

* N.B. The following forms the early stage of the case. Though this is not given in the case as reported in 18 A. 270. yet, for facility of reference it has been given here.—ED.,

[Order of BANERJI, J., by which the appeal was referred to a Divisional Bench:—

"The first question which arises in this appeal is whether the suit in this case was one cognizable by the Civil Court or by a Court of Revenue. The property in dispute is the tenancy holding of a tenant at fixed rates. The allegation of the plaintiffs-respondents was that the said holding belonged to them in the sense that they were the tenants in respect of that holding at a fixed rate of rent, and that the appellants had no right to it. It appears that, before the present suit was instituted, the appellants applied to the Revenue Court for the ejectment of the respondents, on the allegation that the respondents were their sub-tenants. The respondents denied the alleged sub-tenancy, but the Revenue Court overruled their objection and ordered their ejectment. Thereupon the present suit was instituted, and they claimed a declaration of their right to the holding and maintenance of their possession. It is contended that this was not a suit of which the Civil Court could take cognizance. I am of opinion that this contention is untenable. The claim as laid in the plaint is one which could not be brought in a Court of Revenue under s. 93 or s. 94 of Act No. XII of 1881. It is one for the establishment of right to a tenancy holding in the character of tenant, in other words, the question between the parties is, whether the fixed rate holding in dispute is the holding of the plaintiffs-respondents or that of the defendants-appellants. It is a pure question of right to the holding and not a question as to the status of the plaintiffs as tenants of the holding. If a landlord applies to a Revenue Court for the ejectment of a person who is alleged to be his tenant and succeeds in that Court, and the alleged tenant subsequently brings a suit in the Civil Court for a declaration that he has the proprietary right to the land in question, and denies the proprietary title of his alleged landlord, that undoubtedly would be a suit not cognizable by a Court of Revenue and would properly lie in a Civil Court. In this case, although the subject-matter of the suit is the holding of a tenant at fixed rates, the question between the parties is one of title between rival claimants to the holding, in the same way as in the suit last referred to the dispute was one of title only. Of course if the plaint was framed in such a way as to make the claim laid in it one of a nature cognizable in a Court of Revenue under s. 93 or s. 95 of Act No. XII of 1881, the Civil Court could not entertain it simply on the ground of the denial of the plaintiffs' title by the defendant. This was what was held by the Full Bench in the case of *Tarapat Ojha v. Ram Ratan Kuar* (I.L.R. 15 All. 387). In this view this case is distinguishable from S. A. No. 1276 of 1892, to which Mr. Gobind Prasad has drawn my attention. In that case the plaintiff alleging that the defendant was his sub-tenant claimed possession against him. This was a matter which could have formed the subject of an application under s. 95 of Act No. XII of 1881, and the suit was therefore not cognizable by a Civil Court. In that case, however, it appears that my learned brother Burkitt held that the decision of the Revenue Court operated as *res judicata* between the parties as to the nature of their right to the holding which was in dispute in that case, and Mr. Gobind Prasad has relied upon it in support of his second plea in appeal. ("Because the Revenue Court having determined the plaintiffs to be *shikmi* tenants of the appellants the Civil Court has no jurisdiction to make a contrary declaration"). The question is one of importance, and I have doubts in my own mind as to whether in a suit such as the one before me the decision of a Court of Revenue can be regarded as *res judicata*, I therefore refer the case to a Bench of two Judges.]

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Munshi *Gobind Prasad* for the appellants.
Munshi *Jwala Prasad* for the respondents.

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[271] EDGE, C. J., KNOX, BLAIR, BANERJI and BURKITT, JJ.—In the suit in which this second appeal has been brought the question between the parties is whether the plaintiffs or the defendants are the tenants at fixed rates of certain lands to which Act No. XII of 1881 applies. The plaintiffs allege that they are the tenants at fixed rates of the land in question. On the other hand, the defendants allege that they are the tenants at fixed rates of those lands and that the plaintiffs were their under-tenants. The defendants had, under s. 36 of Act No. XII of 1881, caused a written notice of ejectment to be served upon the plaintiffs in respect of those lands. The plaintiffs within thirty days of the service upon them of the notice of ejectment made an application to the Collector of the district contesting their liability to be ejected and denying that they were tenants of the defendants and alleging that they, and not the defendants, were the tenants-in-chief under the zamindar of the lands. The Collector, under s. 39 of the Act, determined adversely to the plaintiffs the question of their liability to be ejected on the notice of ejectment which the defendants had caused to be served on the plaintiffs. Thereafter the plaintiffs brought this suit praying for a declaration of their right as the tenants of the holding and for maintenance of possession. The defendants pleaded that they, the defendants, were the tenants at fixed rates of the land and that the plaintiffs were their under-tenants. The defendants also pleaded the decision of the Collector under s. 39 of Act No. XII of 1881 as a bar to this suit.

* The Munsiff held that the suit was one for the Civil Court, but dismissed it for other grounds.

* The plaintiffs appealed. The Subordinate Judge allowed the appeal. From that decree the defendants brought this appeal.

When the appeal was called on for hearing it was admitted by the vakil who appeared for the defendants that the third ground in the memorandum of appeal, which was that the proviso to s. 42 of the Specific Relief Act barred the suit, could not be supported on the facts. The appeal was thereupon referred to the Full Bench on the remaining two grounds in the memorandum [272] of appeal, which were that s. 95 of Act No. XII of 1881 barred the suit, and that the decision of the Court of Revenue on the question as to the liability of the plaintiffs to be ejected was final and could not be questioned in this suit.

For the defendants it was contended that the principle of the Full Bench decision in *Tarapat Ojha v. Ram Ratan Kuar* (1) applied in this case, and it was further contended that, even apart from that Full Bench decision, s. 95 of Act No. XII of 1881 barred this suit, and that the decision of the Court of Revenue on the title of the parties was conclusive.

On the part of the plaintiffs it was contended that the question as to whether or not the Civil Court had jurisdiction to hear this suit and to determine it contrary to the decision of the Court of Revenue was not

* For these two paras we find the following in 16 A.W.N. (1896) 59 (60):—

The Munsif, holding that the suit was one for the Civil Court and finding the facts in favour of the plaintiffs, gave them the decree for which they had asked. The defendants appealed. The Subordinate Judge agreed with the Munsif and dismissed the appeal. From that decree the defendants brought this appeal.

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concluded by the principle of the Full Bench decision above referred to; and further, that the Civil Court had jurisdiction to hear the suit and was not bound by the decision of the Court of Revenue.

In addition to the Full Bench case already referred to, the following authorities were cited in the arguments:—*Fakeer Koree v. Sheo Sarun Singh and Behroom Singh* (1), *Gooroo Doss Roy v. Bishtoo Churn Bhattacharji* (2), *Dhonaye Mundul v. Arif Mundul* (3), *Juddoonath Sein v. Ram Coomar Chattarjee* (4), *Janessur Doss v. Goolzaree Lall* (5), *Khugowlee Sing v. Hossein Bux Khan* (6), *Mata Parshad v. Janki* (7), *Musammatt Ghisa v. Didari* (8), *Shimbhu Narain Singh v. Bachcha* (9), *Husain Shah v. Gopal Rai* (10), *Kanahia v. Ram Kishen* (11), *Gopal v. Uchabal* (12), *Sukhdaik Misr v. Karim Chaudhri* (13), *Birbal v. Tika Ram* (14), *Palat Kuari v. Bhinak Kuari* (15), *Lalji v. Nuran* (16), *Ribban v. Partab Singh* (17), *Antu v. Ghulam* [273] *Muhammad Khan* (18), *Sheodisht Narain Singh v. Rameshar Dial* (19), *Arjan v. Rattu* (20) *Mahesh Rai v. Chandar Rai* (21), and *Sakina Bibi v. Swarath Rai* (22). Wilberforce on the Construction of Statutes, p. 15, was also referred to.

This is one of that class of cases which exemplifies the mischief which arises when the jurisdiction of Courts created by the Legislature is not plainly and explicitly and sharply defined. That mischief is intensified when, as in these Provinces, there are two sets of Courts, the Courts of Revenue and the Civil Courts, each having in some matters exclusive jurisdiction, whilst as to other matters the question as to which of such Courts has exclusive jurisdiction depends, not upon plain and explicit language of the Legislature, but upon inferences to be drawn from a painstaking examination of a variety of sections in an Act and upon general principles of jurisprudence upon which it is assumed that the Legislature has acted.

It may be assumed that the Legislature did not, in creating in these Provinces Civil Courts and Courts of Revenue, intend to cause confusion by conferring upon those Courts conflicting jurisdiction in any case, and did not intend, for example, that a question of title to land should be litigated in a Court of Revenue from the Collector through the Commissioner up to the Board of Revenue, and that the same title to the same land should subsequently be litigated between the same parties from the Court of a Munsif through the Court of a District Judge up to the High Court, and possibly to Her Majesty in Council.

It may also be assumed that the Legislature did not intend to confer upon Civil Courts and upon Courts of Revenue any concurrent jurisdiction in particular cases where the title to lands was in question without making some provision by which the decrees and the decisions of one of such Courts on such matters should be binding upon the other of them.

[274] The Act which we have to construe for the purposes of this case is Act No. XII of 1881.

It is quite clear that Act No. XII of 1881 provides no means by which a zamindar can obtain ejectment from his land of a trespasser and

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| (1) S D.A. NW.P. Vol. 2 (1862) 221. | (2) 7 W.R.C.R. 186. |
| (3) 9 W.R.C. R. 306. | (4) 9 W. R. C. R. 359. |
| (6) 7 B.L.R. 673. | (5) 11 W.R.C. R. 216. |
| (8) 7 N.W.P. H.C.R. 257. | (7) 7 N.W.P. H.C.R. 226. |
| (11) 2 A. 429. | (9) 2 A. 200. |
| (14) 4 A. 11 | (10) 2 A. 428. |
| (17) 6 A. 81. | (12) 3 A. 51. |
| (20) 6 A.W.N. (1886) 122. | (13) 3 A. 521. |
| | (15) 1 A.W.N. (1881) 26. |
| | (16) 5 A. 103. |
| | (18) 6 A. 110. |
| | (19) 7 A. 188. |
| | (21) 13 A. 17. |
| | (22) 15 A. 115. |

1896 that for the ejectment of a trespasser recourse must be had to a suit in
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— It is also quite clear from s. 95 of that Act that the Civil Court
FULL has no jurisdiction, except in cases within the proviso to s. 40 of Act
BENCH. No. XII of 1881, to decree at the suit of a zamindar ejectment of his
— tenant from land to which that Act applies, the exclusive jurisdic-
18 A. 270 tion in such a case being in the Court of Revenue. It is also clear
(F.B.)= that if, in a notice of ejectment served under s. 36 of Act No. XII
16 A.W.N. of 1881, or at the hearing under s. 39 of an application by the
(1896) 59. person served with a notice of ejectment under s. 36 contesting his
liability to be ejected, it appeared that the person sought to be ejected
was not a tenant within the meaning of s. 36 and 39, the Court
of Revenue would have no jurisdiction to decide adversely to
the applicant his application under ss. 39 contesting his liability to
be ejected, and in such case the Court of Revenue would have no
jurisdiction under s. 40 to make any order of ejectment. It is equally
clear that if in the plaint or at the hearing of a Civil suit it appeared that
the person sought to be ejected was a tenant of the plaintiff of land to
which Act No. XII of 1881 applied and that the proviso to s. 40 of Act
No. XII of 1881 did not apply to the case, the Civil Court would have
no jurisdiction to decree ejectment. It is also clear that, whether the
proceedings in ejectment were proceedings under ss. 36 and 39 of
Act No. XII of 1881 for the ejectment of a person who denied that
he was a tenant and set up title in himself, or were by suit in a Civil
Court in which the person said by the plaintiff to be a trespasser
alleged that he was the plaintiff's tenant of land to which Act No. XII
of 1881 applied, the Court of Revenue in the first case and the Civil
Court in the second would have to try and determine the question in
dispute between the parties as to title in order to ascertain whether the
[275] Court had jurisdiction to grant relief, in the one case to the person
who had, under s. 36, caused the notice of ejectment to be served, and in
the other case to the plaintiff in ejectment in the Civil suit. It frequently
happens that a Court of Revenue and a Civil Court come to different con-
clusions on the same question of title litigated between the same parties
in reference to the same lands. In such case, which decision is to prevail?
Is that decision to prevail which was first given, or is that decision to
prevail which was given in the proceeding or suit first instituted, or is the
time of one of such Courts to be taken up in arriving at a decision which
when pronounced will not be binding on the other Court and will be for
all practical purposes a *brutum fulmen*? How is such decision
to be enforced? It is clear that, unless a question of title arising
in proceedings in ejectment under Act No. XII of 1881 had been
determined between the parties by a reference to a Civil Court under
s. 204 of that Act or in a suit instituted in accordance with an order
of a Court of Revenue made under s. 208A of that Act, the Court of
Revenue would not be bound by the finding as to title of a Civil Court.
The decision of an issue as to title by a Civil Court would not operate as
res judicata under s. 13 of Act No. XIV of 1882 as to the same question
of title in proceedings under ss. 36 and 39 of Act No. XII of 1881,
although between the same parties and relating to the same land; and
similarly a decision of a Court of Revenue under s. 39 of Act No. XII of
1881 adverse to the application under that section contesting the liability
of the person upon whom a notice of ejectment had been served would not
operate as *res judicata* under s. 13 of Act No. XIV of 1882, in a suit of

ejectment in a Civil Court between the same parties, the Court of Revenue not having jurisdiction to try a suit to eject a trespasser, and a Civil Court not having jurisdiction to try an application under s. 39 of Act No. XII of 1881, contesting liability to ejectment.

Except where there has been an appeal allowed under s. 189 of Act No. XII of 1881, except when the procedure of s. 204 or of s. 208A of Act No. XII of 1881 has been applied, and [276] except where the right to institute a suit in the Civil Court is specifically provided for in that Act, no provision has been made by the Legislature binding a Court of Revenue to accept the decision on a question of title of a Civil Court. Except in suits appealable under s. 189 of Act No. XII of 1881 a Court of Revenue is in no sense subordinate to any Civil Court, and consequently is not bound to accept *as a subordinate Court* the decision of any Civil Court, except when the decision has been passed in such an appeal.

Let us see what may be the result of the conflict of jurisdiction in this case. The Court of Revenue, having upon the application made by the plaintiffs-respondents under s. 39 of Act No. XII of 1881, decided the question of their liability to be ejected upon the notice which the defendants-appellants had caused to be served upon them, the plaintiffs-respondents, is bound, if called upon for assistance by the defendants-appellants under s. 40 of Act No. XII of 1881, to order the ejectment of these plaintiffs-respondents, and, so far as the Court of Revenue is concerned, the principle of *res judicata* would make applicable its decision under s. 39 of Act No. XII of 1881, and not the decision of the Civil Court, should these plaintiffs-respondents dispute either the jurisdiction of the Court of Revenue to order under s. 40 their ejectment or the title or right of the defendants-appellants to obtain an order of ejectment under s. 40. In any proceeding under s. 40 the decree of the Civil Court which decided that the plaintiffs-respondents were not tenants of the defendants-appellants but were the tenants at fixed rates of the land would be a mere *brutum fulmen*.

The Civil Court could not compel the Court of Revenue or the executive officers or these defendants-appellants to recognize the plaintiffs-respondents as the tenants at fixed rates of the land in question. The Civil Court has no power to order an alteration of the entry in the village papers by which the defendants-appellants appear as the tenants at fixed rates of the land or to enforce such an order if it made it.

[277] As it is not conceivable that the Legislature could have intended that there should be of its own creation two sets of Courts in these Provinces, each having jurisdiction to determine the same questions of title to land let to agricultural tenants and neither having any power to compel the other to accept its decision by revision or other procedure or by process, we must assume that in all cases in which it is clear that for the purposes of adjudicating upon an application or making a decree in a suit it was the intention of the Legislature that the decision on the question of title of the Court which was given the exclusive jurisdiction to entertain the application or the suit which would necessarily lead to the maintenance of the entries in the village papers forming part of the record of rights, or to the correction of those entries, should, subject to such rights of appeal as was allowed by the Statute, be final between the parties unless the contrary intention was expressed. The Civil Court has no jurisdiction to frame or alter, although it may interpret, the record of rights. The jamabandi of the village is a part of

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MARCH 28. the record of rights. Many of the suits mentioned in s. 93 of Act No. XII of 1881 would depend in the first instance for their maintenance upon the entries made in the record of rights of the village; as, for example, suits under clause (g) or clause (h) or clause (i) or clause (k) of s. 93. S. 241 of Act No. XIX of 1873, excludes the jurisdiction of the Civil Courts over any of the matters in that section mentioned, and amongst such matters are the amount of revenue, cess or rate to be assessed on any mahal or part of a mahal, the formation of the record of rights, the determination of the class of a tenant, or the rent payable by him, or the period for which such rent is fixed under Act No. XIX of 1873, the distribution of the land or allotment of the revenue of a mahal by partition and the determination of the rent to be paid by a co-sharer for land held by him after the partition in the mahal of another co-sharer. The jurisdiction of Civil Courts to try suits of a civil nature which were instituted after the coming into force of Act No. XIV of 1882 was conferred by s. 11 of that Act. That section is as follows:—"The Court shall [278] (subject to the provisions herein contained) have jurisdiction to try all suits of a Civil nature, excepting suits which their cognizance is barred by any enactment for the time being in force."

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By the first paragraph of s. 93 of Act No. XII of 1881 it is enacted—"Except in the way of appeal as hereinafter provided, no Courts other than Courts of Revenue shall take cognizance of any dispute or matter in which any suit of the nature mentioned in this section might be brought; and such suit shall be heard and determined in the said Courts of Revenue in the manner provided in this Act and not otherwise." By the first paragraph of s. 95 of Act No. XII of 1881 it is enacted as follows:—"No Courts other than Courts of Revenue shall take cognizance of any dispute or matter on which any application of the nature mentioned in this section might be made; and such applications shall be heard and determined in the said Courts in manner provided under this Act and not otherwise." S. 189 of Act No. XII of 1881 gives in certain cases an appeal to the District Judge or the High Court from the decision of the Collector of the District or Assistant Collector of the first class in all suits mentioned in s. 93. One of the cases in which by s. 189 an appeal lies to the District Judge or the High Court is where the proprietary title to land has been determined between parties making conflicting claims thereto. No appeal to any Civil Court is given from the decision of a Court of Revenue on any application of the nature mentioned in s. 95. Applications in ejectment made under ss. 38, 39 or 40 are applications specifically mentioned in s. 95. In the proviso to s. 40 it is enacted that in certain specified cases, of which this is not one, the landholder seeking ejectment of a tenant must proceed by suit in a Civil Court.

The proviso to s. 148 prevents the decision of a Court of Revenue in certain suits for arrears of rent under s. 93 being conclusive as to the title to receive the rent, provided a suit to establish the title is brought in a Civil Court within one year of the decision of the Court of Revenue. To s. 84 there is appended a similar proviso. S. 170 enables any person [279] injured by the irregularity in publishing or conducting a sale of moveable property under an execution held under that Act to recover compensation for such injury by a suit in a Civil Court. S. 181 enables the party against whom an order by a Collector of a District is made under s. 179 or s. 180, to institute a suit in a Civil Court to establish his right at any time within one year from the date of the order. S. 204 enables a Court of Revenue to obtain the opinion of the District Judge upon a

case stated, "if, in any suit instituted or on any application made under this Act, it appears to the presiding officer that any question in issue involving a point of law is more proper for the decision of a Civil Court," and enacts that an appeal shall lie from the judgment of the District Judge to the High Court, and that "the District Judge shall return the case with the opinion of the Civil Court to the Collector of the district, and the Revenue Courts shall decide the suit or application in accordance with such opinion."

S. 208A is as follows:—"If in any suit or application pending before a Revenue Court exercising original, appellate or revisional jurisdiction under this Act, it appears to such Court that any question in issue is more proper for decision by a Civil Court, such Revenue Court may by order in writing require any party to such suit or application to institute, within such time as it may appoint in this behalf, a suit in the Civil Court with a view to obtaining a decision of such question; and if he fails to comply with such requisition, shall decide such question against him. If he institute such suit, the Revenue Court shall dispose of the suit or application pending before it in accordance with the final decision of the Civil Court of first instance or appeal (as the case may be) upon such question."

S. 208A first appeared in Act No. XII of 1881. It and s. 204 are of importance as they indicate that the Legislature considered that questions might arise in suits under s. 93 and on applications under s. 95 which would be more proper for decision by a Civil Court than by a Court of Revenue; but the Legislature did not exclude such cases from the jurisdiction of the [280] Courts of Revenue, nor, except at the instance and on the motion of the Court of Revenue, did the Legislature confer any jurisdiction except in some cases by way of appeal, upon Civil Courts in such cases. It had been held in many cases which were decided on Act No. X of 1859 and Act No. XVIII of 1873, that, notwithstanding the provisions of those Acts, questions of title were to be decided by suits in the Civil Courts and not by the Courts of Revenue. The enacting of s. 208A enabled Courts of Revenue in cases reserved for their jurisdiction to have questions of title determined by a suit in a Civil Court. That section, coupled with the assignment by the Legislature to Courts of Revenue of exclusive original jurisdiction in suits to which s. 93 relates, and of exclusive jurisdiction in such matters and disputes as are referred to in s. 95, satisfies us that in such cases it was the intention of the Legislature that no suit should lie in the Civil Court except when an order is made under s. 208A or the right of suit in the Civil Court is otherwise expressly given or reserved by the Act. Courts of Revenue, so far as we are aware, have seldom taken advantage of the provisions of s. 204 or of s. 208A. Judging by the number of Civil suits in which it has been sought to question the decisions of Courts of Revenue on title, and in which questions of title of importance have been *bona fide* raised, it would appear that Courts of Revenue have either overlooked ss. 204 and 208A, or are of opinion that the presiding officers of Courts of Revenue are as well qualified by a knowledge of and experience in the law to decide points of law and questions of title as are the Civil Courts. Whatever the cause may be, there is no doubt that ss. 204 and 208A are practically treated by Courts of Revenue as if they had been repealed, and parties are deprived of the benefit of having difficult points of law and important questions of title decided by the Civil Courts with a right of appeal as a last resort to Her Majesty in Council. That such was not the object

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of the Legislature is manifest. It may be inferred from a long series of decisions, some of which were on Act No. X of 1859, some on Act [281] No. XVIII of 1873 and the remainder of which were on Act No. XII of 1881, that the opinion was entertained by all the Judges who in these Provinces or in the Lower Provinces of Bengal have considered the question, that questions of proprietary title to land and of title to tenancies between rival claimants, but not questions as to the status of a tenant of agricultural land, are questions which should be determined by the Civil Courts and not by the Courts of Revenue in the more or less summary proceedings of the latter Courts. With the following exception, we entirely agree with that opinion. In our opinion whenever in suits to which s. 93 of Act No. XII of 1881 relates, or in matters or disputes to which s. 95 relates, the relationship of landlord and tenant between the parties or between those through whom they claim had not been admitted, as for example, by the granting and acceptance of a lease of the land, by payment of rent in respect of the land, or by time having been asked and given for the payment of rent in respect of the land, and the relationship of landlord and tenant between the parties or those through whom they claim had not been established in previous litigation, it should be compulsory on the Court of Revenue to pass an order staying the proceedings before it for a limited time within which the party denying that the relationship of landlord and tenant existed might bring a suit in a Civil Court to determine the question of title. If no such suit should have been brought within a limited time the Court of Revenue should, without further inquiry, decide finally the question of title against the party who had denied that the relationship of landlord and tenant existed. If such suit were brought, the Court of Revenue should be bound to accept the result of that suit as determining the question of title, whether the suit was determined in the Civil Court by a dismissal for default or upon an adjudication on the questions of title. A preferable course would be that the Legislature should introduce in Act No. XII of 1881, provisions similar to those contained in ss. 113, 114 and 115 of Act No. XIX of 1873. If this latter course were adopted, a vast amount of litigation arising out of the present uncertainty as to jurisdiction [282] would be obviated, and a decision on all questions of title could be obtained from the Civil Court either in appeal or by suit. It is not in the power of this Court to give to Civil Courts a jurisdiction which has not been given to them or of which they have been deprived by the Legislature.

It is quite clear from a careful perusal of Act No. XII of 1881 that, although in the suits mentioned in s. 93, in which proprietary title to land has been determined between parties making conflicting claims thereto, the party aggrieved by such determination can by appeal obtain the decision of the Civil Court upon the question of title, and can, in a suit for rent to which s. 148 applies, obtain by suit the decision of a Civil Court on the question of title, yet if the same question of title happens to be decided between the same parties on an application to which s. 95 applies, and not in a suit under s. 93, the party aggrieved by such determination of the question of title cannot, either by appeal or by suit, obtain the decision of the Civil Court upon the question of title, unless indeed the Court of Revenue sees fit to take advantage of the provisions of s. 204 or of s. 208A.

The question of title which may be decided by a Court of Revenue under s. 39 may be the title to a large zamindari or it may be the

title, as in this case, to a tenancy at fixed rates. It may be doubted, we do not decide the question, whether the words "proprietary title" in s. 189 include a title such as that in dispute in this case to a tenancy at fixed rates; if they do not, then, unless the amount or value of the subject matter exceeds one hundred rupees, or the suit in the Court of Revenue is one in which the rent payable by the tenant has been a matter in issue and has been determined, the party aggrieved by an adverse determination of the Court of Revenue as to his title has no means by which as of right he can in appeal or by suit obtain the decision of a Civil Court as to his title to the tenancy, although, for example, that title may depend on the determination of a difficult question as to the law of adoption. That is an anomalous state of the law, which was probably not foreseen in all its bearings by the Legislature, and for [283] which the permissive provisions of ss. 204 and 208A, as they stand in the Act, do not afford a remedy, as they are rarely, if ever, taken advantage of. The remedy is for the Legislature, which can, if it sees fit so to do, either give a right of appeal to, or a right of suit in, a Civil Court on all questions of title coming before a Court of Revenue, or can alter ss. 204 and 208A so to make it obligatory on a Court of Revenue to refer all disputes as to title to a Civil Court when the relationship of landlord and tenant between the parties or between those through whom they claim had not been admitted, or in which the parties were not estopped by their acts or by the acts of those through whom they claim or otherwise from denying that such relationship existed. In case of an alteration of ss. 204 and 208A it would probably be necessary to allow an appeal to a Civil Court from the refusal of a Court of Revenue upon a request in writing made to refer the question of title to a Civil Court.

In the present case there stands in the way of any adjudication by the Civil Court on the question of title the order of the Court of Revenue made upon an application falling under clause (c) of s. 95 of Act No. XII of 1881. As clause (b) of s. 96 gives to that order the same effect as if it was a judgment of the Civil Court, that order cannot be questioned by a Civil Court. It follows that this appeal must be allowed and the suit must be dismissed.

As it appears to us that the principles which were applied by the Full Bench in *Tarapat Ojha v. Ram Ratan Kuar* (1) apply in this case, we would not have gone at length into an explanation of our views in this case, were it not that we considered it advisable that our views on the frequently recurring conflicts of jurisdiction and our reasons for those views should be thoroughly understood.

The cases to which we have been referred which were decided prior to the decision in *Ribban v. Partab Singh* (2) were decided on one or other of the Acts which preceded Act No. XII of 1881. In *Ribban v. Partab Singh* (2) and in the subsequent cases which [284] were relied upon to show that this suit would lie, the learned Judges do not appear to have considered what was the intention of the Legislature in passing Act No. XII of 1881 to be inferred from s. 208A of that Act read in conjunction with the other sections of the Act to which we have referred.

We allow this appeal and dismiss the suit with costs in all Courts.

AIKMAN, J.—I concur with the learned Chief Justice and my brother Judges in thinking that this appeal must be allowed. I also concur in almost everything that has been said in the judgment just delivered. I

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(1) 15 A. 387.

(2) 6 A. 81.

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trust that the effect of that judgment will be to put a stop to the hitherto too frequently recurring scandal of a party litigating a case through all the grades of the Revenue Courts, and, after failing there, dragging his adversary to the Civil Courts to litigate again exactly the same question as had been decided against him in the Revenue Courts. If, however, any fresh legislation is undertaken, then in my humble opinion it should be provided that whilst no decision of a Revenue Court, either in a suit or on an application, shall have the effect of finally determining the proprietary title to land, all questions as to the tenant right to an agricultural holding shall, subject to the safeguards of ss. 204 and 208A of Act No. XII of 1881, to the too much neglected provisions of which the judgment just delivered will, I trust, have the effect of directing attention, be for the Revenue Courts, and for those Courts alone; and that, when the pleadings in a Civil suit raise the issue whether a party is or is not a tenant of such a holding, that issue shall be referred to a Court of Revenue for trial.

18 A. 285 = 16 A.W.N. (1896) 45.

[285] APPELLATE CIVIL.

Before Mr. Justice Banerji.

IN THE MATTER OF THE PETITION OF SARAT CHANDRA SINGH.
PANDIT GOKUL CHAND (*Defendant*) v. KUAR SARAT CHANDRA
SINGH (*Plaintiff*).^{*} [3rd March, 1896.]

Civil Procedure Code, ss. 372, 582—Appeal—Devolution of interest pending appeal—Array of parties in appeal—Review.

Held that s. 372 of the Code of Civil Procedure applies as well to the case of a devolution of interest pending an appeal as to the case of a devolution of interest pending a suit.

Held also that a person may, under s. 372, be added or substituted as a party either on his own application or on the application of one of the parties already on the record.

Held also that an application by a respondent to an appeal, whose interest had at one time been represented by an official receiver, to replace upon the record of the appeal as a party respondent the name of such official receiver, which had been struck off owing to a misrepresentation of fact, might be treated as an application for review of the order striking off the name of the official receiver.

[F., 22 A. 231.]

THE facts of this case are fully stated in the order of Banerji, J.
Mr. J. N. Pogose, for the applicant.

Messrs. A. E. Ryves, W. Wallach and Pandit Sundar Lal, for the opposite parties.

ORDER.

BANERJI, J.—The facts which have given rise to the application before me are these:—

Mr. Raj Narain Mitter, who was appointed by the High Court of Calcutta as receiver of the Paikpara estate, instituted a suit against the appellant, Pandit Gokul Chand, in the Court of the Subordinate Judge of Agra, in respect of property belonging to the estate situated in the district of Muttra, Aligarh and Bulandshahr. He obtained a decree for a part of his claim on the 30th of September 1893.

^{*} Application in First Appeal No. 14 of 1894.

On the 23rd of January 1894, Pandit Gokul Chand preferred an appeal from that decree to this Court, making Mr. Mitter the sole respondent to his appeal.

On the 1st of April 1895, Mr. Mitter represented to this Court that he had ceased to have any interest in the subject-matter of the suit, and he prayed that his name should be withdrawn from [286] the appeal. No opposition having been made to his application, his prayer was granted on the 1st of June 1895, and he was dismissed from the appeal.

Thereupon the appellant, Gokul Chand, made an application to bring on the record Kuar Sarat Chandra Singh, the present applicant, as respondent, and an order has been made in accordance with that application.

Kuar Sarat Chandra Singh, by the application which is now under consideration, prays that the following persons should be added as respondents, namely, (1) The Administrator-General of Bengal as representing the estate of Raja Indra Chandra Singh, (2) Kuar Satish Chandra Singh, (3) Mr. Raj Narain Mitter as receiver of the Paikpara Raj in respect of mauza Hathia, and (4) Mr. Raj Narain Mitter as receiver of the share of Kuar Sirish Chandra Singh.

Notices having been issued to those persons and to the appellant, the application is opposed by Mr. *Wallach* on behalf of the Administrator-General of Bengal, by Mr. *Ryves* on behalf of Mr. Mitter, and by Mr. *Sundar Lal* on behalf of the appellant. Mr. *Sundar Lal's* opposition is confined to the prayer for the restoration of Mr. Mitter to the record as a respondent.

It appears from the affidavits filed that the suit in which Mr. Mitter was appointed receiver was one for partition. A decree was made in that suit on the 11th of December 1893, by which the property in the Muttra district, with the exception of the village Hathia which was endowed property, was allotted to the share of Kuar Sarat Chandra Singh; the property in the Aligarh district was assigned to the share of Raja Indra Chandra Singh, and that in the Bulandshahr district to the shares of Raja Indra Chandra Singh, Kuar Satish Chandra Singh and Kuar Sirish Chandra Singh. By an order dated the 16th of August 1894, Mr. Raj Narain Mitter was discharged from his office as receiver except in respect of the estate of Kuar Sirish Chandra Singh and the endowed property referred to above. Raja Indra Chandra Singh having died, the Administrator-General of Bengal is in possession of his estate.

[287] So far as the Administrator-General of Bengal and Kuar Satish Chandra Singh are concerned, there has been a devolution of interest in their favour pending the appeal, and Mr. *Pogose's* application is one under s. 372 of the Code of Civil Procedure read with s. 582.

Mr. *Wallach* contends that s. 372 does not apply to appeals. I am unable to accede to that contention. By s. 582 "the appellate Court shall have in appeals under this Chapter the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted under Chapter V." There can be no doubt that a Court of original jurisdiction has the power under s. 372 to make a person a party to a suit on whom an interest in the subject-matter of the suit has devolved pending the suit otherwise than by death, marriage, bankruptcy or insolvency. The same power is conferred by s. 582 on an appellate Court in respect of appeals. The last portion of the first paragraph of that section which is confined to "proceedings arising out of the death, marriage or insolvency of parties to an appeal" does not, in my judgment,

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limit the scope of the first portion of that paragraph and render the provisions of s. 372 inapplicable to appeals.

Mr. *Wallach's* next contention, which Mr. *Sundar Lal* also pressed on behalf of the appellant, namely, that an application to add a respondent can only be made by the appellant, is, in my opinion, equally untenable. It is true that ordinarily it is the appellant in an appeal or the plaintiff in a suit who selects the person or persons against whom he seeks relief. But, where a devolution of interest has taken place pending a suit or appeal, it would be prejudicial to the person on whom such interest has devolved or to some of the parties to the suit if he could not be brought on the record otherwise than on the application of the plaintiff or the appellant, as the case may be. Take the case of an assignee from the defendant after the institution of the suit. He would be bound by the result of the suit, but, if Mr. *Wallach's* [288] contention were correct, he would not have an opportunity to contest the claim and support his own title. His assignor will no longer have any interest in opposing the claim. Similar results may ensue in appeal also. If a plaintiff happens to be the respondent his assignee pending the appeal must be allowed an opportunity to support the decree. Instances may also arise in which one of the respondents may be seriously prejudiced by reason of persons who had acquired an interest in the subject-matter of the appeal pending the appeal not being added or substituted as parties. For example, as in this case, in the event of the appeal succeeding, the whole burden of the appellant's costs would fall on the only respondent on the record, and he might not be in a position to claim contribution from persons who were interested in the litigation equally with him, but were not parties to the appeal. In my judgment a person may under s. 372 be added or substituted as a party either on his own application or on the application of one of the parties already on the record.

In this case Kuar Sarat Chandra Singh may be seriously prejudiced by reason of the persons named in his application not being added as respondents. If the appeal succeeds, he alone will be cast in costs and the other persons interested in the subject-matter of it will escape liability. In my opinion the Administrator-General of Bengal, as representing the estate of Raja Indra Chandra Singh, and Kuar Satish Chandra Singh should be added as respondents and I order accordingly.

The case of Mr. Raj Narain Mitter presents some difficulties, and it was in consequence of these difficulties that I took time to consider my order. He has not acquired an interest pending the appeal. He was already the receiver of the Paikpara estate, including the *devattar* village Hathia and the share of Kuar Sirish Chandra Singh, when the appeal was filed, and he has not been discharged from his office of receiver in respect of that village and the said share. His case does not therefore come under the provisions of s. 372. He now admits that he has an interest in the subject-matter of the suit, however small the extent of that interest [289] may be. The decree passed against the appellant has, it appears, reference to the *devattar* village Hathia, and to the property in the Bulandshahr district in which Kuar Sirish Chandra Singh has acquired a share under the decree of the Calcutta High Court. Mr. Mitter has, therefore, still an interest in the subject-matter of the appeal, and it is clear that he obtained the order for his dismissal from the array of parties under a misrepresentation of facts. That misrepresentation was in all probability not intentional, but had the facts been correctly stated the order would not have been made.

Now the question is whether the Court is competent to set aside that order on the application of Kuar Sarat Chandra Singh. There can be no doubt that an order can be set aside upon an application for review of judgment. I see no reason why I should not treat Kuar Sarat Chandra Singh's application as one to review my order of the 1st of June 1895. He was not, it is true, a party to that order in his own person, but he was represented by the receiver Mr. Raj Narain Mitter, so that he was substantially a party to the proceeding in which that order was passed, and as such is entitled to ask for a review of it. As that order was obtained on an erroneous representation of facts, and as Mr. Raj Narain Mitter, in his capacity as receiver of the *devattar* village and the share of Kuar Sirish Chandra Singh, never ceased to have an interest in the subject-matter of the appeal, his name should never have been removed from the array of respondents. I accordingly set aside my order of the 1st June 1895, and direct that Mr. Raj Narain Mitter, as receiver of the Paikpara Raj in respect of mauza Hathia and as receiver of the share of Kuar Sirish Chandra Singh, be brought on the record as a respondent. The result is that the rule obtained by Mr. *Pogose* is made absolute.

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[290] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Burkitt.

MAZHAR RAI AND OTHERS (*Defendants*) v. RAMGAT SINGH AND
ANOTHER (*Plaintiffs*).^{*} [5th March, 1896]

Landlord and tenant – Dilution – Subsequent reappearance of land – Relinquishment of tenancy, evidence of – Act No. XII of 1881 (N.W.P. Rent Act).

Act No. XII of 1881 and the Acts of a like nature which preceded it assume that a tenancy of agricultural lands once entered upon continues until determined by effluxion of time, or by mutual consent, or in one of the ways provided for by statutory enactment; but mere non-payment of rent does not of itself determine the tenancy.

Hence where the lands of certain tenants became submerged by the action of a river, and the tenants, though they ceased to pay rent during the period of the submersion, made no overt indication of their intention to relinquish the said lands, but, on the contrary, on the river again shifting its course, laid claim to lands which had emerged and which they alleged to be identical with their former holding; it was held that there had been no relinquishment. *Hemnath Dutt v. Ashgur Sindar* (I.L.R. 4 Cal. 894) not followed.

[R., 21 A. 204; 15 C.P.L.R. 9; D., 6 C.L.J. 149.]

THE facts of this case are fully stated in the judgment of the Court. Mr. J. N. *Pogose* and Pandit *Sundar Lal*, for the appellants.

Messrs. *T. Conlan*, *Abdul Majid* and *Munshi Jwala Prasad*, for the respondents.

JUDGMENT.

EDGE, C. J., and BURKITT, J.—This was a suit in which the main question was as to the title to the possession of certain lands in the village of Rampur Kurraha which had been washed away by the stream of the Ganges and had subsequently been thrown up on the alteration of the course of the stream. It is common ground on both sides that the whole

* First Appeal No. 77 of 1894, from a decree of Babu Kisban Lal, Subordinate Judge of Ghazipur, dated the 21st December 1893.

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village of Rampur Kurraha was washed away by the Ganges changing its course, and that subsequently, about 1886 or 1887, by the Ganges altering its course, a large area of the lands of the village again appeared. It is in that area which has again appeared that the disputed lands lie.

The defendants laid claim to the lands which were claimed by the plaintiffs, and the Maharaja of Dumraon, who is the zamindar [291] of the village, fearing a breach of the peace, applied to the Magistrate of the district to exercise his jurisdiction under s. 145 of the Code of Criminal Procedure. The Magistrate exercised that jurisdiction, and put into possession one Bhagwat Misr as a *locum tenens* until the rights of the various parties to the lands which had been given up by the Ganges had been determined by the Civil Court. The Magistrate acted under s. 146. The Subordinate Judge found in favor of the plaintiffs and gave them a decree. From that decree this appeal has been brought.

It has been contended on behalf of the defendants-appellants that the plaintiffs have failed to prove their case; that they had failed to prove that they had held any occupancy rights in the village; that they had failed to prove that they had held any occupancy-rights in the lands in dispute in this suit, and had failed to prove that they had been tenants of any description of the lands in dispute; and further, that, if the plaintiffs had been tenants of the lands in dispute, we should infer from their never having paid any rent in respect of the lands after their submergence that they had abandoned all right to the lands and relinquished their tenancy, if any. It was also contended on behalf of the appellants that the plaintiffs had failed to earmark the particular lands which they are now claiming. Further, the appellants attempted to prove that in 1874 and 1875 the particular lands now claimed by the plaintiffs, having been submerged and having at that time been given up by the river, had been leased by the Maharaja of Dumraon to other parties, and that those lands having been again submerged were the lands now claimed by the plaintiffs; the point of the argument being that the fact, if it was one, that the Maharaja of Dumraon had let these lands in 1874 and 1875 to other persons showed that, if the plaintiffs ever had any interest in the lands at all, that interest was abandoned before the letting by the Maharaja. It was pleaded by the defendants-appellants that after the lands last appeared from the river the Maharaja of Dumraon had verbally let those lands to them. The Subordinate Judge found on this latter point [292] that the defendants had failed to prove any letting of the lands to them. In this Court that finding of the Subordinate Judge has not been questioned.

The general position is this. The defendants are not shown to have had at any time any interest in any lands in this village. They belong to an adjoining village. It is not suggested that the lands in dispute belong to any village other than Rampur Kurraha, and they certainly did not belong to the defendants' village. The defendants have failed to prove any letting by the zamindar to them, and all that appears is that they, being strangers to the village, laid claim to the lands and tried to seize them. The *qabuliats* on which the defendants relied to disprove the plaintiffs' case prove nothing. Those *qabuliats* must be read together in order to see how ineffective they are as evidence on the question in dispute here. Piecing these *qabuliats* together we find that an area amounting to 441 bighas was let by the Maharaja of Dumraon to the makers of these *qabuliats* in 1874 and 1875. The northern and western boundaries of the lands let by the Maharaja are given in the *qabuliats*. The southern boundary, by piecing the *qabuliats* together, is ascertainable. The eastern

boundary was sand. Now within the ascertained boundaries of north, west and south these 44 bighas of land must have been, and having regard to the north, west and south boundaries, they did not extend as far as the situation of the lands now in dispute by a long way. The eastern boundary in those *gabuliats* was sand, and either in that sand or to east of it were the lands now in dispute. The lands which were leased by the Maharaja of Dumraon, to which the *gabuliats* in question relate, did not include any of the lands claimed in this suit by the plaintiffs.

On the other side, the plaintiffs alleged in their plaint that they had occupancy-rights in the lands which they claimed. The written statement may have been intended to traverse that allegation, but it certainly does not do so directly. One would rather infer from the written statement that the defendants admitted that the plaintiffs were tenants in the village of Rampur Kurraha, but [293] had not had possession of the lands in question. Whatever may be the effect of the pleadings, it is clearly proved in our opinion that the plaintiffs were, prior to the submergence of the village, tenants of a large area of lands exceeding that claimed in this suit within the village. We need not decide, and we do not intend to decide, whether or not the plaintiffs were occupancy tenants of the village. The extract from the *khateoni* of 1867, which is in evidence in this case, shows that Ramgat Singh, one of the plaintiffs, was a tenant of some lands in the village. No objection seems to have been taken to the *khateoni*. In the Court below the Subordinate Judge dealt with it as practically proving the plaintiff's case. All we can say is that the *khateoni* does not, in our opinion, explain itself, and we are not able to find on it whether or not Ramgat Singh held in 1867 any lands either himself or through his shikmis other than the lands entered against his name and against the names of Sheoambar Rai, Dhani Rai and Niranjan Rai, his shikmis, amounting to 120 bighas 14 biswas odd. However, there is oral evidence in the case which shows that Ramgat Rai held lands, stated variously to have amounted to between 300 and 600 bighas, in the village. We have no doubt that he held, prior to the submergence, lands at least equal in amount to those which he has claimed in this suit. There may be, and there always is, in cases of this kind, great difficulty in ascertaining and defining the exact metes and bounds of particular holdings when lands which have been submerged have subsequently been given up. It is difficult for Judges who have not been to the spot and had the lands pointed out by witnesses and heard what those witnesses had to say with the lands in sight to ascertain the precise metes and bounds of such lands. However, the parties here understand perfectly well what are the lands claimed. The plaintiffs allege that certain numbers are theirs. The defendants, on the other hand, allege that the lands claimed by the plaintiffs had been let to them. Consequently there is no difficulty about the parties not understanding the actual lands in dispute between them. We find that the plaintiffs have proved [294] that prior to the submergence they were in possession of the lands which they claim in this suit as tenants.

We have been referred to the following cases:—*Afsur-ood-deen v. Shorooshee Bula Dabee* (1), *Hemnath Dutt v. Asghur Sindar* (2), *Lopez v. Mudden Mohun Thakoor* (3) and *Lukhi Narain Jagadeb v. Maharaja Jodu Nath Deo* (4). Undoubtedly, according to the view expressed in one of

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(1) 1 Marshall, 553.
(3) 13 M. I. A. 467.

(2) 4 C. 894.
(4) 21 I.A. 39.

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those cases by the Calcutta Court, the plaintiffs after the submergence of the lands held by them lost all rights of tenancy in the lands by non-payment of any rent for those lands. We cannot agree that the view of the law there expressed, though it may be sound in lower Bengal, is applicable to these Provinces. As we understand the different Rent Acts (No. X of 1859; No. XVIII of 1873 and No. XII of 1881 which have been applicable in these Provinces, the tenancy of a tenant of agricultural land can only be determined in one or other of the manners mentioned in the particular Act applicable at the time. No doubt a tenant can go to his landlord at any time and say that he abandons his tenancy, and the landlord, if he is willing, may accept the abandonment. Or a tenant of the class to whom s. 31 of the present Act applies can serve a notice under that section of his desire to relinquish the land on the landlord or his recognized agent, or the landlord can obtain a decree for his rent which has not been paid, and by taking proceedings under the Act can obtain ejectment of his tenant, and there are of course other grounds upon which a landlord can obtain ejectment by order of the Court. But it appears to us that the several Rent Acts which have been applicable in these Provinces assume that a tenancy once entered upon continues until determined by effluxion of time, or by mutual consent, or in one of the ways provided for by statutory enactment, and that mere non-payment of rent does not of itself determine the tenancy.

We were asked to infer an intention on the part of these tenants to abandon their tenancy in the submerged lands. It is possible that if the landlord had, while the lands were submerged [295] claimed rent from them, and on their refusal to pay had obtained a decree and served notice of ejectment upon them, such an inference might be drawn; but we cannot find as a fact from their merely sitting quiet and doing nothing that they intended to relinquish all rights in land which any year might emerge from the Ganges and become culturable. We find that their tenancy did not in fact determine in any of the ways provided for by the Rent Act or by agreement, and we consequently find that when the lands did emerge from the water owing to a change in the stream of the Ganges, the plaintiffs, being still tenants of those lands, were entitled to the possession of them. The defendants have no title whatsoever. The plaintiffs are proved to have a title, but whether it is one as occupancy tenants or merely as tenants having no right of occupancy it is not necessary to consider. It is to be noticed that neither the Maharaja of Dumraon, who certainly would have an interest in showing that the plaintiffs, were not entitled to this, considerable area of land as tenants, particularly as occupancy tenants, nor any one of their co-villagers in Rampur Kurraba was shown to have disputed or challenged the plaintiffs' title. The plaintiffs' title is merely challenged by strangers from the neighbouring village who are not shown to have even a scintilla of right to any lands in Rampur Kurraba. We dismiss this appeal with costs.

Appeal dismissed.

18 A. 295 = 16 A.W.N. (1896) 68.

APPELLATE CIVIL.

Before Mr. Justice Aikman.

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(1896) 68.

KALLU (*Plaintiff*) v. HALKI (*Defendant*).^{*} [6th March, 1896.]

Usufructuary mortgage - Redemption—Limitation—Act No. XV of 1877 (Indian Limitation Act), s. 20—Act No. I of 1879 (Indian Stamp Act), ss. 34, 35, 39—Admission of unstamped document in evidence on payment of penalty—Necessity for production of document.

S. 20 of Act No. XV of 1877 does not have the effect of extending indefinitely the period within which a usufructuary mortgage must be redeemed.

Where a Court has occasion to admit a previously unstamped document in evidence upon payment of a penalty under s. 34 and the following ss. [296] of Act No. I of 1879, it is necessary that the original instrument should be before the Court.

[F., 26 A. 167 = 23 A.W.N. 223; R., 33 P.R. 1913 = 16 Ind. Cas. 950 (953) = 11 P.L.R. 1913 = 279 P.W.R. 1912; D., 11 A.L.J. 477 (478).]

THE facts of this case sufficiently appear from the judgment of Aikman, J.

Munshi Madho Prasad, for the appellant.

Babu Jogindro Nath Chaudhri, for the respondent.

JUDGMENT.

AIKMAN, J.—The appellant in this case brought a suit for redemption of a mortgage, which he alleged had been made by his predecessor in title "about 40 years" before the date of the institution of the suit in favour of the predecessor in title of the defendant-respondent, Musammât Halki. The mortgage was a usufructuary one, and the defendant was in possession of the property claimed. The plaintiff got a decree in the Court of first instance, which was reversed in appeal by the Subordinate Judge of Banda. The learned Subordinate Judge entirely discredited the evidence adduced by the plaintiff to prove the mortgage upon which his suit was based, and held, on the authority of the ruling *Parmanand Misr v. Sahib Ali* (1) that it was for the plaintiff to prove by *prima facie* evidence that he had a subsisting title at the date when the suit was instituted. The subordinate Judge came to the conclusion that the plaintiff had failed to prove that the mortgage on which he relied had been made within the period of limitation prescribed by art. 148 of the second schedule of the Limitation Act No. XV of 1877. The plaintiff comes here in second appeal. The learned vakil who appears for the appellant argues that, inasmuch as the mortgage was a usufructuary one, his client is entitled to rely upon the last clause of section 20 of the Limitation Act, which, he contends, has the effect of extending the period of limitation. In support of his contention he relies upon an unreported judgment of this Court in S. A. No. 38 of 1893 decided on the 25th June 1894, by Tyrrell and Blair, JJ. That judgment is undoubtedly an authority for the contention that a mortgagor suing for redemption is entitled to take advantage of the last clause of the section above quoted, which runs as follows:—

^{*} Second Appeal No. 74 of 1895, from a decree of Rai Shankar Lall, Subordinate Judge of Banda, dated the 27th November 1894, reversing a decree of Munshi Kalika Singh, Munsif of Hamirpur, dated the 3rd February 1894.

(1) 11 A. 438.

1896 [297] "Where mortgaged land is in possession of the mortgagee the receipt of the produce of such land shall be deemed to be a payment for the purpose of this section."

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 (1896) 68.

The result of the ruling referred to would be that a suit to redeem a usufructuary mortgage would never be barred by any lapse of time. That is a view which has not been taken in any other case which has come to my notice. In numerous cases art. 148, which provides a period of 60 years from the date when the right to redeem accrues, has been applied to suits for the redemption of usufructuary mortgages. As instances of such cases, I would refer to the Full Bench ruling of *Parmanand Misr v. Sahib Ali*, quoted above, and to the case of *Zingari Singh v. Bhagwan Singh* (2). With all deference to the learned Judges who decided S. A. No. 38 of 1393, I am unable to follow them in holding that the last clause of s. 20 applies to a suit for redemption. It will be seen that that clause declares that the receipt of the produce of the mortgaged land shall be deemed to be a payment "for the purpose of this section." Reading the section as a whole, these words in my opinion indicate that the clause is meant to extend the time for suit by a mortgagee to recover a debt secured by a usufructuary mortgage, and are not intended to override the general provision as regards limitation for suits for redemption which is to be found in art. 148 of the second schedule of the Act. The period provided by that article could be extended by an acknowledgment of liability made in writing under the provisions of s. 19 of the Act, but I hold that it was not intended that it should be extended indefinitely by the concluding words of s. 20. As the evidence which it was necessary for the plaintiff to adduce in order to substantiate his case has been considered entirely unreliable by the Court below, which had to find the facts, it is impossible to say, notwithstanding the fact that the defendant failed to make out the title set up by her, that the plaintiff has produced the *prima facie* evidence which it was necessary for him to adduce. I may also remark that the evidence which the plaintiff did [298] adduce, even if reliable, failed to show that any right to redeem had accrued.

There is another peculiar feature in this case. The mortgage-deed was not produced. The Subordinate Judge, discovering from the evidence of the witnesses called to prove its execution that it had been written on plain paper, and professing to act under the provisions of s. 34, proviso 1, of the Indian Stamp Act, 1879, levied from the plaintiff the amount of the proper duty and a penalty. Section 35 of that Act provides that when an officer admits an instrument in evidence upon payment of a penalty as provided in s. 34 he shall send to the Collector an authenticated copy of the instrument. Section 39 further provides that he shall certify by endorsement on the document that the proper duty and penalty have been levied. The terms of these sections make it clear that a Court cannot admit in evidence an instrument not duly stamped upon levy of a penalty under s. 34, unless the instrument is actually produced before it, and that the action of the Subordinate Judge was not warranted by law. The original instrument not having been admissible, as not being duly stamped, I hold that secondary evidence was not admissible to prove its contents.

For the reasons set forth above, this appeal fails and is dismissed with costs.

Appeal dismissed.

18 A. 298 = 16 A.W.N. (1896) 71.

APPELLATE CIVIL.

*Before Sir John Edge, Kt, Chief Justice, and Mr. Justice Burkitt.*KULSUM BIBI (*Defendant*) v. FAQIR MUHAMMAD KHAN
AND OTHERS (*Plaintiff*).^{*} [6th March, 1896.]*Pre-emption—Muhammadan law—Demand made on the premises—Demand made within an undivided village a share in which was the subject of sale.*

Where certain persons claimed pre-emption in respect of a share in an undivided village and proved that they made an immediate assertion of their intention to pre-empt in the presence of witnesses within the area of the zamindari to which the share sold belonged, it was held that, in the absence of any indication that the demand was not made *bona fide*, the demand of pre-emption was a good demand made "on the premises" within the meaning of the Muhammadan law.

[F., 34 A. 1 (3) = 8 A.L.J. 950 (952) = 11 Ind. Cas. 319.]

[299] THIS appeal arose out of a suit for pre-emption. The plaintiffs, who were the present respondent, Faqir Muhammad Khan, and Mahbub Khan, the predecessor in title of the other respondents, based their claim upon an agreement, said to have been entered into between the original plaintiffs, the vendor Musammat Ajuba Bibi and one Bushir Khan, who between them were once owners of the entire village, a share in which was the subject of the suit: upon the *wazib-ul-arz* of the village, and upon the Muhammadan law. They alleged in their plaint that the defendant vendor, who was stated to be the aunt of the plaintiffs, being a sharer to the extent of 4 annas in the village Supa, in which village they were also co-sharers, had sold 2 annas out of her share to the other defendant Musammat Kulsum Bibi. They further alleged that the sale consideration had been overstated with a view to defeat their right of pre-emption, and they further alleged that upon coming to know of the sale on the 31st of January 1890 they had at once made the *talab-i-muasibat* and *talab-i-ishtishhad* as required by the Muhammadan law.

The defendant vendor did not defend the suit. The vendee filed a written statement in which she raised numerous pleas, more particularly that the plaintiffs had no right of pre-emption under the agreement relied upon by them, and that the requirements of the Muhammadan law as to pre-emption had not been complied with.

The Court of first instance (Subordinate Judge of Cawnpore) found in favour of the plaintiffs on the agreement set up by them, and gave the plaintiffs a decree without deciding any other issue in the suit except that of the price.

On appeal by the defendant vendee the lower appellate Court (District Judge of Cawnpore) found that the agreement relied upon by the plaintiffs was inadmissible in evidence, and made an order of remand under s. 562 of the Code of Civil Procedure. That order of remand was set aside on appeal by the High Court, and the appeal was ordered to be disposed of on the merits by the lower appellate Court. That Court accordingly, after directing [300] evidence to be taken on the plea raised as to the making of the demands for pre-emption, proceeded to hear the appeal. The Court found that the first demand had been made at the earliest opportunity

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* Second Appeal No. 1270 of 1893, from a decree of J. J. McLean, Esq., District Judge of Cawnpore, dated the 6th September 1893, confirming a decree of Syed Akbar Husain, Subordinate Judge of Cawnpore, dated the 20th December 1890.

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at the door of the plaintiff's house in the village of which the share in dispute formed part, in the presence of certain witnesses; and that the demand had been repeated without any inexcusable delay to the brother of the vendee, who was her manager of affairs, the vendee being a *parda nashin* woman. As the result the Court found that the provisions of the Muhammadan law had been complied with, and, accepting the finding of the Court of first instance as to the price, dismissed the appeal.

The vendee defendant appealed to the High Court.

There the case turned on the question whether the first demand was made "on the premises," and an issue was referred under s. 566 of the Code of Civil Procedure:—"Was the first demand made within the area of that part of the village in which the two-anna share was?" The lower appellate Court found that the village being undivided the answer to the reference must be in the affirmative.

Maulvi Muhammad Ishap and Maulvi Muhammad Ahmad, for the appellant.

Pandit Moti Lal and Maulvi Ghulam Mujtaba, for the respondents.

JUDGMENT.

EDGE, C.J., and BURKITT, J.—A two-anna undivided share in a zamindari village was sold. The plaintiffs, who were share-holders in the village, claimed pre-emption under the Muhammadan law. They proved an immediate assertion of the intention to pre-empt made in the presence of witnesses within the area of the zamindari the two-anna share in which was sold. The owner of an undivided two-anna zamindari share is an owner of every portion of the zamindari, although his interest is limited to a two-anna share. We hold that this demand was made on the premises within the meaning of the Muhammadan law, and, as it was made in the presence of witnesses and was immediate, it was sufficient. It must not be inferred that the Court would hold that a pre-emptor [301] who purposely went to an uninhabited and distant part of the village, a share in which was sold, and there in the presence of his couple of witnesses made a second demand under circumstances which would not make it likely that the demand would come to the ears of the vendee, would be making a *bona fide* and good demand according to the Muhammadan law. There is no doubt as to the *bona fide* of the demand in the present case. We dismiss this appeal with costs.

Appeal dismissed.

18 A. 301 = 16 A.W.N. (1896) 58.

REVISIONAL CRIMINAL.

Before Mr. Justice Aikman.

QUEEN-EMPRESS v. LACHMI KANT.* [7th March, 1896.]

Criminal Procedure Code, s. 423 (b) (3)—Sentence, enhancement of—Powers of appellate Court.

Held that the alteration by an appellate Court of a sentence of a fine of Rs. 50 or in default two months' simple imprisonment to a sentence of six months' rigorous imprisonment was an enhancement of the sentence, and, as such prohibited by s. 423 of the Code of Criminal Procedure. *Queen-Empress v. Dansang Dada* (1) referred to.

* Criminal Revision No. 63 of 1896.

(1) 18 B. 751.

THIS was a reference under s. 438 of the Code of Criminal Procedure made by the Sessions Judge of Gorakhpur. A tahsildar having powers of a Magistrate of the second class had sentenced the accused to a fine of Rs. 50 or in default to two months' simple imprisonment. On appeal the District Magistrate upheld the conviction, but altered the sentence to one of six months' rigorous imprisonment, being of opinion that the alteration of the sentence was one of form only and not of amount, and that the nature of the offence was such as rendered a punishment by fine only undesirable. On an application by the accused for revision of the District Magistrate's order the Sessions Judge came to conclusion that the sentence passed by the Magistrate of the district was illegal with regard to s. 423 of the Code of Criminal Procedure, and referred the matter to the High Court.

The Public Prosecutor (Mr. E. Chamier) in support of the reference.

JUDGMENT.

[302] AIKMAN, J.—This case has very properly been reported to this Court by the learned Sessions Judge of Gorakhpur. The following are the facts. One Lachmi Kant was convicted by a Magistrate of the second class of the offence of voluntarily causing hurt, and sentenced under the provisions of s. 323 of the Indian Penal Code to pay a fine of Rs. 50, or in default to undergo two months' simple imprisonment. Lachmi Kant appealed to the District Magistrate, who upheld the conviction, but altered the sentence of fine of one of six months' rigorous imprisonment. The District Magistrate endeavours to defend his action by stating that all that he did was to change the "form" of punishment. There cannot be the slightest doubt that the action of the District Magistrate was in contravention of the provision contained in s. 423 (b) (3) of the Code of Criminal Procedure, which provides that "an appellate Court may alter the nature of the sentence, but not so as to enhance the same." I have no hesitation in holding that the alteration made by the District Magistrate was in this case an enhancement of the sentence. In the case *Queen-Empress v. Dansang Dada* (1) it was held that the action of a Sessions Judge, who on appeal altered a sentence of Rs. 51 fine to a sentence of rigorous imprisonment for one month, was illegal. This is a more glaring case of enhancement. I set aside the order of the District Magistrate in regard to the sentence passed on Lachmi Kant, and restore the sentence imposed by the Magistrate of the second class.

18 A. 302 = 16 A.W.N. (1896) 71.

APPELLATE CIVIL.

Before Mr. Justice Aikman.

TILAKDHARI RAI AND ANOTHER (*Defendants*) v. SOGHRA BIBI
(*Plaintiff*).^{*} [9th March, 1896.]

Act No. XII of 1881 (*N.W.P. Rent Act*), s. 189—*Appeal—Suit to recover arrears of revenue.*

The term "rent," as used in s. 189 of Act No. XII of 1881, cannot be extended so as to include revenue.

[303] Hence where a plaintiff sued to recover arrears of revenue alleged to be payable to the plaintiff by the defendants under an agreement, the defendants

^{*} Second Appeal No. 217 of 1895, from a decree of W. F. Wells, Esq., District Judge of Ghazipur, dated the 1st December 1894, modifying a decree of W. Lamb, Esq., Collector of Ghazipur, dated the 20th April 1894.

(1) 18 B. 751.

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being admitted to be inferior proprietors of the land in respect of which the revenue claimed was payable, it was *held* that no appeal lay to the District Judge under s. 189 of Act No XII of 1891.

THIS was a suit to recover certain sums which, according to the allegations of the plaintiff, she (the plaintiff) had been compelled to pay as revenue, and which were properly payable by the defendants in respect of certain lands of which they were under-proprietors.

It appears that the predecessors in title of the plaintiff had sold to the predecessors in title of the defendants a certain tract of jungle, and that in 1836 an agreement was entered into between the parties by which the defendants, purchasers, bound themselves to pay the revenue hereafter to be assessed upon the land purchased by them in the event of its being brought under cultivation and assessed to revenue. In the settlement papers of 1840 was recorded an entry that the land in question having become culturable, the then representatives of the plaintiff should take "rent" from the purchasers proportionate to the general rental of the village. At the settlement of 1881, the representatives of the defendants were recorded as inferior proprietors of the lands in question. It seems also to have been decided in 1884 in a suit for rent between the predecessors in title of the present parties that "rent" was not payable by the representatives of the defendants, and that neither the agreement of 1836 nor the settlement record of 1840 had ever been acted upon.

The present suit was brought to obtain a refund of "revenue" alleged to be payable by the defendants. The first Court (Assistant Collector) dismissed the suit. The plaintiffs appealed to the Collector, who upheld the decision of the first Court. On appeal, however, to the District Judge, the decision of the Collector was reversed and a decree for "rent" was given in favour of the plaintiffs. The defendants appealed to the High Court.

Munshi Jwala Prasad and Munshi Gorind Prasad, for the appellants.

[304] Mr. Abdul Raoof and Maulvi Muhammad Ishaq, for the respondents.

JUDGMENT.

AIKMAN, J.—In this case the plaintiff respondent brought a suit under clause (g) of s. 93 of the North-Western Provinces Rent Act, 1881, to recover from the defendants, who are appellants here and whom she describes as inferior proprietors, arrears of revenue alleged to be due from them for the years 1299, 1300 and portions of the years of 1298 and 1301 Fasli. The Assistant Collector dismissed the claim, which was for Rs. 42-8-6. On appeal the Collector of the district confirmed the decree of the Court of first instance. The plaintiff then appealed to the District Judge, who gave a decree in favour of the plaintiff. The defendants appeal to this Court against the decree of the District Judge.

The first ground relied on is that no appeal lay to the District Judge with reference to the provisions of s. 189 of the Rent Act. In my opinion this plea is valid. An appeal lies to the District Judge in cases in which the amount or value of the subject-matter exceeds Rs. 100. The case before us admittedly does not come under that category. Next, an appeal lies in cases in which the rent payable by the tenant has been a matter in issue and has been determined. The learned counsel for the respondent contends that he is entitled to take advantage of this clause of s. 189. S. 93 of the Rent Act, clause (a), provides for suits for the arrears of rent: clause (d) provides for suits for any overpayment of rent: clause (g) provides for suits by lambardars for arrears of Government

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revenue payable through them by the co-sharers whom they represented and for village expenses: clause (i) provides for suits by *muafidars* or assignees of the Government revenue for arrears of revenue due to them as such: clause (j) provides for suits by *talugdars* and other superior proprietors for arrears of revenue due to them as such: clause (k) provides for suits by recorded co-sharers to recover from a recorded co-sharer who defaults arrears of revenue paid by them on his account. Thus we have in s. 93 a distinction drawn between suits for arrears of rent and suits for arrears of revenue. The learned counsel for the respondents [305] argues that the word "rent" in s. 189 includes also "revenue." I should be glad if I could so hold. I see no reason why the Legislature should have made appealable to the District Judge a decision in a suit in which the rent payable by a tenant had been determined as a matter in issue and given no right of appeal in the equally important case in which the revenue payable by an inferior proprietor had been a matter in issue and had been determined. But the right of appeal is a creation of statute and must not be assumed to exist where it has not been clearly given by the Legislature. The learned counsel for the respondent has referred me to s. 4 of the Rent Act, in which the payment by a person intermediate between the proprietor of the *mahal* and the occupants of the land is indirectly referred to as rent. I asked the learned counsel for the respondent who were the occupants of the land in suit. He stated first that the defendants were the occupants, and then that there was no evidence in the record to show whether they were or were not persons intermediate between the proprietors of the *mahal* and the actual occupants. This being so, I do not think the terms of s. 4 can assist him, and in any case, seeing that the Legislature in the section, describing the various classes of suits which are cognizable by the Revenue Courts, speaks of some as suits for arrears of rent and of others as suits for arrears of revenue, I cannot hold that the word "rent" in s. 189 was used in a general sense to include revenue also.

The learned counsel for the respondent argued that, if the suit did not fall within the second category, it might be looked on as a suit in which the proprietary title to land had been determined between the parties making conflicting claims thereto. I do not think the circumstances of this case are such as to bring the suit within this category. The sole question is whether under an old agreement of 1836 the appellants are liable to pay a certain sum yearly to the plaintiff on account of the land revenue which the plaintiff pays to Government. Both the parties are at one in asserting that the defendants are inferior proprietors of the land: all that has been determined in this case is whether, by a contemporaneous agreement entered into when the land was sold by the predecessor in title of the plaintiff to the predecessor in title of the defendants, the vendee did or did not covenant to pay in a certain event a proportionate amount of the Government revenue. I cannot hold that the determination of this issue one way or another was a determination of the proprietary title to land.

For the above reasons, I hold that no appeal lay to the District Judge. I allow the appeal to this Court, and, setting aside the decree of the Court below, restore the decree of the Collector of the District. As the plea upon which the appellants have now succeeded was not taken in the Court below, parties will bear their costs in this Court and in the Court below.

Appeal decreed.

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18 A. 306 = 16 A.W.N. (1896) 72.

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APPELLATE CIVIL.

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*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.*KALIAN RAI AND ANOTHER (*Plaintiffs*) v. RAM RATAN AND OTHERS
(*Defendants*).^{*} [11th March, 1896.]18 A. 306 =
16 A.W.N.
(1896) 72*Civil Procedure Code, s. 32—Parties to a suit—Improper addition of a defendant.*

An order for sale was made in execution of a decree. A party claiming the property objected. His objection was overruled by the Court of first instance. He appealed to the High Court. The High Court held that the property ordered to be sold was not the property included in the mortgage on which the decree for sale was made and was not property which could be sold under that decree. In the meantime the sale had taken place. Thereupon the owner of the property, which the High Court had held on appeal was not saleable, brought a suit and made the decree-holders and auction-purchaser parties to it, and claimed as against them his property.

Held, that it was not competent to the Court acting under s. 32 of the Code of Civil Procedure to introduce into this suit as a defendant a person who claimed the property in suit by a title quite distinct from that under which any of the parties to the suit claimed.

[R., 5 O.C. 94; 38 P.R. 1903 = 87 P.L.R. 1903.]

THE plaintiffs sued for possession of certain zamindari property, alleging that it had been wrongfully sold in execution of a decree, in execution of which decree the High Court had subsequently, by its order of the 9th of August 1893, declared the said property not liable to be sold.

[307] The original defendants, who were the decree-holders and the auction-purchaser, pleaded that the property claimed was not in fact a portion of the share to which it was alleged by the plaintiffs to belong; but was part of certain property which had been sold to satisfy a long antecedent decree of 1859 to one Salig Ram, whose present representative was his son Badri Prasad. Badri Prasad was made by the Court on his own application a party defendant to the suit and supported the allegation that the property in suit had been sold to Salig Ram.

Upon this defence the Court of first instance (Subordinate Judge of Moradabad) dismissed the plaintiff's suit, holding that the finding of the High Court in its order of the 9th August 1893, as to the ownership of the property was not binding as between the plaintiffs and Badri Prasad.

The plaintiffs appealed to the High Court.

Pandit *Sundar Lal*, for the appellants.

Messrs. *T. Conlan* and *D. N. Banerji*, for the respondents.

JUDGMENT.

EDGE, C. J., and BURKITT, J.—An order for sale was made in execution of a decree. A party claiming the property objected. His objection was overruled by the Court of first instance. He appealed to the High Court. The High Court held that the property ordered to be sold was not property included in the mortgage on which the decree for sale was made and was not property which could be sold under that decree. In the meantime the sale had taken place. Thereupon the owner of the property, which the High Court had held on appeal was not saleable,

^{*} First Appeal No. 172 of 1894, from a decree of Pandit Raj Nath Sahib, Subordinate Judge of Moradabad, dated the 30th April 1894.

brought this suit and made the decree-holders and auction-purchaser defendants to the suit and claimed as against them his property. There was absolutely no defence to the suit. The point was *res judicata* and had been decided by the High Court. But a gentleman named Badri Prasad, possibly at the instance of the defendants, stepped into the legal arena and asked to be allowed to contest the suit as a defendant. The plaintiffs had made no claim against him. Whether he was concerned with the property or not, the suit did not affect him. The Subordinate Judge made [308] Badri Prasad a defendant to the suit and went on and tried an issue between Badri Prasad and the plaintiffs which was not raised by the pleadings between the real parties to the suit and which could not be raised between them owing to s. 13 of the Code of Civil Procedure. The Subordinate Judge devoted nearly the whole of his energy to this question, which had nothing to do with the issue between the parties to the suit originally. It has been contended here that the Subordinate Judge had power under s. 32 of the Code of Civil Procedure to bring Badri Prasad in as a defendant. In our opinion s. 32 does not enable a Court to go contrary to the ordinary procedure provided by the Code. It would not enable a Court, for instance, to override the effect of the second clause of s. 31, and, because there might be a dozen claimants to a piece of property, all having different interests and all having different claims of title, to make them all parties to the suit as plaintiffs; nor does s. 32 enable a Court to go contrary to s. 45 of the Code, and to impose on the plaintiff to a suit persons as defendants whom he has made no claim against, and against whom he may never make any claim and who have no community of title with the real defendant to the suit. There is no section in the Code under which Badri Prasad ought to have been made a party to the suit, nor was it necessary to join him in order to enable the Court to adjudicate on and settle any question involved in the suit between the original parties. The position is this:—Badri Prasad finding a suit going on in which he was not concerned, steps into Court and asks the Judge to make him a defendant and settle a point which may or may not be subsequently in dispute between him and the plaintiffs. We should like to have known whether Badri Prasad at the time when the order for sale was made was sufficiently interested in the property to raise any objection to its being sold. We allow this appeal with costs, and we dismiss Badri Prasad from the suit: he should never have been joined in it. We give the plaintiffs a decree against the defendants other than Badri Prasad for possession, and we declare the sale to be invalid and set it [309] aside. We give the plaintiffs their costs against the parties to this suit.

Appeal decreed.

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18 A. 306 =
16 A.W.N.
(1896) 72.

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18 A. 309 = 16 A.W.N. (1896) 76.

APPELLATE CIVIL.

*Before Mr. Justice Knox and Mr. Justice Blair.*ALI MUHAMMAD KHAN (*Defendant*) v. MUHAMMAD SAID HUSAIN
(*Plaintiff*).^{*} [24th March, 1896.]18 A. 309 =
16 A.W.N.
(1896) 76.*Pre-emption—Muhammadian Law—Tajab-i-ishtishhad—Demand made to vendee not in possession—Demand made by agent of pre-emptor.*

Held, that if the *talab-i-ishtishhad* is made in the presence of the vendee, it is not necessary that such vendee should at the time the demand is made be actually in possession of the property in respect of which pre-emption is claimed. *Chamroo Pasban v. Puhlwan Rai* (16 W.R. 3) explained. *Jhootee Singh v. Komul Roy* (10 W.R. 119), *Janger Mohamed v. Mohamed Arjad* (I.L.R. 5 Cal. 509), *Goluck Ram Deb v. Brindabun Deb* (14 W.R. 265) and *Shaikh Dayemoolah v. Kirtee Chunder Surmah* (18 W.R. 530) referred to.

Held, also that the ceremony of *talab-i-ishtishhad* need not necessarily be performed by the claimant for pre-emption in person, but may be performed by a duly constituted agent on his behalf. *Syed Wajid Ali Khan v. Lala Hanuman Prasad* (4 B.L.R. A.C.J. 139) and *Muzzammut Ojheoonissa Begum v. Sheikh Rustum Ali* (W.R. 1864, 219) referred to.

[R., 20 A. 457 ; 35 C. 575.]

THE plaintiff sued for pre-emption, under the Muhammadan law, of a certain zenana house. The defendants pleaded *inter alia* that the plaintiff had not performed the necessary rites of pre-emption prescribed by the Muhammadan law. An issue was framed upon this point, which in argument resolved itself into two questions: first, whether the pre-emptor could make a valid demand from the purchaser when the latter was not in possession of the property sold, and secondly, whether the demand could be made otherwise than by the pre-emptor in person, the pre-emptor being under no physical disability. The Court of first instance (Munsif of Moradabad) relying upon a ruling of the Calcutta High Court in *Chamroo Pasban v. Puhlwan Roy* (1) found against the plaintiff on this issue. The plaintiff appealed.

The lower appellate Court (District Judge of Moradabad), following the ruling in *Janger Mohamed v. Mohamed Asjad* (2) overruled the decision of the Munsif on this point, and finding that the requirements of the Muhammadan law as to both *Talab-i-ish-*[310]*tishhad* and *talab-i-mu-asibat* had been fulfilled by the plaintiff, remanded the case to the Court of first instance under s. 562 of the Code of Civil Procedure.

Against this order of remand the defendant vendee appealed to the High Court.

Maulvi Ghulam Mujtaba, for the appellant.

Mr. Abdul Majid, for the respondent.

JUDGMENT.

KNOX and BLAIR, JJ.—This is an appeal from an order of remand passed under s. 562 of the Code of Civil Procedure. The plaintiff, who is respondent before us, is seeking to enforce a right of pre-emption which he claims under the Muhammadan law. The Court of first instance found that the plaintiff had not performed certain rites and ceremonies which that Court considered necessary before he could enforce the right of

^{*} First Appeal from Order No. 100 of 1895.

(1) 16 W.R. 3

(2) 5 C. 509.

pre-emption claimed. It therefore dismissed the suit. On the matter going into appeal, the appellate Court dissented from the view taken by the Court of first instance, considered that all the essential requisites under the Muhammadan law had been complied with, and remanded the case under the order which is complained of in this appeal for determination upon the merits.

In appeal before us, it is now contended that the order of remand is bad on two grounds, the first being that the *talab-i-ishtishhad* was in the present case made to the vendee, who had not, at the time when the demand was made, obtained possession of the land over which the respondent seeks to enforce his pre-emptive rights; the second is that the demand is bad, inasmuch as it was not made by the pre-emptor himself, but by an agent. The main authority for the former of these contentions is based upon the argument that the procedure in such matters laid down by the *Durrul Mukhtar*, which appears to be of a more liberal and lax nature, differs from the stringent rule laid down upon the same subject in the *Hidayah*, and it is urged that where these two are at variance, the *Hidayah* is the authority which should be followed by us. We have not before us the passage from the *Hidayah*, but we were referred to a note (q) to be found in the Tagore Law [311] Lectures, 1873, at page 522, in which it is given as a quotation from the *Fatawa-i-Alamgiri*, vol. 5, p. 267. That passage is as follows:—"It is therefore necessary afterwards to make the *talab-i-ishtishhad wa taqrir*, which is done by the Shafi taking some person to witness either against the seller, if the ground sold be still in his possession, or against the purchaser or upon the spot regarding which the dispute has arisen," and we were also referred to the precedent *Chamroo Pasban v. Puhlwan Rai* (1) as an authority for the proposition that the *talab-i-ishtishhad* to be valid must be made in the presence of the vendor or vendee who may be at the time when the demand is made in possession of the premises, the subject-matter of the pre-emption. The case cited is not a very full and clear authority. The learned Judges who decided it had before them a case in which no demand had been made either in the presence of the vendor or vendee, and their attention was not directly brought to bear upon the question whether the demand in order to be valid could only be made before the person in possession at the time of demand. This is really all the authority upon which this contention rests. We have, on the other hand, a chain of decisions beginning with a case of *Jhotee Singh v. Komul Roy* (2) if not earlier, and extending down to the case of *Janger Mohamed v. Mohamed Arjad* (3). There are cases between, viz:—*Goluck Ram Deb v. Brindabun Deb* (4) and *Shaikh Dayemoollah v. Kirtee Chunder Surmah* (5). The Calcutta Court in these cases has throughout laid down that the demand *talab-i-ishtishhad* must be made in the presence of the vendor or purchaser, or upon the premises and in the presence of witnesses. In the case in 10 Weekly Reporter, the learned Judges were certainly not disposed to make any relaxation, and fully bore in mind the fact that the right of pre-emption was one in which they should not be disposed to relax any of the rules by which the Muhammadans themselves found it necessary to confine its operation. In *Janger Mohamed v. Mohamed Arjad*, the precedent of *Chamroo Pasban v. [312] Puhlwan Roy* was quoted, and the learned Judges considered it to amount to nothing further than that the demand must be made either before the

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18 A. 309=
16 A.W.N.
(1896) 76.

(1) 16 W.R. 3.
(4) 14 W.R. 265.

(2) 10 W.R. 119.
(5) 18 W.R. 530.

(3) 5 C. 509

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MARCH 24. vendor or the purchaser or on the premises; in other words, the matter deemed essential was that the affirmation should be made in the presence of witnesses and before the vendor or purchaser who might be deemed to be in possession of the lands. The fact of the purchase would seem to be considered as giving, at any rate, a constructive possession for such purposes, and we see no reason to rule otherwise.

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18 A. 309 =
16 A.W.N.
(1896) 76. As regards the second point, the main authority cited to us is a passage from Macnaghten's Principles and Precedents upon Muhammadan Law, Edition 1890, p. 183, where it is said that the party claiming must make the demand, and, it is added, he may also depute an agent, provided he is at a considerable distance and cannot afford personal attendance, and, if unable to depute an agent, he may communicate with the seller or purchaser by letter. Along with this, which after all does not appear to be of higher authority than an answer made, as the practice then was, by a person considered an authority in Muhammadan law to a question put by Judges, we were referred to the case of *Syed Wajid Ali Khan v. Lala Hanuman Prasad* (1). In that case a Subordinate Judge had expressed an opinion that the ceremony of *talab-i-ishtishhad* could only be performed by the pre-emptor in person and could not be done through an agent. The learned Judges who decided that case remarked that they were not referred to any authority for this dictum, and the law is otherwise enunciated in Muhammadan law books. The restriction that the demand should be made by the pre-emptor in person depends upon his ability to perform it, and the question of ability would seem to be one lightly dealt with, the preference being given to the rule which prevails in Muhammadan Law as elsewhere, that an agent can do what a principal can do, except where prohibited by law or where his power is restrained. In the case of *Mussamat Ojheoonissa Begum v. Sheikh Rustum Ali* (2), the Judges held that unless [313] there was a clear provision in the law that the claimant must go to the spot or to the seller or to the purchaser, his act could be done by a duly constituted agent. As in that case, so in this, we think that the evidence shows that the needful ceremonies of Muhammadan law have been complied with to all intents and purposes, and that the learned Judge was right in so considering and in making the order of remand. The appeal is therefore dismissed with costs.

Appeal dismissed.

18 A. 313 = 16 A.W.N. (1896) 77.

APPELLATE CIVIL.

Before Mr. Justice Banerji.

MURARI DAS AND OTHERS (*Decree-holders*) v. THE COLLECTOR OF GHAZIPUR AND ANOTHER (*Respondents*).^{*} [28th March, 1896.]

Act No. X of 1877, s. 326—*Civil Procedure Code*, ss. 322, 325, 326—*Execution of decree—Right of creditor under a simple money decree obtained after property of debtor has been taken over by the Collector to be entered in list of creditors prepared under s. 322 B.*

Held that the assignees of a decree for money obtained against a person whose property had been taken over by the Collector under s. 326 of Act No. X of 1877,

^{*} First Appeal No. 162 of 1895 from an order of Kuar Bharat Singh, District Judge of Ghazipur, dated the 17th May 1895.

(1) 4 B.L.R. A.C.J. 139.

(2) W.R. (1864) 219.

whilst such property was under the management of the Collector, were not entitled to be placed on the list of creditors prepared by the Collector under s. 322 of Act No. XIV of 1882 ; and that in any case application to be placed on the said list of creditors should have been made to the Collector and not to the District Judge.

THE facts of this case are sufficiently stated in the judgment of Banerji, J.

Babu Jogindro Nath Chaudhri and Munshi Madho Prasad, for the appellants.

Mr. E. Chamier, for the respondents.

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18 A. 313=
16 A.W.N.
(1896) 77.

JUDGMENT.

BANERJI, J.—The facts which have given rise to this appeal are these — Several decrees having been passed against Babu Har Shankar Prasad Singh, one of the respondents to this appeal, the Collector of Ghazipur, in which district a part of Babu Har Shankar Prasad's property was situated, was appointed by the District Judge of Ghazipur under s. 326 of Act No. X of 1877 to take [314] the property under his management for the satisfaction of the decrees and debts due by Har Shankar Prasad. The Collector prepared a statement of the decrees and debts in the manner provided by the Code of Civil Procedure, and among the persons whose debts were entered in such statement were Babus Sita Ram and Harak Chand.

They, it is stated, held a promissory note, executed by Har Shankar Prasad Singh, but their names were entered as decree-holders, although as a matter of fact they had not obtained a decree at the time. In March 1891 Harak Chand and Hari Chand obtained a decree against Har Shankar Prasad in the Court of the Subordinate Judge of Benares. It is alleged that they sold the decree to Sundar Das, and Sundar Das assigned it to the present appellants. The decree was transferred for execution to the District Judge of Ghazipur, and execution was taken out in the Court of the Subordinate Judge of that district under the orders of the District Judge. The application which has given rise to this appeal was subsequently presented by the appellants in the Court of the District Judge of Ghazipur on the 30th of January 1895. By it they prayed that their names should be entered in the statement of the debts due by Har Shankar Prasad Singh and that the amount due to them should be put down in that statement as being Rs. 13,339-8-10.

This application having been refused by the District Judge, the present appeal has been preferred.

One of the respondents to the appeal is the Collector of Ghazipur, the other respondent being Babu Har Shankar Prasad Singh, the judgment-debtor. As against the Collector of Ghazipur Mr. Madho Prasad, who has appeared for the appellants, has not satisfied me that the appellants have any case. The Collector, acting under the provisions of s. 326 of the Code of Civil Procedure, was not acting in any capacity other than that of a manager of the property appointed by the Court. He was nothing better than an officer of the Court for the purpose of managing the [315] property in order to satisfy the decrees which were due by Har Shankar Prasad on the date of the appointment of the Collector as such manager. I fail to see that the appellants have any case against the Collector, and in my judgment the Collector has been improperly made a party to this appeal.

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On the merits also the appeal must, in my opinion, fail. The application of the appellants may be regarded either as an application to be entered in the statement of debts prepared under s. 322B, or as an application to amend the statement prepared under that section. If it is an application to be entered in the statement it should have been made to the Collector and not to the District Judge. It is only when disputes arise as to the fact or extent of the liability of the judgment-debtor to any of the decrees or claims of which the Collector is informed, that the Civil Court is to determine such disputes, and it is to do so only upon a reference being made by the Collector. The appellants, instead of going to the Collector, applied to the District Judge, and this, in my opinion, they were not entitled to do. Further, they were not entitled to have their names entered in the statement of debts prepared under s. 322B. In that statement only such persons are to be entered as are referred to in s. 322A. The persons so referred to are, first, persons holding decrees for money, and, secondly, those having any claim on the property of the judgment-debtor. The appellants evidently did not come within the second class as they had no claim on the property of Har Shankar Prasad, but were merely holders of decrees for money against him. It is not, however, every holder of a decree for money who is entitled to be entered in the statement prepared under s. 322B. Under clause (a) of s. 322A only two classes of holders of decrees for money are entitled to come in: (1) those whose decrees are capable of execution by sale of the immoveable property of the judgment-debtor, and (2) those in execution of whose decrees proceedings for the sale of such property are pending. There is no question that the appellants do not fall within the category of decree-holders of the second class, as proceedings for the sale of the judgment-debtor's property are not [316] pending in execution of their decree. They do not come within the other class also. By reason of the provisions of the last portion of the first paragraph of s. 325A no Civil Court can issue any process against the judgment-debtor's property which is under the management of the Collector in execution of a decree for money obtained after the property came under such management. The decree held by the appellants was passed after Har Shankar Prasad's property had been placed under the management of the Collector, and therefore in execution of that decree the said property is not liable to be sold so long as the management continues. It is thus clear that the appellants are not persons who are entitled to be entered in the list of creditors prepared under s. 322 B. There can be no doubt that if a claim like the one put forward by the appellants were admitted, the object of the management of the judgment-debtor's property by the Collector would become wholly infructuous.

For the above reasons, I am of opinion that the application of the appellants has been properly dismissed. I dismiss this appeal with costs.

Appeal dismissed.

18 A. 316 = 16 A.W.N. (1896) 78.

APPELLATE CIVIL.

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Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blennerhasset.

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RIKHI RAM AND ANOTHER (*Defendants*) v. SHEO PARSHAN RAM
AND OTHERS (*Plaintiffs*).^{*} [30th March, 1896.]*Mortgage—Construction of document—Meaning of the term “Sudi”—Interest post diem—Post diem interest decreed as damages not a charge on the mortgaged property.*18 A. 316 =
16 A.W.N.
(1896) 78.

The use of the term “sudi” (bearing interest) in a mortgage-deed held not to imply a covenant to pay *post diem* interest, there being a specific agreement to repay the mortgage debt, principal and interest, in seven years.

Where in a suit upon a mortgage bond *post diem* interest is decreed, as damages the payment of such damages does not constitute a charge upon the mortgaged property. *Narindra Bahadur Pal v. Khadim Husain* (1) referred to.

[Diss., 12 C.P.L.R. 18.]

[317] THIS was a suit to recover money payable under a mortgage bond. The material portion of the bond sued upon ran as follows:—
“Inasmuch as I, having taken a loan of Rs. 1,200 from * * * bearing interest (*sudi*) at the rate of Rs. 1-12 per cent. per monsem, with a promise to repay in seven years, have brought it into my use, I agree that I will without demur pay the principal and interest as promised, * * * and I will continue to pay (or go on paying) each six months’ interest within the six months (in question), and if such * * * should not be paid, then that interest shall be considered as principal, &c.” The plaintiffs claimed a sum which included a considerable item in the way of interest *post diem*, though it was not specified as such in the plaint. The Court of first instance (Subordinate Judge of Allahabad) held that under the mortgage sued upon the plaintiffs were not entitled to *post diem* interest as such; and further that though they might be entitled to get interest *post diem* by way of damages, yet for reasons stated by the Court even such damages ought not to be allowed. The first Court decreed the plaintiffs’ claim in part. The plaintiffs appealed as to the allowance of *post diem* interest and as to the method of computing interest *ante diem* adopted by the first Court. The lower appellate Court (District Judge of Allahabad) held that the bond sued upon did provide for the payment of *post diem* interest and that the lower Court’s computation of interest payable *ante diem* was incorrect. It accordingly varied the decree of the first Court, enhancing the amount payable under it by the defendants. The defendants appealed to the High Court.

Pandit Sundar Lal and Babu Datti Lal, for the appellants.

Munshi Ram Prasad and Pundit Moti Lal, for the respondents.

JUDGMENT.

EDGE, C. J., and BLENNERHASSETT, J.—The suit out of which this appeal has arisen was one for sale under s. 88 of the Transfer of Property Act. The plaintiffs claimed principal and a large amount for interest. They did not show in their plaint how the amount which

* Second Appeal No. 540 of 1893, from a decree of F. E. Elliot, Esq., District Judge of Allahabad, dated the 6th March 1893, modifying a decree of Munshi Muhammad Siraj-ud-din, Subordinate Judge of Allahabad, dated the 23rd November 1892.

(1) 17 A. 581.

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The first Court held that there was no contract, express or implied, to pay interest *post diem*. The lower appellate Court, relying on the use of the adjective "*sudi*" in the mortgage bond, held that the intention of the parties was that the principal should bear interest until payment, and gave the plaintiffs a decree under s. 88 of the Act for the principal, interest up to due date and interest *post diem*. The same District Judge had given a similar decision in the case of *Ram Kuar and another v. Sheoratan Singh and others* which came up to this Court in second appeal (S. A. No. 67 of 1892). In that case this Court, having before it the views of the District Judge as to the effect in a mortgage contract of the use of the adjective "*sudi*," held that there was absolutely no express provision in the contract for *post diem* interest and that there were no sufficient materials for the Court finding by implication that the parties intended to contract for *post diem* interest. That is a decision bearing on the meaning of the term "*sudi*" in a contract of mortgage. In our opinion the District Judge misinterpreted the mortgage deed. All moneys lent upon mortgage are lent either bearing interest or not bearing interest. Those cases in which no interest at all is stipulated for must be of the rarest possible occurrence. "*Sudi*" as used in this mortgage deed merely meant that until due date the principal money should bear interest. Beyond that, it is obvious that the parties did not contemplate *post diem* interest. They expressly provided that all [319] payments of principal or interest during the mortgage term should be endorsed upon the mortgage bond and that payment not so endorsed should not be allowed if claimed. They made no provision for any payment of principal or interest *post diem*. We may conclude that the intention was that the debt and contractual interest should be paid within the seven years provided for in the bond. The defendants who have brought this second appeal are assignees of 1892 of the mortgagor's rights. The mortgagor who was a party to the suit has not appealed. As against him it would have been proper to have given a decree for damages for non-payment of the mortgage money on the due date, but a decree for damages, as pointed out in the judgment of the Full Bench of this Court in *Narindra Bahadur Pal v. Khadim Husain* (1) cannot constitute under the Transfer of Property Act a charge on the estate, i.e., the mortgaged property could not be sold under s. 88 (or rather s. 89) in respect of damages which might be decreed for breach of contract to pay, although, if the mortgaged property is in the possession of the mortgagor no doubt the decree for damages, which would be a decree for money, might be executed, if the Court thought fit so to grant execution of it, against the hypothecated property;

(1) 17 A. 581.

but that would be a proceeding under the Code of Civil Procedure and not under the Transfer of Property Act. In that respect there may be a difference between the practice followed in the Courts in England and the law as it has to be administered in India under the Transfer of Property Act.

We allow this appeal, and we vary the decree of the Court below as against these appellants and the property hypothecated by limiting the amount for which the property may be sold to the amount due for principal and interest up to the 28th of October 1886, and the costs. The appeal is allowed with costs.

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18 A. 316 =
16 A.W.N.
(1896) 78.

Appeal decreed.

18 A. 320 = 16 A.W.N. (1896) 86.

[320] APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice and Mr. Justice
Blennerhassett.*

NATHU SINGH AND OTHERS (*Defendants*) v. GUMANI SINGH AND
OTHERS (*Plaintiffs*). [31st March, 1896.]

Act No. I of 1877 (Specific Relief Act), s. 42—Suit for a declaration—Further relief.

The plaintiffs were purchasers at a sale held in execution of a decree for money, and had obtained possession. Before that decree had been executed the property in question was mortgaged to two other persons. After the purchase by the plaintiffs, the mortgagees, with knowledge of the auction-purchasers' rights, brought a suit for sale upon their mortgage without making the former auction-purchasers parties. They obtained a decree, and brought the mortgaged property to sale, and it was purchased by N. S. and another. The former auction-purchasers thereupon sued the purchasers under the decree upon the mortgage for a declaration that they and their interests were not affected by the suit for sale and by the decree for sale and the sale in execution of that decree.

Held, the plaintiffs in that suit were not bound either to tender the mortgage money, or to offer to redeem, or to frame their suit as a suit for redemption, and that their not having done so did not deprive them of their right to a declaration.
Bhawani Prasad v. Kallu (1) referred to.

[R., 14 C.L.J. 530 (534) = 12 Ind. Cas. 155 (157).]

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Jogindro Nath Chaudhri, for the appellants.

Munshi Ram Prasad and Munshi Gobind Prasad, for the respondents.

JUDGMENT.

EDGE, C. J., and BLENNERHASSETT, J.—The plaintiffs were purchasers at a sale held in execution of a decree for money. Before that decree was executed the property which these plaintiffs purchased had been mortgaged by a deed of simple mortgage. After the plaintiffs' purchase, the mortgagee, with knowledge that the plaintiffs had purchased the rights and interests of the mortgagor in this property, brought a suit for sale under the Transfer of Property Act, 1882, and did not make the plaintiffs (or either of them) parties to that suit.

* Second Appeal No. 30 of 1894 from a decree of Mir Jafar Husain, Subordinate Judge of Bareilly, dated the 4th October 1893, reversing a decree of Babu Banke Behari Lal, Munsif of Haveli Bareilly, dated the 7th June 1893.

(1) 17 A. 537.

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18 A. 320 =
16 A.W.N.
(1896) 86.

The mortgagees obtained a decree for sale. The property was put up for sale under the decree for sale, and was sold, and purchased by the defendants, who are appellants here. The defendants [321] having purchased under the decree for sale sought possession. The plaintiffs, having previously obtained possession in virtue of their purchase at the sale in execution of the decree for money, brought this suit under s. 42 of the Specific Relief Act, asking in effect for a declaration that they and their interests were not affected by the suit for the sale, and by the decree for sale and the sale in execution of that decree.

The first Court dismissed the suit: the second Court granted the plaintiffs a decree. The defendants have appealed.

It has been urged in appeal that the granting of a declaratory decree is discretionary with the Court, and that the Court ought not to exercise that discretion by giving a declaration, except on condition of the plaintiffs' discharging the money which was due under the mortgage. It has also been urged on behalf of the plaintiffs that the proviso to s. 42 of the Specific Relief Act applies, the contention being that the plaintiffs could have asked for substantial relief by having framed their suit as a suit for redemption; and that not having done so the proviso deprives them of of their right to a declaration.

There can be no doubt in law that the plaintiffs were persons who, within the meaning of s. 85 of the Transfer of Property Act, had an interest in the property comprised in the mortgage, and who were known by the plaintiffs in the suit on the mortgage to have had an interest, and as such should have been joined in the suit. They had in fact what is known in England as an equity of redemption. Not having been made parties to the suit in which the decree for the sale was made, the decree under s. 88 and the order for sale made under s. 89, the sale and the subsequent proceedings could not in law bind or affect the plaintiffs or their interests, as they were not parties.

As to the two points which were urged on us in this appeal, we are of opinion that the plaintiffs were not bound either to tender the mortgage money, or to offer to redeem, or to frame their suit as a suit for redemption, and that their not having done so does not deprive them of their right to a declaration. The plaintiffs do not [322] seek possession; they have got it. All they seek is to have their title cleared from the cloud which has been put on it by the decree for sale and the sale under that decree. For all we know, they may have some defence to a suit on the mortgage. This is not at all similar to that class of cases in which a Hindu or Muhammadan heir seeking to avoid a sale by a person purporting to act as guardian, but not having power, is bound to make restitution of the money advanced which has been employed for his benefit or for the benefit of his property.

A similar point as to the application of the proviso to s. 42 of the Specific Relief Act was practically settled by the Full Bench judgment in the case of *Bhawani Prasad v. Kallu* (1).

We dismiss this appeal with costs.

18 A. 322 = 16 A.W.N. (1896) 81.

APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and
Mr. Justice Blennerhassett.*

ABDULLAH KHAN AND ANOTHER (*Defendants*) v. ABDUR
RAHMAN BEG (*Plaintiff*). [7th April, 1896.]

*Contract—Sale of immoveable property—Misdescription of area of property sold—Suit
for damages—Fraud.*

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18 A. 322 =
16 A.W.N.
(1896) 81.

A purchaser of certain immoveable property sued his vendors to recover compensation or damages on account of a deficiency in the actual area of land purchased by him as compared with the area stated in his sale-deed. There was no covenant in the sale-deed to make compensation in case of misdescription.

Held that the plaintiff in order to succeed must make out a fraudulent misrepresentation which he accepted as true, and which induced him to enter into the contract, and which caused him damage. *Derry v. Peek* (1) referred to.

THE plaintiff sued to recover damages on the ground of fraud. He alleged that the defendants had sold to him a certain house, the site of which was stated by them in the sale-deed, as the plaintiff averred, fraudulently, to consist of 107 square yards; that about six months before suit, on coming to measure the land, he discovered it to measure only 86 square yards. He accordingly claimed damages in respect of the alleged deficiency of 21 yards [323] and interest on the amount so claimed, or, in the alternative, an equal quantity of land.

The defendants denied any fraudulent intention on their part, and stated that the plaintiff had bought the house after inspection and without reference to the exact number of yards contained in the site; the measurement was entered in the sale-deed from the deed under which they themselves purchased.

The Court of first instance (Munsif of Saharanpur) found that there was a misstatement in respect of the area of the property sold, but that such misstatement was not made fraudulently or intentionally; and, there being no covenant to pay damages on account of such deficiency as that alleged, dismissed the plaintiff's suit, except as to a small strip of land immediately adjoining the house.

The plaintiff appealed. The lower appellate Court (Subordinate Judge of Saharanpur), though agreeing with the Munsif that the misstatement of the area was not intentional, found that such a misstatement amounted to fraud in law; and further, finding that the actual deficiency amounted to 17 yards, gave the plaintiff a decree for the proportionate price of that quantity of land. The defendants thereupon appealed to the High Court.

Pandit Baldeo Ram Dave, for the appellants.

Babu Durga Charan Banerji, for the respondent.

JUDGMENT.

EDGE, C.J., and BLENNERHASSETT, J.—In this case the plaintiff seeks compensation for misdescription of the area of land which he had purchased from the defendants. The sale was completed. The sale-deed

* Second Appeal, No. 40 of 1894, from a decree of Babu Sanwal Singh, Subordinate Judge of Saharanpur, dated the 6th June 1893, modifying a decree of Pandit Kanhaiya Lal, Munsif of Saharanpur, dated the 20th December 1892.

(1) L.R. 14 App. Cas. 387.

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(1896) 81.

was executed. The purchaser went into possession ; and it was not until the lapse of a year and a half from the date of the sale that it was discovered that the area of the land in question was short of the area mentioned in the sale deed. There was no agreement to make compensation in case of misdescription such as one finds as a rule in conditions of sale or agreements of sale in England. Consequently the plaintiff can only succeed if he makes out a case of fraud, and that he was damnified by reason of fraud. The Munsif apparently found that there was no fraud, [324] and that the statement as to the area was an innocent statement made by the vendors relying on the area mentioned in the sale-deed to them. The Subordinate Judge in appeal did not try the issue as to whether there was fraud in fact or not ; but held that the misstatement as to the area was fraud in law which entitled the plaintiff to succeed.

The attention of neither of the Courts below was drawn to the judgments in the case of *Derry v. Peek* (1). Sir Frederick Pollock in his *Law of Fraud in British India*—one of the Tagore Law Lectures—throws out the suggestion that Courts in India need not follow decisions of the House of Lords in England. In one sense that is true. The House of Lords is not the Court of Appeal from Courts in India. In another sense it is in our opinion a suggestion not capable of support. The House of Lords is the highest legal tribunal in England. It is the legal tribunal which lays down the law, subject to the rights of Parliament, for Great Britain and Ireland. Their Lordships of the Privy Council have held that, where the law is not certain in India, Courts in India ought to follow the law of England. In any event, the Judicial Committee of the Privy Council, being composed almost exclusively of the Lords of Appeal, presumably would decide a point of law like this as it was decided in the House of Lords. We, at all events, feel bound to accept the law as laid down by the House of Lords in *Derry v. Peek*, as on this particular point it does not appear to be in conflict with any of the Code law of India. We are not now dealing with a case in which a plaintiff asks, on allegations of misrepresentation, to avoid a contract. We are dealing with a case in which a plaintiff seeks compensation or damages for injury alleged to have been suffered by him by reason of misrepresentation as to a matter which is alleged to have been one of the bases of the contract. It appears to us that in order to obtain compensation or damages, there being no agreement to pay compensation in case of misdescription, and this not being a case for specific performance of a contract, the plaintiff [325] must make out a fraudulent misrepresentation which he accepted as true and which induced him to enter into the contract, and, further, which caused him damage. The Subordinate Judge, if his attention had been drawn to the decision of the House of Lords to which we have just referred, would no doubt have framed and tried the proper issues of fact. As those issues of fact which we deem necessary to the disposal of the case have not been tried, we must refer under s. 566 of the Code of Civil Procedure the following issues for trial by the lower appellate Court :—

1. Was the statement as to the area made by the vendors with an honest belief in its truth, or was it made without belief in its truth, or recklessly by the vendors careless as to whether it was true or false ?

2. Did the vendee-plaintiff in this case conclude the contract of purchase believing that the statement as to the area was correct, and

(1) L. R. 14 App. Cas. 387.

was he induced to complete that contract believing that statement to be correct?

As it has already been found by the lower appellate Court that the plaintiff did suffer damage to the amount stated, we need refer no issue on this point.

Ten days will be allowed for objections on the return of the findings.

Issues referred.

18 A. 325 = 16 A.W.N. (1896) 94.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blennerhassett.

TARA CHAND (*Plaintiff*) *v.* IMDAD HUSAIN AND OTHERS
(*Defendants*).² [10th April, 1896.]

Act No. IV of 1882 (Transfer of Property Act), s. 99—Civil and Revenue Courts—Jurisdiction—Sale by a Court of Revenue in contravention of s. 99—Subsequent suit in a Civil Court based upon rights acquired under that sale.

A Court of Revenue in execution of a decree for rent sold the mortgagor's interest in a certain house, which had been mortgaged together with other property and the sale was upheld on appeal to the Board of Revenue. Subsequently the auction-purchaser at the sale above referred to sued in a Civil Court for [326] partition of the share purchased by him. *Held* that the co-sharers in the property in question could not dispute the validity of the sale, notwithstanding that the decree and the sale in pursuance thereof were in direct violation of s. 99 of Act No. IV of 1882.

[*P.*, 5 A.L.J. 121 (123) = A.W.N. (1903) 49; *Appr.*, 27 A. 517 = 2 A.L.J. 210 = A.W.N. (1905) 80; *R.*, 24 A. 549 (552); 35 C. 61 = 6 C.L.J. 320 = 11 C.W.N. 1011; 1 A.L.J. 360; 8 O.C. 327.]

THE plaintiff in this case sued for partition and possession of a share in a certain house, on the allegation that he had purchased the same at a sale held in execution of a decree of a Court of Revenue, and that the defendants would neither give him possession nor pay rent.

The principal defendant, namely, the defendant whose share had been sold, resisted the plaintiff's claim upon various pleas, and *inter alia* on the plea that the sale under which the plaintiff had purchased was bad in law, inasmuch as it had been held in contravention of the provisions of s. 99 of the Transfer of Property Act, 1882. It appeared that the defendant in question, Muhammad Husain, mortgaged with possession his zamindari property and his share in the house in suit to one Dwarka Das. Dwarka Das then leased the lands mortgaged to him to Muhammad Husain. Muhammad Husain fell into arrears with his rent, and Dwarka Das got a decree against him. In execution of that decree for rent Dwarka Das had the share of the house now in suit, being part of the mortgaged property, put up for sale, and it was sold and purchased by the plaintiff, Tara Chand.

The Court of first instance (Munsif of Moradabad) found that the sale under which the plaintiff purchased was an illegal and void sale, and dismissed the plaintiff's suit.

² Second Appeal, No. 78 of 1894, from a decree of H.P. Mulock, Esq., District Judge of Moradabad, dated the 16th November 1893, confirming a decree of Maulvi Aziz-ul-Rabman, Munsif of Moradabad, dated the 15th April 1893.

1896
APRIL 10.
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APPEL-
LATE
CIVIL.
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The plaintiff appealed, and the lower appellate Court (District Judge of Moradabad), on a similar finding, dismissed the plaintiff's appeal.

The plaintiff thereupon appealed to the High Court.

Munshi *Ram Prasad*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondents.

JUDGMENT.

18 A. 325 =
16 A.W.N.
(1896) 94.

EDGE, C.J., and BLENNERHASSETT, J.—This was a suit for partition. The zamindar had mortgaged certain interests in his zamindari and his interest in a house by way of usufructuary [327] mortgage. The usufructuary mortgagee granted a lease to the mortgagor, and the mortgagor became his tenant of the mortgaged premises. The mortgagor made default in payment of rent. The mortgagee brought a suit for arrears of rent and obtained a decree under Act No. XII of 1881. He applied to the Court of Revenue to execute that decree by sale of the mortgagor's interest in the house which was included in the mortgage. The mortgagor opposed the application for sale on the ground that s. 99 of Act No. IV of 1882 applied. As a matter of fact the mortgagor was quite right: the section did apply. The Court of Revenue, however, was of opinion that the Transfer of Property Act did not apply to Courts of Revenue, and declined to pay any attention to s. 99 of that Act. It is hardly necessary to say that s. 99 of the Transfer of Property Act is as binding on a Court of Revenue as it is on a Civil Court. It is a section of general application which has been enacted by the Legislature which can pass enactments binding on Courts of Revenue. The judgment-debtor appealed to the Board of Revenue. The Board of Revenue saw no reason for differing from the decision of the lower appellate Court, and dismissed the appeal. The result was that the Court which is given jurisdiction by the Legislature, in such a case to execute decrees for arrears of rent under the Rent Act, came to an erroneous decision. That erroneous decision was affirmed by the Court of appeal provided by the Legislature in such cases; and the decision became final between the parties and binding. It is a good example of a result of a Court of Revenue having jurisdiction to decide a question of title or of right. However, the Court of Revenue and the Board had the exclusive jurisdiction in the matter, and the decision of the Court of Revenue is final. The property was sold in contravention of s. 99 of the Transfer of Property Act, and this suit is brought by the auction-purchaser to obtain possession of the interest which he purchased in the house.

The suit was brought in the Civil Court. The first Court rightly construed s. 99 of the Transfer of Property Act, and rightly held that it applied to a Court of Revenue, and the Munsif [328] dismissed the suit. On appeal the District Judge, taking the same view which the Munsif did as to the applicability of s. 99 of the Transfer of Property Act, dismissed the appeal. The plaintiff has brought this second appeal.

The position is shortly this. As between the judgment-debtor and the judgment-creditor in the rent suit, the decision of the Court of Revenue is final, namely, that notwithstanding s. 99 of the Transfer of Property Act, the judgment-debtor's interest could be lawfully brought to sale in execution of a decree, for rent by the mortgagee. The plaintiff purchased in execution of that decree, and neither the judgment-debtor nor the judgment-creditor can dispute the title which he obtained by the purchase. The only question remaining is—can the other co-sharers in the

house be allowed to dispute the title of the auction-purchaser, the plaintiff, under these circumstances? The other co-sharers had no interest in the share sold. As between the parties interested in that share and the auction-purchaser the question is concluded by the decisions of the Courts of Revenue. In our opinion the other co-sharers in the house cannot, in this suit for partition, be heard to say that the plaintiff has not got that title by the auction sale which neither the judgment-debtor nor the judgment-creditor could dispute.

We have been referred to *Sathuvayyan v. Muthusami* (1), *Durgayya v. Anantha* (2) and *Vigneswara v. Bapayya* (3). The facts of those cases were not similar to the present.

We allow this appeal with costs in all Courts; and we remand this case under s. 562 of the Code of Civil Procedure to the first Court to be disposed of according to law.

The issue raised on the question of *ism farzi* has already been decided and is not open.

Appeal decreed and cause remanded.

18 A. 329 = 16 A.W.N. (1896) 90.

[329] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blennerhasset.

NAKCHEDI BHAGAT (*Plaintiff*) v. NAKCHEDI MISR AND OTHERS
(*Defendants*). [13th April, 1896.]

Mortgage by tenant at fixed rates - Ejectment of mortgagor by zamindar - Suit for redemption against mortgagee in possession of the mortgaged property.

The rule of law which prohibits a mortgagee or tenant from disputing his mortgagor's or landlord's title does not bar the mortgagee or tenant from showing that the title of his mortgagor or landlord under which he entered has determined.

Hence where a tenant at fixed rates, who, having mortgaged his fixed rate holding by a usufructuary mortgage and put the mortgagee in possession, was ejected by the zamindar, subsequently sued the mortgagee, who had remained in possession after his mortgagor's ejectment, for redemption, it was held that the mortgagee could plead successfully that the mortgagor's interest in the holding had determined by the ejectment of the mortgagor.

[R., 11 C.P.L.R. 5; D., 2 N.L.R. 92.]

THIS was a suit for possession of certain zamindari property by redemption of a mortgage made in 1858 by the then tenant of the land, Ram Charan, in favour of one Ram Nawaz Misr, the ancestor of the principal defendants. The plaintiff was the purchaser of the mortgagor's rights from Musammatt Anupi, the representative of the original mortgagor.

The principal defendants pleaded that in 1872 the rights of the mortgagor under the mortgage in suit had been extinguished by the ejectment of the then mortgagor, Palakdhari, by the zamindar, and that, so far as the portion of the land in suit which was held by them was concerned, they had since the ejectment of Palakdhari held it as tenants of the zamindar and not as mortgagees.

* Second Appeal, No. 116 of 1894, from a decree of Rai Kishan Lal, Subordinate Judge of Ghazipur, dated the 24th November 1893, reversing a decree of Maulvi Syed Abbas Ali, Additional Munsif of Korantadih, dated the 30th June 1893.

(1) 12 M. 325.

(2) 14 M. 74.

(3) 16 M. 436.

1896
APRIL 10.
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CIVIL.
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18 A. 329 =
16 A.W.N.
(1896) 94.

1896
APRIL 13.
—
APPEL-
LATE
CIVIL.
—
18 A. 329 =
16 A. W. N.
(1896) 90.

It appeared that in 1871 the zamindar had sued Palakdhari for arrears of rent, and in that suit a compromise was effected by which Palakdhari agreed to pay up the arrears within a year's time. The payment was not made, and in 1872 Palakdhari was ejected and formal possession given to the zamindar. The mortgagees however were not ejected at the same time. A suit was [330] subsequently brought against them by the zamindar, which was compromised, the mortgagees giving up a portion of the property in suit and acknowledging themselves to be tenants of the zamindar and not mortgagees.

The Court of first instance (Munsif of Korantadih) gave the plaintiff a decree for a small portion of the land claimed, which it found had been throughout in the possession of the mortgagees, as such, and not as tenants of the zamindar. The plaintiff appealed.

The lower appellate Court (Subordinate Judge of Ghazipur) found that inasmuch as Palakdhari's rights, both as tenant and as mortgagor, had been extinguished by the ejectment proceedings taken in 1872, the plaintiff had no right of redemption in respect of any of the lands in suit. It accordingly dismissed the plaintiff's claim *in toto*.

The plaintiff thereupon appealed to the High Court.

Munshi Jwala Prasad, for the appellant.

Munshi Gobind Prasad, for the respondent.

JUDGMENT.

EDGE, C. J., and BLENNERHASSETT, J.—This was a suit for the redemption of a mortgage. The plaintiff had been a tenant at fixed rates of certain land. Whilst he was such tenant he granted the mortgage of his fixed rate holding now sought to be redeemed. It was a usufructuary mortgage, and possession was given to the mortgagee. Afterwards the tenant at fixed rates became in arrears in payment of his rent. A decree for arrears of rent was obtained against him under Act No. X of 1859. The decree was obtained on a compromise, and was made in accordance with the terms of the compromise, and the terms were that the tenant at fixed rates should have twelve months within which to pay up the arrears, otherwise he should be ejected. On the expiration of the twelve months, *viz.*, in May 1872, the tenant at fixed rates had failed to pay the arrears decreed, and thereupon the zamindar, decree-holder, proceeded against the tenant at fixed rates and ejected him under Act No. X of 1859. The Collector of the district made an order of ejectment, and on the 12th of June 1872, [331] formal possession was given to the zamindar, landlord, decree-holder. It appears that the usufructuary mortgagee was permitted by the zamindar to continue in occupation of a portion of the lands, and several years after, when the zamindar sought to eject the mortgagee, it was held that as to a portion of these lands the mortgagee had acquired a right of occupancy. We presume that the mortgagee had been in occupation for more than twelve years after the proceedings in ejectment had determined.

On these facts the mortgagor now seeks redemption of the mortgage, it being contended on his behalf that as his mortgagee was put into possession by him under the usufructuary mortgage and is still in possession of a portion of the property mortgaged, the mortgagee cannot deny the mortgagor's title and cannot assert that a mortgage is not still continuing and capable of being redeemed, and cannot dispute that if there is redemption of the mortgage the plaintiff is entitled to be reinstated in possession by the defendant-mortgagee. The suit is really one by which a former tenant at fixed rates, who was ousted in 1872 from his tenancy, and whose tenancy

then determined, seeks to be again placed in possession of the lands or some portion of them, on a contention that, as his mortgagee is still in possession, his tenancy at fixed rates was reinstated or continued. As a general rule, neither a mortgagee nor a tenant can dispute his mortgagor's or landlord's title unless that title has determined. If the title of the mortgagor in the one case or of the landlord in the other has determined, the mortgagee or the tenant can show that the title under which he entered has determined in fact and in law. Now the tenancy at fixed rates undoubtedly determined on the ejectment in June 1872, and it is needless to observe that in this case no new tenancy at fixed rates could possibly have been created. What the tenant at fixed rates had done by the mortgage was that by granting that mortgage he gave to the mortgagee a right to go into occupation of the fixed rate holding. He did not transfer his right of tenancy. When the mortgagor's title determined, the usufructuary mortgage, so far as it depended on that title, determined also. The fact that the zamindar allowed the [332] mortgagee after 1872 to continue in possession and pay rent to him direct did not keep alive the tenancy at fixed rates of the mortgagor which had already determined, and it did not create in favour of that mortgagor any right of tenancy whatever. The case is similar to that of a landlord who ejects his tenant, the tenant having sublet. If the sub-tenant's title depends upon his immediate lessor's title, it falls to the ground with that lessor's title; but the landlord is not bound to eject the sub-tenant, if he prefers to keep him on as a tenant and to allow him to attorn to himself.

The first Court decreed the claim in part. The lower appellate Court dismissed the suit entirely. This is the plaintiff's appeal. We dismiss the appeal.

Appeal dismissed.

18 A. 332 = 16 A.W.N. (1896) 91.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blennerhassett.

MIHIN LAL AND OTHERS (*Defendants*) v. IMTIAZ ALI AND OTHERS (*Plaintiffs*).^{*} [14th April, 1896.]

Procedure—Parties—Appeal—Civil Procedure Code, s. 32—Party added in appeal who was not a party to the suit nor a representative of such party.

When a Court hearing an appeal is of opinion that a person not a party to the suit and not entitled to be brought on the record in a representative capacity should be a party to the record, its proper course is to remand the case to the Court of first instance, and to direct that Court to bring on the particular person as a defendant, or as a plaintiff if he consents, give him time to file his statement and opportunity to produce his evidence, and try the issues raised between him and the opposite side.

[F., 1 L.B.R. 252; 2 L.B.R. 277; 1 S.L.R. 90 (91); R., 23 A. 167; 32 C. 483 (492); 69 P.R. 1906 = 118 P.L.R. 1906.]

THE facts of this case sufficiently appear from the judgment of the Court.

^{*} Second Appeal, No. 146 of 1894, from a decree of Maulvi Muhammad Anwar Husain, Subordinate Judge of Farakhabad, dated the 19th November 1893, confirming a decree of Pandit Raj Nath Sahib, Munsif of Farakhabad, dated the 19th December 1890.

1896
APRIL 13.
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APPEL-
LATE
CIVIL.
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18 A. 329 =
16 A.W.N.
(1896) 90.

1896
APRIL 14.

Babu Satya Chandar Mukerji, for the appellants.
Pandit Sundar Lal, for the respondents.

APPEL-

JUDGMENT.

LATE
CIVIL.
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18 A. 332 =
19 A.W.N.
(1896) 91.

EDGE, C.J., and BLENNERHASSETT, J.—The plaintiffs brought their suit for possession and for damages. They made certain persons defendants. The plaintiffs obtained a decree. The defend- [333] ants to the suit appealed. In the appellate Court the Judge, considering that one Mihin Lal should be a party to the appeal, made him a party to the appeal as a defendant-appellant. He had not before been a party to the suit. The Judge delivered a judgment in which he found all the issues against the defendants-appellants including Mihin Lal. This appeal is from the decree founded upon that judgment. Mihin Lal is one of the appellants. It turns out on examination of the record that no decree was made as against Mihin Lal in the Court below. He consequently had no right of appeal from the decree below, and his appeal must be dismissed. There is nothing in the appeal of the other appellants. The fact of Mihin Lal being made a party in the Court below did not prejudice them. The appeal so far as it concerns the other appellants must be dismissed.

Before disposing of this appeal, we think it right to say that a person who has been a stranger to the suit in the Court of first instance ought not to be brought on to the record of an appeal, unless he is brought on as a representative under the sections applying to the bringing on to the record of a representative in case of the death of a party to the suit or the devolution of title. When an appellate Court thinks it is necessary to have as a party before it in appeal a person not appearing in a representative capacity and who is not a party to the suit in the Court of first instance, the appellate Court should, in our opinion, remand the case to the Court of first instance, direct that Court to bring on the particular person as a defendant, or as a plaintiff if he consented, give him time to file his statement, and opportunity to produce his evidence and try the issues raised between him and the opposite side. It was the intention of the Legislature that in cases which might go in second appeal to the High Court, or which might go to Her Majesty in Council the parties to the suit should have the benefit of their issues of fact and of law being tried by two Courts. In the present case, if the decree below had been made against Mihin Lal he would have had the benefit of the decision of only one Court on the facts, as by reason of s. [334] 584 and s. 585 of the Code of Civil Procedure this Court could not in second appeal try the issues of fact.

This appeal is dismissed with costs.

Appeal dismissed.

18 A. 334 = 16 A.W.N. (1896) 82.

APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice
Blennerhassett.*

MUHAMMAD BAKSH AND OTHERS (*Plaintiffs*) v. MANA AND
OTHERS (*Defendants*).^{*} [17th April, 1896.]

*Occupancy tenant—Partition—Right of joint occupancy-tenants to partition—Civil and
Revenue Courts—Jurisdiction.*

1896
APRIL 17.
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APPEL-
LATE
CIVIL.

18 A. 334 =
16 A.W.N.
(1896) 82.

Held that a joint occupancy-tenant is entitled to sue for, and a Civil Court is competent to grant a decree for partition of the joint occupancy-holding, though, if the zamindar is not made a party to the suit for partition, such decree will not affect the mutual rights and liabilities of the zamindar and the occupancy-tenants as they stood prior to the partition. *Sundar v. Parbati* (1), *Baring v. Nash* (2), *Oomesh Chunder Shaha v. Manick Chunder Bonick* (3) and *Bhagi v. Girdhari* (4) referred to.

THE facts of this case, so far as they are necessary for the judgment of the Court, appear from the judgment of the Court.

Pandit Madan Mohan Malaviya, for the appellants.

Mr. Abdul Raoof, for the respondents.

JUDGMENT.

EDGE, C.J., and BLENNERHASSETT, J.—The plaintiffs in this case sought a decree for partition of an occupancy-holding. The plaintiffs and the defendants were co-sharers in the holding. It has been found that they were joint tenants of the holding. The zamindar was not a party to the suit. The suit was brought in the Court of the Munsif of Muzaffarnagar, who decreed the claim. On appeal, the Judge of Saharanpur dismissed the suit, being apparently of opinion that joint tenants of an occupancy-holding could not obtain partition. The plaintiffs have brought this appeal.

Mr. Malaviya, for the appellants, has contended that all joint tenants are entitled as of right to partition. He has relied upon a dictum of their Lordships of the Privy Council in the case of [335] *Sundar v. Parbati* (1). That was a case of Hindu widows being in possession. It was questionable, so far as appears from the report of that case, whether they had any title except a possessory title. One of the widows sued for partition. Their Lordships made a decree for partition, saying that "it is impossible to hold that a joint estate is not also partible." Mr. Malaviya has also contended that, at least since the time of Henry VIII, joint tenants and tenants in common and persons jointly entitled to an interest for years in lands had been entitled in England to obtain partition, and that where the tenants for years, for example, seek partition, it is not necessary that the landlord or owner in fee should be a party to the suit. Of course on the latter point Mr. Malaviya is referring to cases in which no express covenant against partition or sub-division is contained in the lease. Mr. Malaviya has relied on the decision of the Vice-Chancellor in *Baring v. Nash* (2). There it was held that the plaintiff, who was entitled under an indenture

* Second Appeal No. 115 of 1894, from a decree of H. Bateman, Esq., District Judge of Saharanpur, dated the 28th November 1893, reversing a decree of Maulvi Maula Bakhsh, Munsif of Muzaffarnagar, dated the 13th December 1892.

(1) 16 I.A. 186.

(3) 8 W.R. 128.

(2) 1 Vesey and Beames 551.

(4) 15 A.W.N. (1895) 143.

1896
APRIL 17.
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APPEL-
LATE
CIVIL.
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18 A. 334=
16 A.W.N.
(1896) 82.

of assignment of the remainder of a term of five hundred years commencing in 1740 to one undivided tenth part of certain premises, was entitled to a decree for the partition of his share against the defendants, who were respectively entitled to seven-tenths of the same premises, and that without making the reversioner a party. Sir Thomas Plumer in delivering judgment said (at p. 554):—"It is clear the absolute owner of a tenth part may compel the owners of the other nine to concur with him, and there would be no objection from the minuteness of this interest the inconvenience, or the reluctance of the other tenants in common, if no objection could be taken to the plaintiff's title; partition being a matter of right; whatever may be the inconvenience and difficulty." Now the question is as to whether the reversioner was a necessary party. Sir Thomas Plumer said (p. 555):—"The question is whether the lessee for years of one-tenth part has the same right and equity against the owner of the inheritance of that tenth; and clearly the lessee has not the same right to compel that owner to concur. As between the lessee and the remainderman in fee [336] they are not as tenants in common. They between them represent the absolute interest in that tenth part, but each has a separate, independent interest, and the proceeding of the one can neither avail nor bind the other. As the owner of the inheritance therefore cannot be compelled to join at the instance of the lessee, a permanent partition cannot take place, if the owner of that tenth part will not concur. If therefore he was a party no relief could be prayed against him; nor would he be bound by the partition, or any right of his precluded to consider the freehold as undivided notwithstanding any division of the temporary interest. For that purpose the owner of the inheritance of this share is not a necessary party." That case is a high authority showing that in order to grant partition as between joint tenants of a holding it is not necessary that the landlord should be a party to the suit, and further that the decree which might be made for partition as between the joint tenants, and which would be binding and effective as between them, would not bind the landlord or affect his rights as landlord: that is to say, that it would not split up, so far as he was concerned, the holding or the rent payable to him or his remedies for the non-payment of the full rent of the whole holding and for the ejectment of the tenants from the whole in case the full rent was not paid. It is quite true that, prior to the Statute 31 Henry VIII, Cap. I, tenants in common and joint tenants could not compel partition *inter se*, and prior to the Statute 32 Henry VIII, Cap. XXXII, persons holding limited interests for life or years could not compel partition *inter se*. However, although the right to obtain partition in this case, if it had originated in England, might have depended upon Statute 31, Henry VIII, Cap. I, still it may be inferred from the dictum of their Lordships of the Privy Council to which we have referred that the holders of a joint estate in India are entitled to enforce partition. In *Oomesh Chunder Shaha v. Manick Chunder Bonick* (1), the High Court at Calcutta granted partition between shikmidars who held under the zamindar. In the case of *Bhagi v. Girdhari* (2) it was held, and [337] we think rightly, that there is nothing to prevent the members of a joint Hindu family in possession as such joint family of an occupancy-holding from obtaining partition of their shares in such holding *inter se* from a Civil Court, though, if the zamindar be not made a party to such suit for partition, the decree therein will not

(1) 8 W.R. 128.

(2) 15 A.W.N. (1895) 143.

affect the joint liability to him of the occupancy tenants. The subject of the right to obtain partition is exhaustively dealt with in chapter XIV of the second English edition (1892) of Story's Equity Jurisprudence.

On the other hand, it has been contended by Mr. *Abdul Raoof* that it is contrary to the policy of the Land Revenue Acts that there should be such partition as that sought in this case, and that in any event a Civil Court has no jurisdiction. We may observe that the case of *Oomesh Chunder Shaha v. Manick Chunder Bonick* (1) was decided several years before Act No. XIX of 1873 was passed, and, if it was the intention of the Legislature that there should be no right of partition between joint tenants of occupancy or other holdings in a *mahal*, we should have expected that the Legislature would so have provided; but it has not done so. The partition which is reserved by Act No. XIX of 1873, for the exclusive jurisdiction of the Courts of Revenue is the perfect or imperfect partition of s. 107 of that Act. Now what is sought here is not the partition or the division of a *mahal* into two or more *mahals*, nor is it the division of any property into two or more properties jointly responsible for the revenue assessed on the whole. The partition here sought is therefore not a partition reserved for the jurisdiction of the Courts of Revenue. Further, it does not appear to us that on the Courts of Revenue was conferred any jurisdiction to make such a partition as is here sought. That being so, and if there does exist the right to have partition in this case, s. 11 of the Code of Civil Procedure confers the jurisdiction to give a decree in accordance with the right in this case on the Civil Court.

[338] In our opinion the plaintiffs were entitled to the decree for partition which they obtained from the first Court, but the partition will not affect the rights of the zamindar, nor will it have the effect of apportioning the rent as between these parties and him. He will be still entitled to the same rights in respect of this occupancy-holding as if no partition had been decreed. The partition will merely affect the rights of the parties to this suit *inter se*.

We allow this appeal with costs in this Court and in the Court below, and restore and affirm the decree of the first Court.

Appeal decreed.

18 A. 338 = 16 A.W.N. (1896) 92.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blennerhassett.

SRI RAM AND OTHERS (*Defendants*) v. KESRI MAL (*Plaintiff*)^{*}.
[21st April, 1896.]

Act No. III of 1877 (*Indian Registration Act*), s. 17, clause (n)—*Mortgage—Receipt purporting to extinguish mortgage—Receipt only covering interest of one co-mortgagee—Registration.*

The provisions of s. 17, cl. (n) of Act No. III of 1877 do not apply to a receipt which purports to extinguish not the entire mortgage but only the rights under the mortgage of one of two joint mortgagees.

[*Rel.*, 16 Ind. Cas. 179 (180); *R.*, 34 A. 528 (529) = 10 A.L.J. 25.]

* Second Appeal No. 175 of 1894, from a decree of E. O. E. Legatt, Esq., Additional District Judge of Saharanpur, dated the 21st December 1893, reversing a decree of Rai Sanwal Singh, Additional Subordinate Judge of Saharanpur, dated the 8th September 1892.

(1) 8 W. R. 128.

1896
APRIL 17.
—
APPEL-
LATE
CIVIL.

18 A. 334 =
16 A.W.N.
(1896) 82.

1896
APRIL 21.
—
APPEL-
LATE
CIVIL.
—
18 A. 338 =
16 A.W.N.
(1896) 92.

THIS was a suit for sale on a mortgage.

One Afzal Husain had borrowed Rs. 1,000 from Sri Ram and Ramji Mal jointly under a registered mortgage deed, the shares of the mortgagees in the loan being $\frac{1}{3}$ and $\frac{2}{3}$ respectively. Afzal Husain sold the mortgaged property to Sri Ram and certain other persons. Subsequently Ramji Mal assigned his rights and interests in the mortgage to Kesri Mal, the present plaintiff. Kesri Mal, not having received the amount due to him, sued to recover the same by sale of the mortgaged property. He made Afzal Husain, the original mortgagor, Sri Ram and his co-vendees, and Ramji Mal parties to the suit.

Afzal Husain pleaded that the assignment of the mortgage had been made with the knowledge of Ramji Mal. The defendants vendees pleaded that they had paid off Ramji Mal, and tendered [339] in evidence a receipt given by him for his share in the mortgage. Ramji Mal admitted the assignment to the plaintiff and the receipt of consideration for the assignment, but alleged that his share had never been paid off by the assignees of Afzal Husain.

The Court of first instance (Additional Subordinate Judge of Saharanpur) found that the receipt produced by the defendants assignees was a genuine and valid receipt, and that it was admissible in evidence, and accordingly dismissed the plaintiff's suit.

The plaintiff appealed. The lower appellate Court (Additional Judge of Saharanpur), finding that the receipt in question was not admissible in evidence, and that there was no oral evidence sufficient to establish the fact of payment to Ramji Mal, decreed the plaintiff's claim.

The defendants thereupon appealed to the High Court.

Mr. *T. Conlan*, for the appellants.

Pandit *Sundar Lal*, for the respondent.

JUDGMENT.

EDGE, C.J., and BLENNERHASSETT, J.—This was a suit for sale brought by the assignee of a mortgage. The mortgagees were Sri Ram and Ramji Mal. The defendants mortgagors pleaded payment. In order to prove payment of part of the mortgage money they produced a receipt which purported to be a receipt of Ramji Mal for his share of the mortgage money. It was objected that the receipt should have been registered under section 17 of Act No. III of 1877. The mortgage was for over Rs. 100. The Subordinate Judge held that clause (n) of section 17 applied, and that the receipt was exempt from registration. The District Judge in appeal held that the receipt purported to extinguish the mortgage, and consequently was not within the protection of clause (n). There being no other evidence of payment of this particular sum, he decreed the plaintiff's suit.

What the receipt purports is this. It purports to be a receipt in full for Ramji Mal's two-thirds share of the mortgage money. It shows that there was another person interested in the mortgage and another share unaccounted for by the receipt. That receipt standing alone, and without any evidence except evidence that it [340] was the receipt of Ramji Mal, would not have supported a plea that the mortgage had been discharged by payment. It would have supported a plea, if it was a genuine receipt, as to which we express no opinion, that Ramji Mal's interest in the mortgage had been extinguished by payment. Clause (n) does not say "when the receipt does not purport to extinguish the mortgage, or the interest of any mortgagee in the mortgage." The words are—"when the receipt does not purport to extinguish the mortgage." For the purposes

of clause (n) extraneous evidence cannot be looked at : the receipt coming within clause (n) was admissible in evidence without registration.

We set aside the decree of the lower appellate Court, and remand this case under s. 562 of the Code of Civil Procedure to that Court to be disposed of on the merits. The costs of this appeal will abide the result.

Appeal decreed.

1896
APRIL 21.
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APPEL-
LATE
CIVIL.

18 A. 338 =
16 A.W.N.
(1896) 92.

18 A. 340 (F.B.) = 16 A.W.N. (1896) 95.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Aikman and Mr. Justice Blennerhassett.

AJUDHIA RAI AND ANOTHER (*Defendants*) v. PARMESHAH RAI AND OTHERS (*Plaintiffs*). [23rd April, 1896.]

Jurisdiction—Civil and Revenue Courts—Suit for a decree for maintenance of possession as tenants at fixed rates—Act No. XII of 1881 (North-Western Provinces Rent Act), s. 95 (a)—Act No. XIX of 1873 (North-Western Provinces Land Revenue Act), s. 241.

The plaintiffs sued in a Civil Court alleging that they were tenants at fixed rates of a cultivatory holding and that at the settlement the settlement officer had entered the defendants in the village papers as the tenants at fixed rates and the plaintiffs merely as mortgagees, and they asked for a decree for maintenance of possession "invalidating the proceeding of filling up the columns at the recent settlement."

Held by the Full Bench (BANERJI, J., *dubitante*) that the suit so framed was not within the cognizance of a Civil Court.

[F., 1 A.L.J. 703; R., 20 A. 258 (261); 20 A. 520; 1 A.L.J. 9 (14); D., 19 A. 452 (454); 20 A. 241; 23 A. 481 (483).]

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of the majority of the Court.

[341] Munshi Gobind Prasad, for the appellants.

Munshi Jwala Prasad, for the respondents.

JUDGMENT.

EDGE, C.J., KNOX, BLAIR, AIKMAN and BLENNERHASSETT, JJ.—The plaintiffs alleged in their plaint that they were the tenants at fixed rates of a cultivatory holding; that at the settlement the Settlement Officer had entered the defendants as the tenants at fixed rates of the holding and had entered the plaintiffs simply as mortgagees, and they asked for a decree for maintenance of possession "invalidating the proceeding of filling up the columns at the recent settlement." We may observe that there was a party who had considerable interest in the determination of this question, namely, the zamindar, who was not made a party to the suit. He certainly would be entitled to be heard on the question as to who was and who was not his tenant of the holding, and indeed on the further question as to whether, if the plaintiffs were tenants of the holding, they were tenants at fixed rates. He has not been made a party to the suit. However we do not dispose of this appeal on the ground of his absence.

1896

APRIL 23.

—
FULL

BENCH.

—
18 A. 340

(F.B.) =

16 A.W.N.

(1896) 95.

The plaintiffs brought their suit in the Court of the Munsif or Ghazipur, who gave them a decree. The defendants appealed. The Subordinate Judge in appeal confirmed the decree of the first Court, and from that decree the defendants have brought this appeal. It has been referred to the Full Bench.

At the settlement the Settlement Officer, rightly or wrongly, entered the defendants in the khasra as the tenants at fixed rates of the holding in question, and he entered the plaintiffs simply as mortgagees of that holding.

The preliminary question which we have to decide is whether the Civil Court had any jurisdiction to entertain this suit. The object of the suit was to obtain a direct or indirect declaration that the plaintiffs and not the defendants were the tenants at fixed rates of the holding in question and that the plaintiffs' title was not that merely of mortgagees.

Now ordinarily the Civil Court is the Court which has the jurisdiction to grant declarations of title. The Court of Revenue, no doubt [342] has in certain cases jurisdiction to grant what is in effect a declaration of title, that is, as to the status of a tenant in cases arising under s. 10 of Act No. XII of 1881. Under s. 11 of the Code of Civil Procedure the jurisdiction is conferred upon Civil Courts of hearing and determining all civil suits, except in those cases which are removed by Acts of the Legislature from the cognizance of Civil Courts. We pointed out in a recent judgment the inconvenience, to say the least of it, of the Legislature allowing any doubt to exist as to the jurisdiction of Courts created by the Legislature, and we also indicated the evils which had arisen and still exist from the uncertainty as to whether the Civil Courts or the Courts of Revenue have the exclusive jurisdiction in certain cases relating to title. We need not go again over that ground.

It appears to us in the first instance that if a Civil Court exercised jurisdiction in this case by declaring that the plaintiffs were, and the defendants were not, the tenants at fixed rates of the holding in question, it would be exercising a jurisdiction which s. 241 of Act No. XIX of 1873, has prohibited the Civil Courts from exercising. If we declared that the plaintiffs were the tenants at fixed rates of this holding, and that the defendants were not the tenants at fixed rates of the holding, we should be determining that the plaintiffs held a certain class of tenancy in the holding and that the defendants held no class of tenancy in the holding. The Act is rather obscurely worded. Take, for example, a case which might arise in which a Civil Court had the rival claimants to a holding before it, the plaintiffs alleging that they were tenants at fixed rates and that the defendants had nothing to do with it, the defendants, on the other hand, alleging that the plaintiffs were trespassers without any title, and that they, the defendants, were tenants at fixed rates. In that case, if the Civil Court had jurisdiction to entertain the suit, it would be necessary, the entire status of each side being denied by the other, for the Civil Court to ascertain, if it were to give the plaintiff a decree at all, what was the status of the plaintiff with regard to the holding. The Civil Court if satisfied, for example, that the plaintiff was an occupancy tenant whose right of occupancy [343] had arisen, not under s. 6 of Act No. XII of 1881, but under s. 8 of that Act, could not make a declaration that the plaintiff, although the tenant of the holding, was, what he claimed to be, the tenant at fixed rates of the holding. In that event if the Civil Court interfered at all, it would be dealing with a subject for the Court of Revenue or the Settlement Officer and excluded from the cognizance of the Civil Court.

Looking at the case from another point of view, we have also arrived at the same conclusion that the Civil Court has no jurisdiction in this case. It is quite clear that either of the parties, plaintiffs or defendants, or both, in this suit, would be entitled to make an application under s. 10 of Act No. XII of 1881, to have the class of their tenancy determined. It is true that within the four corners of the Act, there is no provision in such a case for bringing several rival claimants to such a determination before the Court of Revenue. The landlord would of course be a necessary party to any application under s. 10. However, by s. 211 (d) of Act No. XII of 1881, the Local Government is empowered to make rules consistent with the Act as to the procedure to be followed on all applications under s. 95 of the Act. Under these powers the Local Government did make a rule by which the procedure prescribed by Chapter VI of the Act should be followed as far as it could be made applicable in all applications. S. 112-A is in Chapter VI of that Act, and under that section the Court of Revenue in a suit may add the name of any person, as a plaintiff, if such person consents, and consent or no, as a defendant, whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon all questions involved in the suit. The effect of that rule appears to us to be that if these plaintiffs, for example, had made an application under s. 10 of Act No. XII of 1881, to the Court of Revenue, the Court of Revenue, if it was aware that the defendants were adverse claimants, might make an order adding these defendants as respondents to the application. What the Legislature intended should be the result, or how that result should be dealt with, if a fraudulent [344] and collusive application on the part of a person not a tenant, but whom the zamindar was willing to have as a tenant, were made in a Court of Revenue, and the Court of Revenue in ignorance that there was rival claimant made an order determining that the applicant, who in such case presumably had no title, was a tenant at fixed rates or any other class of tenant, we do not know.

It appears to us that s. 95 (a) of Act No. XII of 1881, also prohibits the Civil Court from taking cognizance of this suit. It is to be hoped that the Legislature may at an early date by legislation remove the doubts which have hitherto existed as to the jurisdiction of Civil Courts and Courts of Revenue, on questions of this nature, and lay down a clear line of demarcation between the jurisdiction of Civil Courts as Courts of original jurisdiction and Courts of Revenue. We allow this appeal and dismiss the suit with costs in all Courts.

BANERJI, J.—I have considerable hesitation in accepting the view adopted by my learned colleagues in this case; but having regard to the desirability of legislation of the nature suggested in a recent Full Bench case (S.A. No. 543 of 1893; *supra*, p. 59 §.), I do not deem it proper to record a dissentient judgment. I therefore agree in the decree proposed.

Appeal decreed.

1896
APRIL 23.
—
FULL
BENCH.
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18 A. 340
(F.B.) =
16 A.W.N.
(1896) 93.

1896

APRIL 28.

18 A. 344 = 16 A.W.N. (1896) 87.

APPELLATE CIVIL.

APPEL-
LATE
CIVIL.*Before Mr. Justice Knox, Mr. Justice Blair and Mr. Justice Aikman.*LACHMI NARAIN (*Decree-holder*) v. JWALA NATH (*Judgment-debtor*).^{*}
[28th April, 1896.]18 A. 344 =
16 A.W.N.
(1896) 87.*Execution of decree—Decree ambiguous—Reference to pleading in the suit to ascertain meaning of the decree.*

Where a decree is in its terms ambiguous it is competent to the Court executing it to refer to the pleadings in the suit in which such decree was passed to ascertain its precise meaning. *Muhammad Sulaiman v. Muhammad Yar* (1) distinguished. *Jawahir Mal v. Kistur Chand* (2) and *Robinson v. Duleep Singh* (3) referred to.

[R., 29 M. 84 = 16 M.L.J. 50 ; 5 A.L.J. 742 = A.W.N. (1908) 257 ; 10 P.L.R. 1904.]

THE facts of this case sufficiently appear from the judgment of the Court.

[345] Babu *Durga Charan Banerji*, for the appellant:
Munshi Gobind Prasad, for the respondent.

JUDGMENT.

KNOX, BLAIR and AIKMAN, JJ.—The parties to this second appeal are Lachmi Narain, a decree-holder, who is appellant, and Jwala Nath, judgment-debtor, who is respondent. Lachmi Narain took out proceedings in execution of a decree which he had obtained on the 31st of August 1892. The decree was one which had been confirmed by an appellate Court and also by this Court, before which it came in second appeal. The attempt to obtain execution was resisted by the respondent on the ground that the decree as framed was defective and incapable of execution.

Apparently when the objection was first raised the defects which were alluded to were that no mention was made in the decree of the *mohalla* and of the name of the *kasba* in which the property, the subject-matter of execution, was situate. The decree ran as follows:—"It is ordered and decreed that the plaintiff's claim for demolition of the *sehdari* with the walls built by the defendant on the *chabutra*, with the exception of relief (b), in so far as it relates to the joint property, be decreed; that a perpetual injunction be issued to defendant prohibiting him from making interference with plaintiff in respect of the land shown in 'Multani' colour; that the plaintiff shall get costs in proportion to the claim for demolition of the *sehdari* and *chabutra*, and the defendant shall not get any costs, and that the rest of the claim be dismissed.

(Subject of decree.)

"Demolition of the *sehdari* with the walls built by defendant on the *chabutra*. Issue of a perpetual injunction prohibiting the defendant from interfering with plaintiff in respect of the land measuring 16 sq. yards, i.e., 2½ yards in breadth east to west and 6 yards 8 girahs north to south in length, adjacent to the wall of the house of Deoki Prasad, shown in the map in 'Multani' colour. The plaintiff will continue as before to have passage and allow the water of his houses to flow as before on the land measuring 20 sq. yards 10 girahs, i.e., 3 yards 12 girahs in breadth east to

^{*} Second Appeal No. 230 of 1895.

(1) 6 A. 30.

(2) 13 A. 343.

(3) L.R. 11 Ch. D. 798.

[346] west and 5 yards 8 girahs in length north to south. The rest of the claim dismissed."

The Munsif before whom the objections were raised disallowed them. The learned Judge in appeal held that the decree in its present form was vague and uncertain and incapable of enforcement.

In second appeal before us it is urged that the decree is one which does admit of execution, and that if there is any defect it can at once be removed by reference to the pleadings.

In support of the contention that in a case of this nature the Court which had to execute the decree is not precluded from referring to the record, the case of *Jawahir Mal v. Kistur Chand* (1) was cited. In that case it was held by this Court that, although the decree drawn up was not strictly in form, still from the record it could be ascertained what the amount of the decree was, and the informality in the decree, which was the result of the manner in which it was drawn up in the office of the lower Court, should not be allowed by a Court of justice, equity and good conscience to stand in the way of the decree-holder seeking execution of the decree made in his favour.

On the other hand, it was contended by Mr. Gobind Prasad, who appeared for the respondent, on the authority of *Muhammad Sulaiman v. Muhammad Yar* (2), that a Court is not justified in reading into a decree matters which are not set out in the decree itself. To use the words of the learned vakil, this case was an authority for holding that a Court executing a decree must not look beyond the decree. He also referred us to *Janki Prasad v. Baldeo Narain* (3), and to the opinions of the dissenting minority in the Full Bench that decided the case of *Debi Charan v. Pirbhu Din Ram* (4).

The case of *Muhammad Sulaiman v. Muhammad Yar* is a case which probably pushed to the extreme the view set out therein, but even as it stands it does not bear out the contention [347] raised by the respondent. The Court in that case refused to read into a decree details in a separate list of villages filed with the plaint by the plaintiff's pleader on the ground that the list formed no part of the plaint. It did not, however, refuse to look at the plaint itself, and apparently if the plaint had contained the necessary details, it would have been prepared to read them into the decree. The case of *Janki Prasad v. Baldeo Narain* has no application whatever to the case before us. We are most in favour of the principle laid down in *Jawahir Mal v. Kistur Chand* (1). The principle is one not confined to Courts in India alone, but is of a more general application, as we find from the case of *Robinson v. Duleep Singh* (5). At page 813, James, J., lays down that, in order to determine what a decree really decides, it is essential to see what were the rights which were in dispute between the parties and which were alleged by them. This is a distinct authority for reference to the pleadings. It must not, however, be assumed from our judgment that we look with any favour upon Courts drawing up imperfect decrees. A decree should be so drawn up as to need no interpretation other than may be gathered from the language of the decree itself; and there should be no need of reference to any document or paper whatsoever, unless such document or paper is attached to the decree and forms part of it. While, on the one hand, it is true that the decree should be drawn up in the manner above indicated, it is also just that litigants who have been successful

1896

APRIL 29.

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APPEL-
LATE
CIVIL.

18 A. 344 =

16 A.W.N.

(1896) 87.

(1) 13 A. 343. (2) 6 A. 30. (3) 3 A. 216. (4) 3 A. 388. (5) L.R. 11 Ch. D. 798

1896
APRIL 28.

APPEL-
LATE
CIVIL.

18 A. 344=
16 A.W.N.
(1896) 87.

should not be deprived of the fruits of their success owing to carelessness on the part of the Court or officer charged with the preparation of decrees.

We decree the appeal, set aside the decree of the lower appellate Court, and restore that of the Court of first instance. The appellant will get his costs in this Court and in the lower appellate Court.

Appeal decreed.

18 A. 348 = 16 A.W.N. (1896) 93.

[348] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

BALKISHEN (*Defendant*) v. NARAIN DAS AND OTHERS (*Plaintiffs*).^{*}
[29th April, 1896.]

Execution of decree—Civil Procedure Code, s. 285—Attachment of the same property by two courts of different grades.

The operation of s. 285 of the Code of Civil Procedure is not affected by the fact that prior to the attachment made by the Court of higher grade proceedings subsequent to attachment may have taken place in the Court of lower grade in execution of the decree of that Court. *Badri Prasad v. Saran Lal* (1), *Aghore Nath v. Shama Sundari* (2) and *Muttukaruppan Chetti v. Mutturamalinga Chetti* (3) referred to.

[F., 26 A. 528 = A.W.N. (1904) 95 ; R., 34 C. 836 = 6 C.L.J. 130 ; 13 C.P.L.R. 145.]

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi Gobind Prasad, for the appellant.

Mr. Abdul Raoof, for the respondents.

JUDGMENT.

EDGE, C.J., and BANERJI, J.—The plaintiffs in this suit were purchasers at a sale held in execution of the decree of a Munsif. The defendant is the purchaser of the same property at a sale held in execution of a decree against the same judgment-debtor passed by the Court of a Subordinate Judge. The attachment in execution of the decree of the Munsif took place on the 7th of April 1892. We do not know the precise date of the proclamation of sale in execution of the decree of the Munsif, but it must have been before the end of June 1892, as by an error the 31st of June was fixed as the date for sale. When it was discovered that the date was an impossible one, the 11th of July was fixed for the sale in execution of the decree of the Munsif, and the sale took place on that date. At that sale the plaintiffs purchased. The property was attached in execution of the decree of the Subordinate Judge on the 3rd of July 1892, and it was sold in execution of that decree on the 28th of August 1892, and was at that sale purchased by the defendant. The plaintiffs brought this suit for possession of the property in question. The first Court dismissed the claim. The District Judge in appeal granted the plaintiffs a decree for [349] possession, holding that there was no fraud in the case, and that it was not shown that at the date of the sale the Munsif was aware that the

^{*} Second Appeal No. 158 of 1894, from a decree of H. B. Finlay, Esq., District Judge of Shabjahanpur, dated the 18th January 1894, reversing a decree of Maulvi Muhammad Shafi, Munsif of Tilhar, dated the 30th June 1893.

(1) 4 A. 859.

(2) 5 A. 615.

(3) 7 M. 47.

property in question was under attachment in execution of the decree of the Subordinate Judge. The District Judge considered that under those circumstances the decisions in *Badri Prasad v. Saran Lal* (1) and *Aghore Nath v. Shama Sundari* (2) did not apply, and followed the decision in *Bykant Nath Shaha v. Rajendro Narain Rai* (3). The defendant appealed.

On behalf of the respondents it has been contended that s. 285 of the Code of Civil Procedure does not apply when any proceeding subsequent to attachment has taken place in execution of a decree, and in support of that contention the decisions in *Patel Naranji Morarji v. Haridas Navalram* (4); *Turmukhlal Harkisanrai v. Kalyandas Khushal* (5) and *Bykant Nath Shaha v. Rajendro Narain Rai* (3) have been referred to.

It appears to us that all that is necessary to be done in order to ascertain under what circumstances s. 285 of the Code of Civil Procedure applies is to read the section. There is nothing in the section to say that it shall not apply if after attachment by two Courts the property happens to be sold by the inferior Court, or if before attachment by the Court of higher grade proclamation of sale in execution of the decree of the Court of the lower grade has been issued. For present purposes all that is material to see is—was the property attached by the Court of the Subordinate Judge before it was sold by the Court of the Munsif? The section applies at once in its full force the moment the same property is attached by more Courts than one. The section does not suggest that it is to be construed according to convenience, and that a sale which is in contravention of the section is to be held good because it is convenient not to interfere with it. It is quite plain that under the section, where the same property is attached in execution of the decrees of an inferior Court and of a Court of a higher grade, the Court of the higher grade is the only Court which is [350] allowed jurisdiction to sell the property or to receive it, and that it is that Court which must determine any claim and any objection to the attachment of either Court.

So far as the decisions in I.L.R., 4 All., 359, I.L.R., 5 All., 615, and I.L.R., 7 Mad., 47, construe the section as laying down the rule that in cases of attachment by Courts of different grades it is the Court of the higher grade or highest grade which has got the sole jurisdiction to sell or receive or realize the property, we agree with them.

We allow the appeal with costs, and setting aside the decree of the lower appellate Court we restore and affirm the decree of the first Court.

Appeal decreed.

1896
APRIL 29.
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APPEL-
LATE
CIVIL.

18 A. 348=
16 A.W.N.
(1896) 93.

(1) 4 A. 359.
(4) 18 B. 458.

(2) 5 A. 615.
(5) 19 B. 127.

(3) 12 C. 333.

1896

APRIL 29.

REVI-
SIONAL
CRIMINAL.

18 A. 350=16 A.W.N. (1896) 96.

REVISIONAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blennerhassett.

QUEEN-EMPRESS v. RAM DEI AND OTHERS.* [29th April, 1896.]

18 A. 350=
16 A.W.N.
(1896) 96.*Act No. XLV of 1860 (Indian Penal Code), ss. 366, 368—Criminal Procedure Code, s. 180—Offences committed in different districts in the course of the same transaction—Commitment where to be made.*

Ram Dei, Chajju, Piru and Kamar were committed by the Joint Magistrate of Muzaffarnager to the Court of the Sessions Judge of Saharanpur. Upon the case which was before the Joint Magistrate it appeared that Ram Dei had committed the offence punishable under s. 366 of the Indian Penal Code in the district of Bijnor, and possibly the other three persons had committed the offence punishable under s. 368 of the Indian Penal Code in the district of Muzaffarnagar; Chajju and Piru also possibly having committed the offence punishable under that section in Bijnor.

Under the above circumstances the High Court, maintaining the order of commitment made by the Joint Magistrate, directed the case to be transferred for trial to the Court for the trial of Sessions cases arising in the Bijnor district, namely, that of the Sessions Judge of Moradabad. *Reg. v. Samia Kaundan* (1) and *Queen-Empress v. Surja* (2) not followed. *Queen-Empress v. James Ingle* (3) and *Queen-Empress v. Abbi Reddi* (4) referred to. *Queen-Empress v. Thaku* (5) followed.

[R., 27 C. 1041 (1058); 13 Cr.L.J. 35 (38)=13 Ind. Cas. 275 (278)=22 M.L.J. 141 (145)=10 M.L.T. 563=(1912) M.W.N. 3 (6).]

THIS was a reference made by the Sessions Judge of Saharanpur under s. 438 of the Code of Criminal Procedure.

[351] The following were the circumstances which gave rise to the reference.

Four persons, Ram Dei, Chajju, Piru and Kamar, were committed to the Sessions Court of Saharanpur by the Joint Magistrate of Muzaffarnagar. Ram Dei was charged with kidnapping, under s. 366 of the Indian Penal Code, and the other three were charged with abetment of the offence, under s. 366.

On the case coming before the Sessions Court, that Court, made an order the material portion of which is as follows:—"The commitment of the first accused, Ram Dei, for the offence of kidnapping, is bad in law. The offence is stated to have been committed at Sisauni in the Bijnor district, Moradabad Sessions division. She committed no new offence by bringing the girl kidnapped into this district and Sessions division, nor is the offence a continuing one. With her are charged Chajju and Piru, who joined her at Sisauni, as would appear from the charge, and presumably were in a conspiracy with her. They accompanied her to this district and assisted her in attempting to dispose of the girl. They are charged with abetment. I submit that these offences were also completed in Sisauni. Anyhow, they may be tried there. Kamar belongs to the Bijnor district, but does not appear to have been with the others. The girl was recovered from his possession here, and the case for the prosecution is that he took her off the hands of the others with criminal intentions (he says, to restore her to her home). If so, he should be charged under s. 368 of the Indian Penal Code

* Criminal Revision No. 183 of 1896.

(1) 1 M. 173.

(2) 3 A.W.N. (1889) 164.

(3) 16 B. 200.

(4) 17 M. 402.

(5) 8 B. 312.

and can be tried in Bijnor. Whether he should be tried jointly with the others is a question which will be considered there.

"The Joint Magistrate refers to *Queen-Empress v. Samia Kaundan* (1). That case was not argued at bar, and the question of jurisdiction was not touched in it. It does not appear to have been followed in the High Court of these Provinces, or were cited. See *Empress v. Surja* (2), *Empress v. James Ingle* (3) and *Empress v. Abbi Reddi* (4)."

[352] On this reference the following order was passed.

The Government Pleader (Munshi Ram Prasad), for the Crown.

ORDER.

EDGE, C.J., and BLENNERHASSETT, J.—This is a reference by the Sessions Judge of Saharanpur. Ram Dei, Chajju, Piru and Kamar were committed by the Magistrate of Muzaffarnagar to the Court of Session at Saharanpur. From what we are going to say it must not be presumed that we have prejudged the case against these persons. This commitment as against Ram Dei was for the offence punishable under s. 366 of the Indian Penal Code, and as to the others for abetment of the offence punishable under s. 366 in the district of Bijnor, and that Chajju and Piru took part with her in moving the girl about that district and ultimately into Muzaffarnagar, and that in Muzaffarnagar they were joined by Kamar, who, proceeded to take charge of the girl while the other three accused returned to Bijnor. If the case against these persons is true, Ram Dei committed the offence under s. 366 in Bijnor, and possibly the other three prisoners committed the offence punishable under s. 368 in Muzaffarnagar, Chajju and Piru also possibly having committed the offence punishable under that section in Bijnor. Under these circumstances the proper Court for a committal to have been made to was the Court for the trial of sessions cases arising in Bijnor. The main charge against Ram Dei was triable in that Court, that Court having local jurisdiction, and the offences for which they were committed, which we have indicated as against the other accused, could, by reason of s. 180 of the Code of Criminal Procedure, have been tried in the same Court. We are not prepared to follow the decision of the Madras High Court in *Reg. v. Samia Kaundan* (1), and we are not aware that it has ever been followed in any other case, nor are we prepared to follow the procedure which was acted on by this Court in *Queen-Empress v. Surja* (2). In our opinion the procedure followed by the Bombay High Court in *Queen-Empress v. Thaku* (5) is correct. We do not set aside the [353] commitment, as in our opinion the decisions in *Queen-Empress v. James Ingle* (3) and *Queen-Empress v. Abbi Reddi* (4) are correct; but, following the procedure adopted by the High Court at Bombay in *Queen-Empress v. Thaku* (5) we transfer the trial of the persons accused in this case to the Court of Session of Moradabad.

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APRIL 29.

REVI-
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CRIMINAL.

18 A. 350 =

16 A.W.N.

(1896) 96.

(1) 1 M. 173.
(4) 17 M. 402.

(2) 3 A.W.N. (1883) 164.
(5) 8 B. 312.

(3) 16 B. 200.

1896

MAY 5.

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REVI-
SIONAL
CRIMINAL.

18 A. 353 = 16 A.W.N. (1896) 98.

REVISIONAL CRIMINAL.

Before Mr. Justice Banerji.

MEGHAI v. SHEOBHIK AND OTHERS.* [5th May, 1896.]

18 A. 353 =
16 A.W.N.
(1896) 98.

Criminal Procedure Code, s. 560—Frivolous and vexatious complaint—Act No. IX of 1871 (Cattle Trespass Act), s. 20—Complaint of wrongful seizure of cattle—“Offence.”

A complaint of the wrongful seizure of cattle is not a complaint of an offence within the meaning of the Code of Criminal Procedure. Consequently on the dismissal of such a complaint it is not competent to a Court to act under s. 560 of the Code and award compensation to the persons against whom the complaint is made. *Pitchi v. Ankappa* (1), *Kottalanada v. Muthaya* (2), *Kala Chand v. Gudadhur Biswas* (3) and *Nedaram Thakur v. Joonab* (4) referred to.

THE facts of this case sufficiently appear from the judgment of Banerji, J.

JUDGMENT.

BANERJI, J.—This is a reference by the District Magistrate of Allahabad under s. 438 of the Code of Criminal Procedure. A complaint was brought against three persons by one Meghai of the wrongful seizure of cattle under s. 20 of Act No. I of 1871. The complaint was dismissed as frivolous and vexatious, and the Magistrate who tried the case awarded compensation to each of the accused persons from the complainant under s. 560 of the Code of Criminal Procedure. That section authorizes a Magistrate to award compensation to a person accused of an offence. A wrongful seizure of cattle is not made punishable under any law, and is not therefore an offence within the meaning of the Code of Criminal Procedure. That being so, a complaint of the illegal seizure of cattle was not a complaint of an offence, and s. 560 was not applicable. The award of compensation by the Deputy Magistrate was consequently illegal. This view is supported by the rulings of [354] the Madras High Court in *Pitchi v. Ankappa* (1), *Kottalanada v. Muthayya* (2) and of the Calcutta High Court in *Kala Chand v. Gudadhur Biswas* (3) and *Nedaram Thakur v. Joonab* (4).

I set aside the order of the Magistrate, and direct the compensation awarded to be refunded.

* Criminal Revision No. 206 of 1896.

(1) 9 M. 102.

(2) 9 M. 374.

(3) 13 C. 304.

(4) 23 C. 248.

18 A. 354 = 16 A.W.N. (1896) 109.

APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blennerhassett.*BADRI PRASAD (*Defendant*) v. SHEODHIAN AND ANOTHER
(*Plaintiffs*).^{*} [2nd May, 1896.]*Landlord and tenant—Occupancy tenant—Lease of occupancy holding—Relinquishment of holding pending term of lease—Act No. XII of 1891, s. 31.*1896
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(1896) 109.

Where an occupancy tenant grants a lease of land forming part of his occupancy holding for a term of years he cannot during the subsistence of such term relinquish his holding to the zamindar so as to put an end to his lessee's rights under the lease. *Khiali Ram v. Nathu Lal* (1). *Hoolassee Ram v. Pursotum Lal* (2), *Heeramonee v. Ganganarain Roy* (3), and *Nehaloonnissa v. Dhunnoo Lall Chowdry* (4), referred to, *Sukru v. Tafazzul Husain Khan* (5), distinguished.

[F., 27 A. 82 = A.W.N. (1904) 170; 11 C.P.L.R. 5; Appr., 24 A. 538; R., 33 A. 335 (336) = 8 A.L.J. 117 (118); 8 A.L.J. 695 (697); 12 C.P.L.R. 127 (129); 12 C.P.L.R. 158 (159); 6 Ind. Cas. 705 (706); 9 Ind. Cas. 217 (218); 18 Ind. Cas. 383 (384); 2 O.C. 204 (206); 2 N.L.R. 170; D., 27 M. 401 (403); 7 O.C. 265 (272).]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit Madan Mohan Malaviya, for the appellant.

Mr. J. Simeon, for the respondents.

JUDGMENT.

EDGE, C. J., and BLENNERHASSETT, J.—This is a suit for ejectment. One Jodha Singh was a zamindar of mahals in the village which were known as a western, eastern and intermediate mahals. On the 20th of August 1891, the plaintiffs to this suit purchased at a sale under a decree against Jodha Singh his interest in the western and intermediate mahals. On the 11th of June 1892, Jodha Singh, sub-let to the defendant in this suit his ex-proprietary holdings in the western and intermediate mahals and let to the [355] defendant two plots in the eastern mahal. The term of the lease was twelve years. On the 30th of October 1892, the plaintiffs by a private contract purchased Jodha Singh's share in the eastern mahal. On the 1st of November 1892, Jodha Singh purported to relinquish, and did so far as he could relinquish, his rights to the plaintiffs in all the three mahals. Plaintiffs brought this suit on the 20th of June 1893, to eject the defendant, contending that by reason of the relinquishment of the 1st of November 1892, the defendant had no longer any title to the possession of any of the three mahals. It was contended before us that as the Rent Act (Act No. XII of 1881), by s. 31 recognized the right of an ex-proprietary tenant to relinquish his holding, Jodha Singh, notwithstanding the lease granted by him on the 11th of June 1892, which was still current, was entitled to relinquish his holdings, and to determine not only his interest but the right of the sub-tenant also.

We will deal first with the case so far as it relates to the claim of the eastern mahal. At the time when Jodha Singh granted the lease of 1892, his position was that of a zamindar and not of an ex-proprietary tenant,

* Second Appeal No. 162 of 1894 from a decree of Pandit Raj Nath Sabib, Subordinate Judge of Moradabad, dated the 4th December 1893, reversing a decree of Babu Ramdhan Mukerji, Munsif of Chandausi, dated the 14th September 1893.

(1) 15 A. 219.

(2) N.W.P.H.C.R. (1871) 63.

(3) 10 W.R. 384.

(4) 13 W.R. 281.

(5) 16 A. 398.

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(1896) 109.

consequently the lease being a registered lease granted by a zamindar having full power to grant it, would not be defeated by any subsequent assignment or relinquishment by Jodha Singh. It was not a sub-lease *quâ* the two plots in the eastern mahal. It was a lease direct from a zamindar and we fail to see how the transferee in title of the zamindar, can dispute the lease granted by his predecessor in title or how he can bring this suit in a Civil Court to eject a tenant holding under a lease from a zamindar, it not being a lease to which the proviso to s. 40 of Act No. XII of 1881 applies. The plaintiffs suit *quâ* two plots must fail on two grounds : in the first place the Civil Court cannot entertain this suit, in the second place the plaintiffs cannot question the validity of the lease granted by their predecessor in title when he was a zamindar and had full power to grant the lease.

Now as to the claim in respect of the holdings in the western and intermediate mahals. It has been decided in this Court that [356] it is perfectly lawful for an ex-proprietary tenant or any other occupancy-tenant to sub-let his ex-proprietary or any other occupancy holding. We pointed out in *Khiali Ram v. Nathu Lal* (1), that an occupancy-tenant by sub-letting could create no rights which would prevent the zamindar obtaining ejectment of the occupancy-tenant and his sub-tenant in case of non-payment or on a forfeiture of the lease, and that such sub-tenant does not become the tenant of the zamindar and his interest subsists no longer than the right of occupancy subsists. That is a perfectly good proposition of law and consistent with the view we take in this case. It is a well recognized principle of law that a man shall not be allowed to do anything to defeat his own grant. Applying that principle to this case it prevents Jodha Singh making an effectual and voluntary relinquishment of his ex-proprietary rights and prevents us from recognizing the so-called relinquishment of the 1st of November 1892 as a relinquishment which has determined the ex-proprietary rights of Joda Singh and determined the subsisting rights of the sub-tenant, the defendant-appellant. That is a principle in no way at variance with the principle of Act No. XII of 1881. It is a broad principle of equity, justice and common sense that a man having created a tenancy in favour of another to whom he sub-lets shall not, without the consent of that other, be allowed voluntarily to relinquish his tenancy and his title to the detriment of the sub-lease. To some extent that principle was recognised in the case of *Hoolasee Ram v. Pursotum Lal* (2). The learned Judges in that case, however, seem to have been under the impression that an occupancy-tenant could not grant a lease unless allowed to do so by custom, and that a custom might exist which would enable an occupancy-tenant to grant a lease which would entitle the sub-tenant to remaining in possession after the determination of the occupancy-right by ejectment. In our opinion it is not necessary that there should be custom entitling an occupancy tenant to grant a lease. There is nothing in Act No. XII of 1881 to prevent an occupancy-tenant granting a sub-lease. On the [357] other hand a custom would be bad which would enable an occupancy-tenant to sub-let by a lease which would continue effectual after the occupancy-right is determined by ejectment or forfeiture. That may be gathered from the judgment of the Full Bench in the case of *Khiali Ram v. Nathu Lal* (1). It was contended by Mr. Simeon that the decision in *Sukru v. Tafazzul Husain Khan* (3), shows by analogy that the relinquishment by Jodha was good as against the defendant sub-tenant. The

(1) 15 A. 219.

(2) N.W.P. H.C.R. (1871) 63.

(3) 16 A. 398.

case of *Sukru v. Tafazzul Husain* was a case in which an occupancy-tenant gave a simple mortgage of his occupancy holding. The mortgagee brought a suit for sale, put up the occupancy holding to sale and purchased it himself, and then sought possession. What was held in that case was that the decree-holder acquired no title to possession by his purchase, as the particular occupancy-right was one the transfer of which was prohibited so far as the mortgagee purchaser was concerned, by s. 9 of Act No. XII of 1881, and that the purchaser could obtain no benefit by falling back on his simple mortgage as mortgagee, if he could fall back upon it then, because a simple mortgagee would not be entitled to possession.

The result is that we hold that Jodha Singh by reason of the lease which he granted to the defendant, which he was capable of granting at the time when he did grant it and which was a valid and continuing lease on the 1st of November 1892, was incapable of making a voluntary relinquishment of his ex-proprietary interest and of defeating the lease which he had granted.

As bearing to some extent on the question argued before us we may mention *Heeramonee v. Ganganarain Roy* (1), *Nehaloonissa v. Dhunnoo Lall Chowdry* (2).

We allow the appeal with costs. We set aside the decree of the lower appellate Court and restore that of the first Court.

Appeal decreed.

18 A. 358 = 16 A.W.N. (1896) 113.

[358] REVISIONAL CRIMINAL.

Before Mr. Justice Aikman.

MANGAR RAM (*Applicant*) v. BEHARI AND ANOTHER
(*Opposite parties*).^{*} [4th May, 1896.]

Criminal Procedure Code, s. 195—Sanction to prosecute—Notice to show cause not a necessary preliminary—Sanction not acted upon within six months—Renewal of sanction.

An order under s. 195 of the Code of Criminal Procedure sanctioning a prosecution for perjury is not bad by reason of notice to show cause not having been issued previously to the person against whom such order is made. *Krishnand Das v. Hari Bera* (3) followed.

If an order under s. 195 of the Code of Criminal Procedure lapses, not having been acted upon within six months, that does not bar the granting of fresh sanction on the same grounds if a sufficient reason for the delay be shown. *Darbari Mandar v. Jagoo Lal* (4) not followed. *Gulab Singh v. Debi Prasad* (5), *Baldeo Singh v. Prasad* (6) referred to.

[R., 28 A. 142 (145) = A.W.N. (1905) 231 = 2 Cr. L.J. 598; 21 A.W.N. 151; D., 8 C.W.N. 797 (800).]

THE facts of this case sufficiently appear from the judgment of Aikman, J.

Messrs. C. Dillon and C. R. Alston, for the applicants.

Maulvi Muhammad Ishaq, for the opposite parties.

^{*} Criminal Revision No. 181 of 1896.

(1) 10 W.R. 384.

(2) 13 W.R. 281.

(3) 12 C. 58.

(4) 22 C. 573.

(5) 6 A. 45.

(6) 12 A.W.N. (1892) 245.

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18 A. 354 =
16 A.W.N.
(1896) 109.

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(1896) 113.

JUDGMENT.

AIKMAN, J.—This is an application for the revocation of sanction granted by the Joint Magistrate of Benares on the 7th of March 1896, to prosecute the applicant Mangar Ram for an offence punishable under s. 193 of the Indian Penal Code. An application was made to the Sessions Judge to revoke the sanction, but was refused by that officer on the 2nd of April 1896, and this Court is now moved in revision to revoke the sanction. In November 1895, two men, Behari and Bisheshar, were on their trial before the Joint Magistrate charged with stealing grain from several different persons, one of whom was the applicant Mangar Ram. The case resulted in the accused being discharged on the 9th December 1895. Thereafter the accused made an application to the Joint Magistrate for sanction to prosecute Mangar Ram for giving false evidence. The sanction was granted by the Joint Magistrate, but was subsequently revoked by the Sessions Judge for a supposed informality. Behari and Bisheshar made a fresh [359] application to the Joint Magistrate for sanction. This application was granted, as stated at the outset of this judgment, and the Sessions Judge declined to interfere.

The learned counsel who appears in support of the application has assailed the sanction on various grounds. It is contended in the first instance that no notice was served on the applicant before the sanction was granted. A Full Bench of the Calcutta High Court held in the case of *Krishnanund Das v. Hari Bera* (1) that no notice is necessary to the person against whom it is intended to proceed before a Court can under s. 195 of the Code of Criminal Procedure grant sanction to the institution of a case. No authority to the contrary has been shown to me. Although I consider that it is advisable that a person against whom it is intended to proceed should be called on by a Court to show cause why sanction for his prosecution should not be given before the grant of such sanction, I fully concur in the view taken by the learned Judges who decided the case just referred to that the law does not require any such notice to be given. I therefore hold that the failure to give notice to the applicant is no sufficient cause why sanction should be revoked.

In the next place it is contended that one sanction having been already given by the Joint Magistrate he was not competent to grant another sanction upon the same materials. In support of this view reference was made to the case of *Darbari Mandar v. Jagoo Lal* (2). What was there held was that after the expiry of six months from the date of the first sanction no fresh sanction can be granted. That case is not exactly upon all fours with the present, but it does to some extent support the contention of the learned counsel for the applicant. With all deference, however, to the learned Judges who decided the case of *Darbari Mandar v. Jagoo Lal*, I am unable to concur with them in holding that a fresh sanction cannot be given if six months has expired after the grant of a previous sanction under s. 195 without any prosecution having been commenced within that period. I am of opinion that [360] before a fresh sanction is granted to an applicant who has not instituted a prosecution within six months of the grant of the previous sanction a very strong case must be made out for the grant of such fresh sanction. But to hold that no fresh sanction can under any circumstances be given might result in a person against whom it is sought to institute proceedings succeeding, by applications to superior Courts, in

(1) 12 C. 58.

(2) 22 C. 573.

delaying the institution of a case against himself and so defeating the sanction. It is quite clear from the cases of *Gulab Singh v. Debi Prasad* (1) and *Baldeo Singh v. Prasadi* (2) that at least two Judges of this Court have held the same opinion as I do. In my judgment the first sanction having been revoked owing to a formal defect there was nothing to prevent the Magistrate from granting a fresh sanction.

The learned counsel, however, contends that on the merits no sanction ought to have been given. With this contention I entirely agree. The applicant in his evidence given on the 25th of November 1895, had stated that he had instituted a suit against the accused on the 21st of September 1895. In his cross-examination the following statement appears:—“I never made any application against accused in Civil Court for grain sold on the 14th September.” It is in respect of this last statement that sanction has been granted to prosecute him for giving false evidence. There is absolutely nothing to show that this statement is false. The applicant did not, as a matter of fact, make any application against accused in the Civil Court for grain sold on the 14th of September; what he did do was to sue for the price of grain sold between the 26th of August and the 14th of September. His answer was therefore literally correct. I do not think that any Court could convict the applicant for giving false evidence on the facts stated above.

For the above reason I revoke the sanction to prosecute the applicant which was granted by the Joint Magistrate of Benares on the 7th of March 1896.

18 A. 361 = 16 A W.N. (1896) 97.

[361] APPELLATE CIVIL.

Before Mr. Justice Banerji.

MUHAMMAD ALI JAN (*Plaintiff*) v. FAIZ BAKHSH AND OTHERS
(*Defendants*).^{*} [5th May, 1896.]

Joint property—Trespass—Suit by one co-parcener for possession of a building erected by a stranger on the joint property and purchased by the other co-parceners.

Where a stranger to the property built upon certain land jointly held by several co-parceners and some of the co-parceners purchased from the stranger the building so erected, it was held that the purchasers were, *quoad* the building in suit, trespassers, and that a suit might be maintained by the remaining co-parcener to be put into joint possession of the land covered by the building; and this though it was not shown that any special damage had been suffered by the plaintiff by reason of the building. *Paras Ram v. Sherjit* (3) and *Najju Khan v. Imtiaz ud-din* (4) referred to.

[R., 2 A.L.J. 455.]

THE facts of this case sufficiently appear from the judgment of Banerji, J.

Messrs. T. Conlan and G. P. Boys, for the appellant.

Mr. J. Simeon, for the respondents.

^{*} Second Appeal No. 370 of 1895, from a decree of Pandit Raj Nath Sahib, Subordinate Judge of Moradabad, dated the 7th January 1895, confirming a decree of Munshi Anant Prasad, Munsif of Amroha, dated the 25th June 1894.

(1) 6 A. 45.
(3) 9 A. 661.

(2) 12 A.W.N. (1892) 245.
(4) 18 A. 115.

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(1896) 97.

JUDGMENT.

BANERJI, J.—The suit in which this appeal has arisen was brought by the appellant for possession of a small room erected on 15 yards of land, for closing certain doors and for opening one. He offered to pay to the defendants the cost of the building of the room. The land on which the room in question stands is a part of a larger piece of land purchased in 1881 by the plaintiff and the defendants Nos. 2, 3 and 4 under a single sale-deed. The plaintiff alleged that the land purchased by him and the defendants mentioned above contained a building, and that the first defendant, who was the father of the defendants Nos. 2 and 3, had pulled down that building and with the materials had built the room in question. The first defendant sold the room to the defendants Nos. 2 and 3, under a sale-deed executed in February 1886, and it is by virtue of that sale-deed that the defendants Nos. 2 and 3 are in possession [362] of the room. The plaintiff's case was that the first defendant had no right to build on land which belonged to him and to the other defendants, and that the encroachment on that land by the first defendant was an act of trespass.

The defendants stated that the room had been built on that portion of the land purchased jointly by the plaintiff and the defendants Nos. 2, 3 and 4, which had fallen into the share of the defendants by partition, and they contended that the plaintiff had consequently no right to the land on which the room in question stood.

The Court of first instance found in favour of the defendants, and holding the land in suit to be the exclusive property of the defendants Nos. 2, 3 and 4 dismissed the claim. Upon appeal by the plaintiff the lower appellate Court came to the conclusion that the land in question belonged jointly to the plaintiff and the defendants Nos. 2, 3 and 4. It also found that by reason of the construction placed on the land the plaintiff had not sustained any injury, and it held that, according to the ruling in *Paras Ram v. Sherjit* (1), the plaintiff's suit was not maintainable, his remedy being a claim for partition of the joint land. It was upon that ground only that the lower appellate Court maintained the decree of the Court of first instance dismissing the plaintiff's suit.

The finding of the lower appellate Court as to the land being joint must be accepted as conclusive between the parties, but upon that finding the Court was not justified in dismissing the claim. The land, which has been found to belong jointly to the plaintiff and the defendants Nos. 2, 3 and 4 was not, according to the plaintiff, encroached upon by those defendants, but by the first defendant alone, who was a stranger to the land. The encroachment therefore which the plaintiff complained of was an encroachment by a stranger upon property in which the plaintiff had a joint interest along with others. There can be no question that, if a stranger trespasses upon joint property, one of the several persons jointly interested in the property is entitled to [363] restrain that stranger from committing the act of trespass. In this case it was a stranger, who, according to the plaintiff, trespassed on his land, and therefore the plaintiff was competent to restrain him from continuing the trespass. The defendants Nos. 2 and 3 purchased from the trespasser the building which he had erected by encroaching on property which did not belong to him. They therefore stand in the shoes of the trespasser, and it is not in their character as joint co-parceners that they

(1) 9 A. 661.

are in possession of the room, the building of which constituted the act of trespass. In this view the ruling in the case of *Paras Ram v. Sherjit* (1) did not apply, and the decree made by the lower appellate Court cannot be sustained. This case is not outside the principle of the ruling in *Nojju Khan v. Imtiaz-ud-din* (2). Upon the facts found by the lower appellate Court, I am of opinion that the suit was maintainable.

There were other contentions raised by the defendants, one of which was that the room had been built with the acquiescence of the plaintiff. It might also be a question in the case whether the plaintiff could claim possession exclusively to himself of the land on which the room stands and also of the room. These questions have not been tried by the lower appellate Court. In the view which the Court of first instance took of the case it was not necessary for that Court to determine these questions; but upon the finding of the lower appellate Court they will have to be determined before the case can be finally disposed of. As, however, the lower appellate Court dismissed the suit upon a preliminary point and the decree upon that point is erroneous, I allow this appeal, and, setting aside the decree of the Court below, remand the case under s. 562 of the Code of Civil Procedure to that Court, with directions to re-admit it under its original number in the register and to determine it on the merits.

Appeal decreed and cause remanded.

18 A. 364 = 16 A.W.N. (1896) 117.

[364] APPELLATE CRIMINAL.

Before Mr. Justice Knox, Mr. Justice Blair and Mr. Justice Aikman.

QUEEN-EMPRESS v. MIRCHIA.*

[5th May, 1896.]

Act No. XLV of 1860 (Indian Penal Code), s. 317—Exposure of child—Facts constituting the offence defined—Child left in charge of a blind woman and deserted.

A woman, who was the mother of an illegitimate child aged at the time about six months, left the child in charge of a blind woman in whose company she was, saying that she was going to get food and would return shortly. She went away to another village and did not return. Apparently she never intended to return. Upon these facts it was held by Blair and Aikman, JJ, *dissentiente* Knox, J., that the mother of the child could not properly be convicted of the offence defined by s. 317 of the Indian Penal Code.

[Rel., 4 Ind. Cas. 801 (803 = 5 N.L.R. 189 (191); R., 24 M. 662 (664).]

THE facts of this case are sufficiently stated in the judgment of Knox, J.

The Public Prosecutor (Mr. E. Chamier), for the Crown.

The appellant was not represented.

JUDGMENT.

KNOX, J.—Musammatt Mirchia has been convicted of an offence under s. 317 of the Indian Penal Code and sentenced to rigorous imprisonment for two years. The following facts are proved in the case:—Mirchia was the mother of an illegitimate child. The age of the child at the time under consideration was six months. Mirchia was wandering about, and in her company was a blind woman. This woman she persuaded to go

* Criminal Appeal No. 160 of 1896.

(1) 9 A. 661.

(2) 18 A. 115.

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with her to a place where a fair was about to be held. On the road Mirchia made over the child to the blind woman, promising to return with food, which she said she was going to beg. She never returned. The blind woman found her way to the nearest Police station and made over the child to the Police. Upon these facts I am of opinion that Mirchia did leave the child with the intention of wholly abandoning it; and the only difficulty as to whether she was rightly convicted under this section arises from the fact that in the Code the offence is described as being an act of exposing or leaving a child *in any place* with the intention of wholly abandoning such child. I am not prepared to give to the words "in any place" the effect of wholly controlling the act done. The offence contemplated in [365] my opinion was the injury done to the child by the act of leaving with the intention of wholly abandoning it. Otherwise we shall be pushed to difficulties, as in the case of a child being made over to the care of another child of tender years, himself or herself practically unable to protect the child from injury, or placed in the hands of a lunatic. I do not think it was the intention of the Legislature to leave unpunished the leaving of a child with the intention of wholly abandoning it, even though the child, as in the present case, may have been left temporarily with a person physically unfit to take care of the child or to secure it from harm. In any case, the appellant is, according to the strict definition of the Indian Penal Code, liable to a conviction for assault. I would therefore dismiss the appeal and sustain the conviction.

BLAIR, J.—The appellant has been convicted of the offence defined by s. 317 of the Indian Penal Code. That section runs in the following words:—"Whoever being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both."

"Explanation. This section is not intended to prevent the trial of the offender for murder or culpable homicide, as the case may be, if the child die in consequence of the exposure."

In the interpretation of Acts the elementary rule is to give full and accurate effect to every word used in them. Upon this principle I propose to deal with this section. It differs materially in language from the section which is in force in England, and which became law about the same time that the Indian Penal Code came into force. Their objects were apparently similar, though not identical. The words of the English Act, s. 27 are:—"Whosoever shall unlawfully abandon or expose any child, being under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanour." [366] Those words differ materially from the words of the Indian Penal Code section. The provisions of the English Act are limited to children under two years of age, while in India they are extended to children under twelve years of age. The English Act does not define the mode of such abandonment or exposure, and no doubt the word "expose" read with the word "abandon" would probably be held to be used in a wider and less literal sense than the words of the Indian Penal Code. It seems to me that the words of s. 317 of the Indian Penal Code should be dealt with in the most literal sense. To expose literally means to physically put outside, so that such putting outside involves some physical risk to the

person put out. Having reference to a child, it would mean putting it somewhere where it could not receive the protection necessary for its tender age; as, for instance, putting it outside the house, whereby it would be exposed to the risk of climate, wild beasts and the like. The exposure contemplated by the Act was one by which danger to life might immediately ensue. The explanation of s. 317 seems to me to indicate with much clearness the scope and purview of the section and the nature of the evil against which it sought to provide. That explanation provides for the case of injuries actually ensuing that the guilty person shall be punished for the injury so inflicted according to the circumstances under which the injury is done, *i.e.*, for murder or culpable homicide, as the case may be. It seems to me that, as the word "leaves" comes in immediate juxtaposition with the word "expose," the word "leaving" means leaving in a sense *ejusdem generis* as the exposure, and indicates an offence only slightly distinguishable from exposing. It cannot in my judgment mean leaving in the large sense of abandonment, but must be construed in strict connection with the word "exposure." The narrower construction of the words "expose or leave" is much strengthened by the insertion of those striking words "in any place." I cannot conceive of any possible antithesis to those words unless it be "with any person." It seems to me manifest that if the framers of the Act had intended to include in the section a case like the present, [367] they would have used after the expression "in any place," the words "or with any person," or some other words to that effect. I find myself wholly unable to understand where, upon any other construction but the one suggested, a line is to be drawn in cases of abandonment of children. I do not see how in point of law the abandoning of a child in the protection of a person able to take care of it, and willing, perhaps, from kindly motives to do so, but under no legal obligation to take care of it, is to be distinguished from leaving a child, as was done in the present case, in the protection of a blind woman who could and did afford some limited protection to the infant. I have yet to see upon what principle this conviction can be supported. Take the case of a person who leaves a child of eleven years of age at a Hill school under the care and protection of a schoolmaster with intent to abandon. I am quite unable to see where a line can be drawn which would include the one case and exclude the other. Of course there may be cases, as my brother Knox pointed out, of much difficulty and requiring some discrimination. One would have to consider whether putting a child in physical possession of another child wholly incapable of protecting it would come at all within the meaning of the section; whether, for instance, leaving a child of eleven years under the care of another child of five years would fall within the purview of the section. These difficulties do not arise in the present case. Here the blind woman was to some extent capable of protecting, and did protect, the child. She was a person with whom the child had been left. Upon these findings I must hold that the child was not exposed or left in any place within the meaning of s. 317. I would therefore quash the conviction and set it aside.

AIKMAN, J.—I concur with my brother Blair in thinking that this conviction must be quashed. The appellant, Musammatt Mirchia, gave birth to an illegitimate child and was in consequence turned out of her house. In order to get rid of the child she persuaded a blind woman named Jahri to take charge of it, saying that she would go and bring some food and return shortly. She [368] went

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18 A. 364 =
16 A.W.N.
(1896) 117.

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16 A.W.N.
(1896) 117.

off to another village, and I think there can be no doubt that she had no intention whatever of returning, but that she intended wholly to abandon the child. Her conduct was undoubtedly culpable, but the question which we have to decide is whether she committed an offence falling within the purview of s. 317 of the Indian Penal Code. In my opinion, if that section does not apply, no other section in the Code does. The words of the section are:—"Whoever, being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both." I consider it proved that the intention of the appellant was to wholly abandon the child. It cannot, I think, be said that when she handed over the child to Musammatt Jahri she exposed the child. The question is:—Can she be said by handing over the child to this other woman to have left it in any place? In my opinion it would be straining the words of the section to hold that this was a leaving of the child in a place. The Legislature might, if it had chosen, have made such conduct as the appellant has been guilty of punishable either by some other section or by some appropriate words in the section under consideration. The section might have been made to run "in any place or with any person." But we have to interpret the section as it stands; and as it stands it does not in my opinion provide for the punishment of the act which the appellant has committed. I would therefore allow the appeal.

By the Court.

The order of the Court will be that the finding and sentence are reversed and the appellant will at once be released.

18 A. 369 = 16 A.W.N. (1896) 106.

[369] APPELLATE CIVIL.

Before Mr. Justice Aikman.

RAMNATH (*Plaintiff*) v. BINDRABAN (*Defendant*).^{*} [11th May, 1896.]

Execution of decree—Civil Procedure Code, ss. 278, 279—Objections to attachment—Objections disallowed—Regular suit—Burden of proof.

In proceedings under s. 278 of the Code of Civil Procedure, the objector pleaded that the property sought to be attached was his by virtue of a certain registered sale-deed. This objection was disallowed on the finding that the deed relied upon was fictitious. The objector then brought a separate suit to have the property declared not liable to be taken in execution; but he did not file the sale-deed in question or account for its non-production.

Held that under the circumstances of the case it was in this instance for the plaintiff to prove that the deed he relied on was not fraudulent and collusive, as had been found in the previous proceedings. *Govind Atma Ram v. Santai* (1) referred to.

[F., 30 A. 321 = 5 A.L.J. 601 = A.W.N. (1908) 125; R., 5 A.L.J. 358 (360); 13 Ind. Cas. 455 (456); 12 O.C. 74 (75); D., 2 L.B.R. 152.]

THE facts of this case sufficiently appear from the judgment of Aikman, J.

^{*} Second Appeal No. 483 of 1895 from a decree of E. J. Kitts, Esq., District Judge of Jhansi, dated the 30th January 1895, reversing a decree of Maulvi Muhammad Abbas Ali, Munsif of Jhansi, dated the 6th December 1894.

Mr. *E. A. Howard*, for the appellant.

Pandit *Madan Mohan Malaviya*, for the respondent.

1896

MAY 11.

JUDGMENT.

APPEL-

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CIVIL.

18 A. 369 =

16 A.W.N.

(1896) 106.

AIKMAN, J.—A decree was passed in favour of the respondent Bindraban against one Gajadhar on the 28th of May 1894. A few days afterwards the judgment-debtor sold to the plaintiff in the suit out of which this appeal arises, a house and a one pie zamindari share in the village of Mayapur for Rs. 2696-6. The plaintiff allowed his vendor to remain in possession of the house on his undertaking to pay one anna monthly rent. The house was attached by the decree-holder Bindraban, the respondent to this appeal. The plaintiff intervened, claiming the house as his own on the strength of the above-mentioned sale-deed. The Court executing the decree found that the sale-deed was without consideration and disallowed the intervenor's claim. He has now filed a regular suit. Along with his suit he did not file the sale-deed on which he relied, and no explanation is forthcoming as to why it [370] was not produced. The defendant Bindraban pleaded that the sale-deed was a collusive document, without consideration and invalid. The Court of first instance held upon this admission that it was for the defendant to prove the want of consideration, and in the result decreed plaintiff's claim. On appeal this was reversed by the District Judge, who held on the facts set forth above that it was for the plaintiff to prove that a real contract of sale had been entered into.

It is no doubt true that, as a general rule, a party who disputes the validity of a deed on the ground of non-payment of consideration is bound to prove his allegation. But in the present instance I am of opinion that the learned Judge was right in the view he took of this case. The plaintiff intervenor having failed in the execution department on account of his not having proved consideration, it was for him to prove his title when he brought a regular suit. It was not sufficient for him merely to allege in his plaint that a certain sale-deed had been executed and registered. The finding in the inquiry which was held under s. 279 of the Code of Civil Procedure being against him, it was for him to get rid of that finding by something more than a mere allegation that a sale-deed had been written and registered. The fact that the vendor, notwithstanding the alleged sale, remained in possession of the house is a circumstance, moreover, which cannot be lost sight of. The learned vakil for the respondent refers to the case of *Gobind Atma Ram v. Sanlai* (1). The view adopted by the Court in that case is in accord with the conclusion at which I had arrived before my attention was drawn to that case. In my opinion the District Judge was quite right. The appeal is dismissed with costs.

Appeal dismissed.

(1) 12 B. 270.

1896

MAY 12.

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18 A. 371 = 16 A.W.N. (1896) 107.

[371] APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice
Blennerhassett.*

18 A. 371 = SHEO CHARAN SINGH (*Judgment-debtor*) v. LALJI MAL (*Decree-holder*).^{*}
16 A.W.N. [12th May, 1896.]
(1896) 107. Act No. IV of 1882 Transfer of Property Act), s. 90 - Application for decree against non-hypothecated property—Limitation—Terminus a quo.

Where in a usufructuary mortgage it was covenanted that if the mortgagee was not given possession he should have a right to obtain the sale of the mortgage property, the mortgage debt meanwhile being payable on a certain specified date, it was held that in respect of an application under s. 90 of Act No. IV of 1882, the mortgaged property having been sold under the above mentioned covenant and having proved insufficient to satisfy the debt, limitation began to run from the breach of the covenant to pay on due date and not from the breach of the covenant to put the mortgagee in possession.

[Diss., 11 C.P.L.R. 141 (143) ; Appr., 6 O.C. 30 (32).]

THIS was an application under s. 90 of the Transfer of Property Act. The judgment-debtors had mortgaged certain property to the applicant by a usufructuary mortgage on the 16th of February 1883. The mortgage deed provided that the mortgage money should be repayable in a year from the date of the mortgage, and that the mortgagee should be put into possession. It also provided that if the mortgagors failed to put the mortgagee into possession, the mortgage money should be recoverable by sale of the mortgaged property. The mortgagee was not put into possession. On the 17th of August 1889 the mortgagee sued for sale of the mortgaged property and obtained a decree, and having brought the property to sale, purchased it himself. The price realized by the sale of the mortgaged property proving insufficient to satisfy the decree, the mortgagee, on the 11th of July 1893, applied for a decree against the person and other property of judgment-debtors. One of the judgment-debtors filed objections to the granting of the decree prayed for, their principal objection being that the application was barred by limitation.

The Court of first instance (Subordinate Judge of Jaunpur) gave the applicant the decree asked for.

[372] The answering judgment-debtor appealed, and the lower appellate Court (District Judge of Jaunpur) dismissed the appeal, holding that limitation began to run only from the date when the mortgage money became payable, viz., the 17th of February 1884, and that the application was consequently within time.

The appellant thereupon appealed to the High Court.

Babu Bishnu Chandar, for the appellant.

Munshi Gobind Prasad, for the respondent.

JUDGMENT.

EDGE, C. J., and BLENNERHASSETT, J.—This is an appeal from an order in execution of a decree. The defendant had granted to the plaintiff

* Second Appeal, No. 280 of 1894, from an order of G. F. G. Forbes, Esq., Officiating District Judge of Jaunpur, dated the 7th March 1894, reversing an order of Rai Anant Ram, Subordinate Judge of Jaunpur, dated the 18th August 1893.

[In 16 A.W.N. (1896) 107, this case is cited as Second Appeal No. 280 of 1896.—ED.]

a mortgage. It was usufructuary. It also contained a covenant for the payment of the money due on the expiration of the term, and a proviso that the mortgagee might bring the mortgaged property to sale if the mortgagor failed to deliver possession. Possession was not delivered. The mortgagee obtained a decree for sale. The sale of the property did not satisfy the amount decreed, and he sought for and obtained a decree under s. 90 of the Transfer of Property Act. From that decree this appeal has been brought. It is contended that the mortgagee's remedy under s. 90 was barred by limitation, the contention being that the six years' limitation began to run from the breach of the agreement to put him in possession. The suit was brought after the expiration of six years from that breach and within six years of the determination of the term of the mortgage on which the mortgagor's covenant to pay depended. We need say nothing as to whether the decree for sale might not have been opposed on the ground that the suit was not brought within six years of the breach of the covenant to put the plaintiff in possession. The remedy under s. 90 was a distinct remedy from any suit under s. 68 of the Transfer of Property Act, and, as the suit in which the remedy was sought and obtained was brought within six years of the breach of the covenant to pay, the amount sought to be recovered by the decree under s. 90 was legally recoverable. We dismiss the appeal with costs.

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Appeal dismissed.

18 A. 373=16 A.W.N. (1896) 99.

[373] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blennerhassett.

NIZAM-UD-DIN SHAH (*Defendant*) v. ANANDI PRASAD (*Plaintiff*).
[13th May, 1896.]

Guardian and minor—Liability of minor for act of person without authority purporting to act as the guardian of the minor.

The uncle of a minor Muhammadan purporting, though without authority, to act as the minor's guardian, made a mortgage of certain property belonging to the minor, and subsequently took a lease of the mortgaged property in favour of the minor. The minor having made default in payment, the mortgagees sued to recover rent. *Held* that the mortgagee was not entitled to recover, although had the minor sued the mortgagee to avoid the mortgage he might not have been able to succeed without paying compensation to the mortgagee to the extent to which he or his property had benefited by the money advanced on the security of the mortgage. *Ruttun v. Dhoomee Khan* (1), *Bhutnath Dey v. Ahmed Hosain* (2), *Anapurnabai v. Durgapa Mahalapa* (3), *Baba v. Shivappa* (4), *Mussamut Bukshun v. Mussamut Doolhin* (5) and *Girraj Bakhsh v. Kazi Hamid Ali* (6) referred to.

[F., 29 C. 473; 5 Ind. Cas. 571 (572)=11 C.L.J. 632; 21 M.L.J. 1077 (1083)=10 M.L.T. 385 (386)=(1911) 2 M.W.N. 461 (463); R., 26 M. 734; 32 M. 276=5 M.L.T. 201=3 Ind. Cas. 876 (877); 3 C.L.J. 260; 15 Ind. Cas. 576 (579)=23 M.L.J. 244 (249)=12 M.L.T. 147 (150); 19 Ind. Cas. 755; 10 O.C. 321; 12 O.C. 146=2 Ind. Cas. 922 (923); 1 S.L.R. 221; D., 25 A. 59.]

* Second Appeal, No. 263 of 1894, from a decree of H. G. Pearse, Esq., District Judge of Agra, dated the 2nd February 1894, confirming a decree of Babu Hari Mohan Banerji, Munsif of Agra, dated the 4th July 1892.

(1) N.W.P. H.C.R. (1863) 21.

(2) 11 C. 417.

(3) 20 B. 150.

(4) 20 B. 199.

(5) 12 W.R. 337.

(6) 9 A. 340.

1896

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APPEL-

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CIVIL.

18 A. 373=

16 A.W.N.

(1896) 99.

THE facts of this case are as follows :—

On the 4th of September 1888, Ghulam Jilani, Farid-ud-din, for himself and as guardian of Nizam-ud-din, his minor nephew, and Musamat Anwari Begam, executed a mortgage with possession of certain shops and houses in favour of the plaintiff Anandi Prasad. The money borrowed was Rs. 2,600, and the stipulated interest was annas 14 per cent. per mensem. The mortgagors did not give possession under the mortgage, but took a lease of the mortgaged property from the mortgagee. Some of the rent due under this lease being in arrears, the mortgagee lessor sued the mortgagors lessees therefor and obtained a decree on the 4th of July 1892, which decree was confirmed on appeal on the 30th of November 1892. The minor, Nizam-ud-din, applied to have this decree set aside as being an *ex parte* decree, so far as he was concerned, and it was set aside as regards him on the 23rd of July 1893. The suit was subsequently retried as to the interest of the minor in the property mortgaged. The minor objected that Farid-ud-din had [374] no authority to borrow on his behalf, and that the debts incurred by Farid-ud-din were not binding on him.

The Court of first instance (Munsif of Agra) was of opinion that Farid-ud-din had power to bind the minor's share, and gave the plaintiff a decree.

The minor appealed. The lower appellate Court (District Judge of Agra) confirmed the decree of the first Court.

The minor defendant thereupon appealed to the High Court.

Maulvi Ghulam Mujtaba, for the appellant.

Munshi Ram Prasad, for the respondent.

JUDGMENT.

EDGE, C. J., and BLENNERHASSETT, J.—This was a suit for rent of shops brought against a Muhammadan who is a minor and has appeared under the guardianship of his mother. An uncle of the minor, assuming to act as a guardian, had granted to the plaintiff a mortgage over the minor's property, and on the same day took a lease of these shops which were the mortgaged property, in favour of the minor. It is for rent alleged to be payable under that lease that this suit is brought. The first Court decreed the claim. The lower appellate Court confirmed the decree. The defendant has appealed here.

The minor's guardian was not a guardian having power to mortgage the minor's property, and as he had not that authority, he was not in a position to give the plaintiff a good title as against the minor. In our opinion that view is supported by the decisions in *Ruttun v. Dhoomee Khan* (1), *Bhutnath Dey v. Ahmed Hosain* (2), *Anapurnabai v. Durgapa Mahalapa Naik* (3), *Baba v. Shivappa* (4), *Mussamut Bukshun v. Mussamut Doolhin* (5) and *Girraj Bakhsh v. Kazi Hamid Ali* (6).

It appears to us that if the plaintiff had brought his suit to enforce his mortgage against the minor it would have been a perfect defence for the minor to make that his uncle had no authority to bind the minor or his estate. It also appears to us that the position is not altered by the fact that the minor's uncle, [375] Farid-ud-din, having made the mortgage, took a lease of the mortgaged property in favour of the minor. If we were to enforce this lease, we should be practically enforcing the mortgage, for this reason that the lease stands or falls with the mort-

(1) N.W.P.H.C.R. (1868) 21.

(2) 11 C. 417.

(3) 20 B. 150.

(4) 20 B. 199.

(5) 12 W.R. 337.

(6) 9 A. 340.

gage. The property belongs to the minor. If the minor were bringing a suit to set aside the mortgage or to set aside the lease, we could, no doubt, in such a suit decline to grant him relief until he had made compensation to the mortgagee to the extent to which the minor or his property had benefited by the money advanced on the security of the mortgage. The position is altered when the minor is a defendant and not a plaintiff.

We need not decide whether or not the plaintiff could succeed in another suit in obtaining restitution or compensation. We cannot give the plaintiff a decree here to be executed in case the minor does not make compensation. We allow this appeal with costs, and set aside the decrees in the Courts below, and dismiss the suit with costs as against Nizam-ud-din Shah. The other parties are not before us, so this decree will not affect the decrees against them.

Appeal decreed.

18 A. 375 = 16 A.W.N. (1896), 110.

MATRIMONIAL JURISDICTION.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Aikman
and Mr. Justice Blennerhassett.*

F. H. PERCY (*Petitioner*) v. J. PERCY (*Respondent*).^{*}
[16th May, 1896.]

Act No. IV of 1869 (Indian Divorce Act), ss. 3, sub-section (2), 8, 9, 13, 17, 55—Notification No. 1203, dated the 23rd September 1874—Statute 28 Vict., Cap. XXV, s. 3—Act No. XIII of 1879 (Civil Courts Act, Oudh), s. 27—Act No. XX of 1890 (North-Western Provinces and Oudh Act), s. 42—Act No. XIV of 1891 (Oudh Courts Act), s. 8—Divorce—Appeal—Jurisdiction.

The High Court of Judicature for the North-Western Provinces has no jurisdiction to entertain an appeal from the decree of a District Judge in Oudh dismissing a suit for dissolution of marriage. *Morgan v. Morgan* (1) overruled.

[R., 4 Ind. Cas. 852 = 98 P.R. 1909 = 172 P.W.R. 1909.]

[376] THE facts of this case so far as they are necessary for the purposes of this report sufficiently appear from the judgment of the Court.

Howard, for the appellants.

The judgment of the Court (EDGE, C. J., AIKMAN and BLENNERHASSETT, JJ.) was delivered by Edge, C.J.—

JUDGMENT.

Mrs. Florence Helen Percy on the 7th of October 1893 presented her petition for divorce in the Court of the District Judge of Lucknow. Her husband was the respondent. The petition alleged matters which, if true, entitled Mrs. Percy to a decree for the dissolution of her marriage. The case came on to be tried by the Additional Judge of Lucknow, to whose file we presume the petition had been transferred for hearing. He dismissed the petition. Mrs. Percy presented her memorandum of appeal to this Court, and it was admitted. When the appeal came on for argument, the question arose as to whether this Court had jurisdiction to entertain and determine the appeal; in other words, whether an appeal

^{*} First Appeal, No. 260 of 1894.

(1) 4 A. 306.

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16 A.W.N.
(1896) 99.

- 1896
MAY 16. from the District Judge of Lucknow, dismissing a petition for dissolution of marriage, lay to this Court.
- MATRI- The question of jurisdiction is one of the first importance. If this
MONIAL Court not having jurisdiction in appeal were to grant the relief asked for
JURISDIC- in this appeal and to decree dissolution of marriage, and either of these
TION. parties, believing himself or herself free, were to contract marriage with
another person and have children, those children would be illegitimate
and subject to all the disabilities of illegitimate children.
- 18 A. 375 = There is no doubt that for some purposes this is the Court having
16 A.W.N. jurisdiction in matrimonial cases instituted in the Courts of the District
(1896) 110. Judges in Oudh. By s. 3 of Act No. IV of 1869, the High Court men-
tioned in the Act is, so far as the non-regulation provinces are concerned,
the High Court or Chief Court to whose original criminal jurisdiction the
petitioner is for the time being subject, or would be subject if he or she
were a European British subject of Her Majesty. By Notification
No. 1203, dated the 23rd of September 1874, the original and appellate
[377] criminal jurisdiction to be thereafter exercised over European
British subjects of Her Majesty in Oudh is to be exercised by the High
Court of these Provinces. That notification was issued under s. 3
of the Statute 28 Vict., Cap. XXV. By sub-s. 2 of s. 3 of Act No. IV
of 1869, the District Judge for the purposes of the Divorce Act meant
in the non-regulation provinces, the Commissioner of a Division. By
s. 27 of Act No. XIII of 1879 it was enacted that "for the purposes
of the Indian Divorce Act the Judicial Commissioner (of Oudh) shall,
throughout the territories to which this Act applies, be deemed to be the
Commissioner of a Division." By s. 42 of Act No. XX of 1890, the
words "District Judge" were substituted for "Judicial Commissioner"
in s. 27 of Act No. XIII of 1879. We have now traced out the jurisdic-
tion under which the petition for dissolution of marriage was presented
to and received in the Court of the District Judge of Lucknow. There
is no doubt that, under s. 8 of Act No. IV of 1869, this Court
had power to remove and try and determine as a Court of original
jurisdiction this suit for divorce while it was pending in the Court
of the District Judge of Lucknow. If any question of law had
arisen and a reference had to be made under s. 9 of Act No. IV of
1869 by the Court of the District Judge of Lucknow, that reference
could only have been made to this Court. The petitioner could,
under s. 13, instead of appealing from the decree of the District Judge of
Lucknow, have instituted her suit in this Court, notwithstanding that
her suit had been heard and determined by the District Judge of Lucknow.
Further, if the District Judge had made a decree for dissolution of
marriage, it was this Court, and this Court alone, which could, under
s. 17, have confirmed that decree. All these powers to which we
have been referring were given to this High Court in cases under
the Divorce Act which might be decided in the Courts having juris-
diction as Courts of first instance in Oudh. One would naturally
assume that in those cases in which an appeal is given by Act
No. IV of 1869 from a decree or order in a matrimonial suit by a
District Judge, the appeal would lie to [378] the Court which had the
power to withdraw the suit before decision from the Court of the
District Judge, to advise on a reference the District Judge upon
questions of law arising in the suit and to confirm the decree for dissolu-
tion of marriage when passed by the District Judge. One would naturally
have expected that the Court to which such jurisdiction was given by the

Legislature would be the Court to which jurisdiction in appeal from orders in such suits made by a District Judge would be given. A right of appeal, as has been frequently decided, is not a natural and inherent right attaching to litigation; it is a right which is given, and can only be given, by statute; and it is only the Court to which the jurisdiction is given to entertain an appeal in a particular matter which can hear and determine such an appeal. In order to see whether any right of appeal is given under Act No. IV of 1869 from the decree or order of the District Judge, we have to turn to s. 55 of that Act. So far as is material, that section enacts as follows:—"All decrees and orders made by the Court in any suit or proceeding under this Act shall be enforced and may be appealed from in the like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction are enforced and may be appealed from under the laws, rules and orders for the time being in force." Mr. *Howard*, who appeared for the petitioner appellant before us, contended, on the authority of the decision of this Court in *Morgan v. Morgan* (1), that the appeal in this case lay to this Court.

We regret to say that we are unable to follow that decision. It appears to us that it is based upon the assumption that, because this Court is for certain purposes the High Court for Oudh under Act No. IV of 1869, appeals from the District Judges of Oudh lie, under s. 55 of that Act, to this Court. It was not noticed that in framing s. 55 the jurisdiction in appeal was made to depend on the original civil jurisdiction, and not, as in cases of confirmation under the Act, on the original criminal jurisdiction in cases of European British subjects of Her Majesty. [379] At no time had this Court any jurisdiction to hear appeals from decrees of Courts in Oudh passed in the exercise of their original civil jurisdiction. There is under certain circumstances a power in the Judicial Commissioner's Court to make a reference under s. 9 of Act No. XIV of 1891 to the High Court. All we have to decide is that the appeal does not lie to us. It is no part of our duty to decide where the appeal does lie, but we think it right to suggest that if it does not lie to the Court of the Judicial Commissioner of Oudh in this case, s. 55 of Act No. IV of 1869 is a dead letter so far as rights of appeal under that section from decisions in Oudh are concerned.

We should also like to point out a difficulty which may arise, assuming that the Court of the Judicial Commissioner of Oudh accepts and entertains the appeal in this case from the District Judge of Lucknow, and makes a decree dissolving the marriage between Mr. and Mrs. Percy. The difficulty in that case may be as to whether a decree *nisi* made on appeal can be confirmed by the Court of the Judicial Commissioner, that Court not being a High Court for the purposes of Act No. IV of 1869. It might be that the decree of the Judicial Commissioner could never be confirmed. Their Lordships of the Privy Council are not a High Court for the purposes of Act No. IV of 1869, and the decree of the Judicial Commissioner's Court, if one is made on appeal in this case, would not be a decree of a District Judge, and consequently would not be capable of confirmation by this Court under s. 17. It appears to us that speedy legislation is necessary to remove the difficulties which we have pointed out, which in our opinion are obviously caused by an oversight on the part of the gentlemen who drafted Act No. IV of 1869.

1896
MAY 16.
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MATRI-
MONIAL
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TION.
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18 A. 375 =
16 A.W.N.
(1896) 110.

(1) 4 A. 306.

1896
MAY 16.
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MATRI-
MONIAL
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TION.

18 A. 375 =
16 A.W.N
(1896) 110.

We much regret that we have been compelled to come to the conclusion that we have no jurisdiction to grant the petitioner the relief which she sought in vain in the Court of the District Judge of Lucknow. We direct that the memorandum of appeal filed in this Court be returned to the petitioner so that she may present it to the Court having jurisdiction to entertain it, or may, if so [380] advised, present an original petition for dissolution of marriage in this Court under s. 13 of Act No. IV of 1869.

Memorandum of appeal returned.

18 A. 380 = 16 A.W.N. (1896) 114.

REVISIONAL CRIMINAL.

Before Mr. Justice Knox and Mr. Justice Blair.

IN THE MATTER OF THE PETITION OF RUDRA SINGH AND OTHERS.*
[18th May, 1896.]

Criminal Procedure Code, s. 212—Sessions case—Defence reserved—Examination by Magistrate of witnesses named for the defence.

The fact that an accused person, against whom a charge has been framed by a Magistrate under the provisions of s. 210 of the Code of Criminal Procedure, has reserved his defence does not preclude the Magistrate from acting under s. 212 of the Code of Criminal Procedure.

THE facts of this case so far as they are necessary for the purposes of this report sufficiently appear from the judgment of the Court.

Kunwar Parmanand, for the applicants.

The Public Prosecutor (Mr. *E. Chamier*), for the Crown.

JUDGMENT.

KNOX and BLAIR, JJ.—This is an application praying that this Court will set aside an order passed by the Joint Magistrate of Etah, and grant an order directing that Magistrate not to examine certain witnesses whom the accused has named in a list as witnesses whom he wishes to be summoned to give evidence on his trial. The order complained of is an order passed by the Joint Magistrate acting under and within the provisions of s. 212 of the Code of Criminal Procedure. We are called upon to set aside that order and to hold that where an accused person says that "he reserves his defence," committing Magistrates have no longer any discretion to act in the terms of s. 212 of the Code. This is the broad proposition contended for with great earnestness by the learned *vakil* who appears on behalf of the petitioner. In the argument which he addressed to us he maintained that when an accused person reserved his defence he was entitled to keep back the defence and withhold from the witness-box all the witnesses who might have had anything to say about it, and who had not [381] been examined under the provisions of s. 208, until the trial went before the Court of Sessions, on the ground that his right of reserving his defence would be infringed and materially prejudiced. Another argument which he addressed to us was that when a charge had been drawn up against an accused person and that charge was a charge of an offence triable only by a Court of Session, however erroneous that charge may be, the case must proceed to trial before the Court of Session and the accused was entitled to an acquittal of that offence, if he could secure it;

* Criminal Miscellaneous No. 62 of 1896.

that the Magistrate was *functus officio* as soon as he had framed the charge, and, as he was compelled to commit, there was no object in his hearing witnesses for the accused.

We have before us the provisions of s. 212 of the Code of Criminal Procedure. That section did not exist in the Act of 1861. It appears for the first time in Act No. X of 1872. About the time when it was enacted, and when the Code of Criminal Procedure of 1872 was under preparation, two cases were decided by the High Court of Calcutta bearing upon this very point. One was the case *in the matter of Mahesh Chandra Banerjee, The Queen v. Purna Chandra Banerji and others. The Queen v. Kali Sarkar and others* (1) and the other was the case of *Queen v. Kishto Doba* (2). The learned Judges who decided these cases took a diametrically opposite view of the duties of committing Magistrates with regard to the examination of witnesses named in a list filed by an accused as witnesses whom he intended to call in evidence on his trial before the Court of Sessions. With those cases before them the Legislature inserted a new section—s. 200—in Act No. X of 1872, and retained it as s. 212 in Act No. X of 1882. That section gave the Magistrate the widest possible discretion to summon and examine any witness named in any list given in to him under s. 211. With that discretion we cannot interfere, nor do we see how any line could be drawn limiting it one way or another. The Code of Criminal Procedure does not require a Magistrate to record his reasons for acting or refusing to act under s. 212, and we cannot [382] lay down a direction that before exercising his powers he should record reasons. He is given a discretion which he may be trusted to use properly, and it will be for a person impugning his order to satisfy us that a judicial discretion has not been used before we can interfere with an order passed under this section. We need not go into or state any reason why it is necessary that this section should appear on the statute book. It is there; and as it is there, it is the duty of every Magistrate, who considers that the use of it is necessary and expedient in the interests of justice, to make use of it to the fullest extent necessary in the interests of justice. If he does not do so, he neglects an obvious duty. No case has been made out to us showing that in the present instance the Joint Magistrate of Etah failed to exercise his discretion or abuse it. We decline to interfere and return the record.

Application dismissed.

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18 A. 380 =
16 A.W.N.
(1896) 114.

(1) 4 B.L.R. App. 1.

(2) 14 W.R.C.R. 16.

1896

MAY 18.

APPEL-
LATE
CIVIL.

18 A. 382 = 16 A.W.N. (1896) 112.

APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and
Mr. Justice Blennerhassett.*UJAGAR LAL (*Plaintiff*) v. JIA LAL AND OTHERS (*Defendants*).^{*}
[18th May, 1896.]

18 A. 382 =

18 A.W.N.

(1896) 112.

Pre-emption—Wajib-ul-arz—Right of pre-emption not forfeited by breach on a former occasion of the rules of the wajib ul-arz relating to pre-emption.

Semble, that a claimant for pre-emption under a *wajib ul-arz* would not forfeit his right to pre-emption if upon a former occasion he had violated the provisions of the *wajib-ul-arz* by mortgaging his share to a stranger. *Gokul Chand v. Ram Prasad* (1) followed; *Rhajjo v. Lalman* (2) referred to.

THIS was a suit to obtain possession as mortgagee of certain zamindari which had been mortgaged by a deed of conditional sale by three of the defendants to the fourth defendant. The plaintiff claimed under a clause of the *wajib-ul-arz* relating to pre-emption and he alleged his right as a co-sharer to be superior to that of the defendant-mortgagee.

[383] The defendant-mortgagee pleaded that as to part of the property mortgaged the plaintiff had no right of suit, not being a co-sharer; that the mortgage was executed with the plaintiff's knowledge and acquiescence, and that the plaintiff had forfeited his right of pre-emption by having on a previous occasion mortgaged his own share to a stranger.

The Court of first instance (Subordinate Judge of Mainpuri) found that the plaintiff had about four weeks before the suit mortgaged his own share to one Harbans Rai, who was a stranger, and, applying the ruling in *Rhajjo v. Lalman* (2), dismissed the suit on the ground that the plaintiff had by his own act deprived himself of his right to claim pre-emption.

The plaintiff appealed, and the lower appellate Court (District Judge of Mainpuri), taking the same view of the law as that taken by the court below, dismissed the appeal.

The plaintiff appealed to the High Court.

Munshi Madho Prasad, for the appellant.

Munshi Gobind Prasad, for the respondents.

JUDGMENT.

EDGE, C.J., and BLENNERHASSETT, J.—This was a suit for pre-emption of a share in a village brought on a clause in the *wajib-ul-arz* providing for pre-emption in case of mortgages or sales of shares by co-sharers. The first Court dismissed the plaintiff's suit on the ground that on a previous occasion he himself had mortgaged his share in the village to a stranger. The lower appellate Court, accepting that view of the law, dismissed the appeal. The plaintiff has brought this appeal.

It so happens that on the previous occasion when the plaintiff himself mortgaged to a stranger no co-sharer in the village claimed pre-emption. No *wajib-ul-arz* which we have ever seen has contained a clause absolutely and in all events prohibiting a co-sharer from selling or mortgaging to a stranger. Such a clause would be unreasonable and bad in law. It would be against public policy. What is provided by such

^{*} Second Appeal No. 357 of 1894, from a decree of G. E. Gill, Esq., District Judge of Mainpuri, dated the 30th January 1894, confirming a decree of Rai Pandit Indar Narain, Subordinate Judge of Mainpuri, dated the 28th November 1892.

(1) 9 A.W.N. (1889) 127.

(2) 5 A. 180.

clauses is that a co-sharer shall have a right to take the mortgage or to [384] buy in preference to a stranger; and that is a perfectly reasonable custom or contract as the case may be. There is nothing to show, in that view of the law, that on the previous occasion the plaintiff acted contrary to the provisions of the *wajib-ul-arz*, for there is nothing to show that any co-sharer desired to take the mortgage. Even if the plaintiff had on a previous occasion acted in violation of the provisions of the *wajib-ul-arz* as to pre-emption, we should hesitate before deciding that such previous contravention of the provisions of the *wajib-ul-arz* deprived him of all right to claim pre-emption in case of a mortgage or sale of another share by another co-sharer in the village. We are disposed to think that the decision in *Gokul Chand v. Ram Prasad* (1) was right. It must not be assumed from what we have said that we throw any doubt on the correctness of the decision in *Rhajjo v. Lalman* (2), with the decision in which case on the facts there before the Court we agree. We allow this appeal, and, setting aside the decrees of the Court below and the first Court, we remand this case under s. 562 of the Code of Civil Procedure to the Court of first instance to be disposed of on the merits. Costs here and hitherto will abide the result.

Appeal decreed and suit remanded.

18 A. 384 16 A.W.N. (1896) 101.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blennerhassett.

HINGAN LAL (*Judgment-debtor*) v. MANSA RAM (*Decree-holder*).^{*}
[21st May, 1896.]

Execution of decree—Limitation—Act No. XV of 1877, s. 19—Acknowledgment—Admission of liability contained in a memorandum of appeal in a different suit.

An admission made by an advocate or duly authorised wakil on behalf of his client in a memorandum of appeal in a case not *inter partes* that a certain decree was a subsisting decree capable of execution will amount to an acknowledgment within the meaning of section 19 of Act No. XV of 1877 so as to give a fresh starting point to limitation for execution of such decree, provided that such admission was necessary for the purposes of the pleadings in the former case. *Sed quære* whether such admission will have a similar effect if it was not necessary for the purposes of the suit in which it was made. *Ram Hit Rai v. Satgur Rai* (3) followed.

[R., 1 Ind. Cas. 240 (241)=5 N.L.R. 8=15 Ind. Cas. 156 (158)=17 C.W.N. 156 (159); D., 22 B. 993.]

THE facts of this case sufficiently appear from the judgment of the Court.

Messrs. T. Conlan and J. Simeon, for the appellant.

Pandit Sundar Lal, for the respondent.

JUDGMENT.

EDGE, C. J., and BLENNERHASSETT, J.—This was an appeal from an order passed in execution of a decree. The question is, was the present application for execution barred by limitation? The present application for

^{*} Second Appeal No. 314 of 1894, from an order of H. Bateman, Esq., District Judge of Sabaranpur, dated the 10th March 1894, confirming an order of A. M. R. Hopkins, Esq., Subordinate Judge of Dehra Dun, dated the 13th November 1893.

(1) 9 A.W.N. (1899) 127.

(2) 5 A. 180.

(3) 3 A. 247.

1896
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18 A. 382=
16 A.W.N.
(1896) 112.

1896
MAY 21.
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APPEL-
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18 A. 384=
16 A.W.N.
(1896) 101.

execution was presented more than three years after the last preceding application for execution, and consequently would ordinarily be barred by limitation. The decree-holder relied on a written statement which was signed and filed by the judgment-debtor in another suit to which the present decree-holder was not a party, and also on a memorandum of appeal in that suit, which was signed and filed by the advocate of the present judgment-debtor, as containing acknowledgments, within the meaning of s. 19 of Act No. XV of 1877, sufficient to give a new start to limitation.

The acknowledgment relied on in the written statement was merely a statement of the fact that the judgment-debtor had been declared liable to the payment of a certain sum of money by a certain decree passed in a certain year, which happened to be the decree now sought to be executed. In our opinion the mere statement of a fact that a decree was passed against a party on a certain date for a certain amount is not an acknowledgment that that decree is capable of execution so as to come within s. 19 of Act No. XV of 1877. It is merely a statement of a fact that a decree was passed, and not an acknowledgment that there is a present liability under the decree. If we were to hold that the statement of fact in that written statement amounted to an acknowledgment within s. 19 of Act No. XV of 1877, we should [386] be practically making it impossible for a defendant to comply safely with the Code of Civil Procedure by giving in his written statement a simple narrative of the facts on which he based his defence.

We now turn to the memorandum of appeal. The appellant sought in appeal relief on two grounds. The first was that a certificate should not have been sent from the Court at Mussoorie to the Court at Saharanpur in execution of the decree, and secondly that the decree attempted to be executed was incapable of execution.

To take the latter point first. In the memorandum of appeal signed by the advocate it was stated:—"The only decree which is capable of execution against the judgment-debtor Nagar Mal is the decree of the appellate Court dated the 25th September 1886, and not that of the 15th of June 1886, which was modified in appeal." The meaning of that is that the decree-holder in that case was attempting to execute a decree of the first Court, whereas the decree of the Court of appeal was the only decree which could be executed. In our opinion, if that ground of appeal had been simply as follows—"The decree sought to be executed has been appealed against and has been modified by the decree of the appellate Court, and consequently cannot be executed"—, there would have been no acknowledgment that the decree of the appellate Court, which appears to be the decree now sought to be executed, was capable of execution. We strongly doubt that either an advocate or a vakil could make a signed acknowledgment within the meaning of s. 19 of Act No. XV of 1877, so as to bind his client, if the acknowledgment relied on was unnecessary for the purpose for which the advocate or vakil had been retained. In the case to which we are referring it was absolutely unnecessary for the advocate to have made in the particular ground of appeal any admission that the decree of the 25th of September 1886, was capable of execution. The point, so far as that ground of appeal was concerned, was not whether the decree of the 25th of September 1886, was capable of execution. The point was:—The decree of the [387] 15th of June 1886 having been modified in appeal, could it be executed?

Now to refer to the other ground stated in that memorandum of appeal. The decree in that case had been passed by a Court at Mussoorie. The complaint in appeal was that it had been wrongly transferred for execution to the Court at Saharanpur, and the appellant in those proceedings sought to make out that case by showing that he had property within the local limits of the jurisdiction of the Mussoorie Court sufficient to satisfy the decree against him. Consequently for that ground of appeal it was necessary to state the fact that there was property of the then appellant within the jurisdiction of the Mussoorie Court sufficient to satisfy the decree. In our opinion that ground of appeal could not have been worded so as to raise the case which the then appellant was trying to raise without acknowledging that the decree of the 25th of September 1886 was enforceable against him, and that was an acknowledgment of a subsisting liability. All that remains is to see whether a memorandum of appeal signed by an advocate or vakil duly authorized in that behalf by his *vakalat-namah* which contains an acknowledgment of liability is within s. 19 of Act No. XV of 1877. It appears to us that the whole question is concluded by the Full Bench ruling of this Court in *Ram Hit Rai v. Satgur Rai* (1). The principle of that case seems to have been applied in many cases, and, whether applied or not, is binding on us. We consequently hold that limitation began to run from the date of the memorandum of appeal filed in the suit between Mansa Ram and Nagar Mal, and that the present application for execution is within time. We dismiss the appeal with costs.

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Appeal dismissed.

18 A. 388 = 16 A.W.N. (1896) 123.

[388] APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice
Blennerhassett.*

CHATARBHUJ (*Defendant*) v. DWARKA PRASAD AND ANOTHER
(*Plaintiffs*).^{*} [22nd May, 1896.]

*Interpretation of documents - Insensible clause - "Fasli year" - "Agricultural year" -
Act No. XIX of 1873 (North-Western Provinces Land Revenue Act) s. 3, clause 8.*

The practice adopted by patwaris in some parts of the North-Western Provinces of applying the term "Fasli year" to the "agricultural year" as defined in Act No. XIX of 1873, s. 3, clause 8, is erroneous. Where parties to a deed describe a date as being in such and such a "Fasli" year, they must be taken, in absence of evidence of mutual mistake, to refer to the calendar Fasli year.

In interpreting a document a clause which is inconsistent in any construction thereof with the remaining provisions of the document must be rejected.

Yad Ram v. Amir Singh (2) and *Shrobaran Singh v. Bisheshar Dayal Singh* (3) referred to.

THE facts of this case sufficiently appear from the judgment of Edge, C. J.

Maulvi Ghulam Mujtaba, for the appellant.

Munshi Ram Prasad, for the respondent.

^{*} Second Appeal No. 254 of 1894, from a decree of Syed Siraj-ud-din, Additional Subordinate Judge of Mainpuri, dated the 22nd February 1894, reversing a decree of Pandit Alopri Prasad, Munsif of Phaphund, dated the 18th September 1893.

(1) 3 A. 247.

(2) 2 A.W.N. (1882) 174.

(3) 12 A.W.N. (1892) 236.

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JUDGMENT.

MAY 22.

APPEL-

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CIVIL.

18 A. 388=

16 A.W.N.

(1896) 123.

EDGE, C.J.—This suit arose out of a sale-deed. The sale-deed was executed on the 9th of July 1890, the date being so described, and not being described as a Fasli year or a Sambat year or a Hijri year. According to the terms of the sale deed the purchaser was entitled to possession on the execution of the deed, and was on the execution of the deed entitled to mutation of names. If it had not been for the clause upon which this suit was founded, there could not be the slightest doubt as to what the parties meant. The passage to which I refer is, as translated, as follows :—"The operation of this sale-deed shall be counted from the commencement of Asarh 1298 Fasli." Now the 9th of July 1890, was in the Fasli calendar year 1297. The suit has been brought for rents which accrued due subsequently to the 9th of July 1890, and which accrued due in the calendar Fasli year 1298, and prior to the beginning of Asarh in that year. The other provisions of [389] the deed would show that the vendor was entitled to any rents which accrued due before execution of the deed, and that the vendee became entitled to any rents which accrued due subsequently to the execution of the deed. The plaintiff took his stand on the sentence in the deed the translation of which I have just given. The defendant by his written statement suggests that the scribe of the deed inserted 1298 Fasli in the particular clause, as in 1298 Fasli the crops sown in Asarh of 1297 Fasli would be reaped. He said in the written statement that the crops sown in Asarh 1297 Fasli are called the crops of 1298 Fasli because they are reaped in Kuar and Kartik 1298 Fasli. That written statement, so far as it is intelligible, would represent that 1298 Fasli was inserted by mistake for 1297 Fasli. Neither side gave in evidence of any mistake. The patwari was called as a witness, and he stated that the sale-deed was executed in 1298 Fasli. The 9th of July 1890 was in fact in 1297 Fasli. The calendar year 1298 Fasli began on the 29th of September 1890. It may be that the parties, not being aware of the calendar Fasli year and when it commenced, considered that the Asarh of the Christian year 1890 was in 1298 Fasli, and that mistake, if it was one, may have originated in what we are told has become the custom amongst patwaris of treating the Fasli year as commencing on the 1st of July of one year and terminating on the 30th of June in the following year. It is true that under the orders of the Board of Revenue the patwaris' accounts are kept from the 1st of July one year to 30th of June in the next. For the purposes of the Board of revenue the agricultural year is not conterminous with any calendar year. Neither the Board of Revenue nor the High Court, nor any other authority except the Legislature, has power to alter the date of the commencement of any calendar year. The Legislature has of course power to enact, if it so thought right, that the Fasli year should be taken as commencing on the 1st of April, or May or of December, or on any other day it chose; but presumably the Legislature, bearing in mind the frightful confusion that any such arbitrary change in a calendar year would cause in the [390] making of contracts and the determining of the rights of parties to contracts, would not interfere with any of the calendar years. Anyhow a patwari, or all the patwaris in these Provinces, have no power to alter the date for the commencement of any calendar year. If there is one thing more than another as to which no doubt should be cast by the Legislature or by a court of Justice, it is the commencement of old and well-known calendar years, whether the year be the Christian year, the Hijri year, the Sambat year or the Fasli year. To raise a doubt in men's minds as to whether there

may not be two totally different dates separated by nearly three months interval at which the same calendar year may commence, would be to create disastrous confusion in all contracts depending on such calendar years. For example, if we were to hold that 1298 Fasli, which did in fact commence on the 29th of September 1890, might be the patwari's Fasli year commencing on the 1st of July 1890, we should have this result that it would be open to either party to a contract which was to be performed in the July, August or September of a named Fasli year to say that he understood that the contract was to be performed a year earlier than the year appearing in the written document, whilst the other party might say that in making the contract he believed he was contracting according to the well-known calendar Fasli year. The result would be, if each side was found to tell the truth, that when they thought they had arrived at a contract, they had in fact arrived at no contract at all. There would in that case be no mutual mistake. Each man believed that the Fasli year was different from what the other man believed it to be. The result would be that a Court of law would be bound to hold the contract to be void. That is a state of things to which patwaris, if they think of these things, ought to pay attention, and not to persist in a course, if they have followed it, of attempting to alter the calendar Fasli year. If patwaris or any other persons wish to keep accounts for twelve months, the twelve months not being conterminous with the commencement or ending of any recognised calendar year, it would be very easy for them to keep [391] their accounts, which related, for example, partly to 1297 Fasli and partly to 1298, under a heading such as this—"Fasli 1297-98." It is to be hoped that confusion will not be raised in the minds of the commercial and trading population as to when the Fasli year, for example, commences. Merchants in Calcutta make contracts with growers of produce in these Provinces: money is advanced on those contracts: it is not advisable that the people of these Provinces should be under the impression that the Fasli year in the North-Western Provinces commences at a date different from that at which it commences throughout the rest of India.

In the passage which I have quoted from the sale-deed it is obvious that there is no patent ambiguity:—there could only be a latent ambiguity if there were in fact two Fasli years, 1298, which commenced on different days. However, it may be that the parties to this contract believed that the Asarh of 1297 Fasli according to the calendar was in fact the Asarh of 1298 Fasli, and made their contract accordingly. If they did so, there was a mutual mistake as to the particular Fasli year about which they intended to contract, and it was competent to either side to show that a mutual mistake had been made, and that they mutually believed that the Asarh to which they were referring was properly described as the Asarh of 1298 Fasli. I use the word "mistake" in this sense, because I am not aware that it is possible for the Asarh of 1297 Fasli to be described as the Asarh of 1298 Fasli with any correctness either in law or in fact. On proof of a mutual mistake the contract could be rectified, or, without rectification of the contract, effect could be given to it according to the intention of the parties just in the same way as if rectification had formally been decreed. If a mistake does exist in these Provinces amongst certain classes of agriculturists as to when the calendar Fasli year begins, that mistake is not the result of any action on the part of the Legislature. The Legislature when defining, in s. 3 of Act No. XIX of 1873, cl. 8, what the term "agricultural year" for the purposes of that Act, and not for purposes outside that Act,

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(1896) 123.

meant, defined it as meaning a year commencing on the [392] first day of July and ending on the thirtieth day of June. That is a definition which could mislead no one. The Legislature did not purport to alter the date of the commencement of any calendar year, any more than the Legislature would intend to alter the commencement of any calendar year if it enacted that the "financial year" should commence on the first of April and end on the thirty-first of March. No one would think of contending that the Legislature by prescribing when the financial year should commence and terminate intended that for the future the Christian year, the Jewish year, the Hijri year, the Fasli year or the Sambat year should commence on the first of April and terminate on the thirty-first of March. Beyond this, Government was careful when publishing the Urdu translation of Act No. XIX of 1873 not to create confusion by using, as a translation of "agricultural year" in cl. 8, s. 3 of Act No. XIX of 1873, any term appropriated to a well-recognised calendar year. They did not use as synonymous with "agricultural year" the term "Fasli year." Government was careful to translate the English expression "agricultural" by the Urdu "zara'ati."

In the result it is apparently to the patwari that we must look, if we want to find the author of the confusion which has arisen. This question is not a new one. It has been twice before this Court, once in 1882, and again in 1892. In the case of *Yad Ram v. Amir Singh* (1), which was a case in which a bond had been made with instalments payable at the end of every Fasli year, Brodhurst and Mahmood, JJ., held that the Fasli year in the bond was the calendar year and had no reference to the agricultural year. They pointed out that the Courts below in that case had confounded the Fasli year with the agricultural year. Mahmood, J., was a native of this country and of these Provinces. Brodhurst, J., had filled the office of Magistrate and Collector before coming to the judicial branch of the service. Their opinion on a question of this kind was certainly entitled to weight. The other case in which the question arose came before two Judges who were neither natives of [393] India nor had had the advantage of having served as Collectors in these provinces. What small knowledge they brought to this subject was the knowledge they had acquired in the training of the law. The two Judges were my brother Blair and myself. In that case—*Sheobaran Singh v. Bisheshar Dayal Singh* (2)—we were guided by general principles of law and the experience which a knowledge of the law and its application had taught us of the danger of recognising two different calendar years of the same denomination and not coincident in commencement and conclusion. So that practically, so far as this Court is concerned, the question is concluded. Unless a case of mutual mistake is shown, the parties must be held to have contracted according to the calendar year.

This question does not, however, determine the fate of this appeal. In either view of what the parties may have meant when they referred to the Fasli year, the sentence of which I have given the translation cannot be reconciled with the other terms of the sale deed. It would be as inconsistent with the other terms of the deed to read the clause in question as 1297 Fasli as it would be to read it as 1298 Fasli. The result in my opinion is that, the other terms in the deed being plain and unambiguous and this clause being consistent with nothing, it must be rejected. Rejecting the clause, the plaintiff's suit must fail. I would allow this appeal,

(1) 2 A. W. N. (1882) 174.

(2) 12 A. W. N. (1892) 236.

and, setting aside the decree of the lower appellate Court, would restore the decree of the first Court, though for different reasons.

BLENNERHASSETT, J.—I concur generally in the judgment of the learned Chief Justice. There can be no doubt that the patwaris of these Provinces consider that the Fasli year commences on the 1st of July and ends on the 30th of June. The whole of their official training compels them to adopt this view. This year does not correspond with the Fasli year introduced by the Emperor Akbar for the purposes of Revenue administration, and it is therefore possible that persons who accept the assistance of patwaris in [394] drawing up their documents may make use of ambiguous terms and that a certain amount of confusion may be caused thereby. In my opinion extrinsic evidence has always been admitted to explain a latent ambiguity in a document, that is, where the language used is unambiguous, though it might fit several conditions of fact equally well. In this connection I would quote the words of Wigram, V. C., in his book on extrinsic evidence in the interpretation of wills, paragraph 200:—"Words cannot be ambiguous because they are unintelligible to a man who cannot read, nor can they be ambiguous merely because the Court which is called upon to explain them may be ignorant of a particular fact, art or science which was familiar to the person who used the words, and the knowledge of which is therefore necessary to a right understanding of the words as used. If this be not a just conclusion, it must follow that the question whether a will is ambiguous might be dependent, not upon the propriety of the language which a testator has used, but upon the degree of knowledge, general, or even local, which a particular Judge might happen to possess." These principles are now embodied in ss. 96 and 98 of the Indian Evidence Act. The appellant in this case urges that the document should be read as a whole and that no one condition of it should be read independently of the others. Both the Courts below have found, and I think rightly, that, read as a whole, the document is in favour of the appellant's case. In my opinion the clause in question by itself is insensible and it is repugnant to the other clauses in the deed. I concur in the order proposed.

By the Court.

The appeal is allowed. The decree of the lower appellate Court is set aside with costs here and in the Court below, and the decree of the first Court is restored.

Appeal decreed.

18 A. 395 = 16 A.W.N. (1896) 119.

[395] REVISIONAL CRIMINAL.

Before Mr. Justice Knox.

QUEEN-EMPRESS v. SUBHAN AND ANOTHER.* [26th May, 1896.]

Act No. XLV of 1860 (Indian Penal Code), s. 297—Trespass on burial place—Acts complained of done by permission of owner.

Held that persons who entered upon a burial-place and ploughed up the graves were liable to be convicted of the offence defined by s. 297 of the Indian Penal Code, notwithstanding that their entry on the land was by the consent of the owner thereof.

[R., 33 A. 773 (774) = 8 A.L.J. 927 (928) = 12 Ind. Cas. 300 (301).]

* Criminal Revision No. 675 of 1895.

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18 A. 388 =
16 A.W.N.
(1896) 123.

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THE facts of this case sufficiently appear from the judgment of Knox, J.

Mr. C. R. Alston, for the applicants.

The Government Pleader (Munshi Ram Prasad), for the Crown.

JUDGMENT.

18 A. 395 =
16 A.W.N.
(1896) 119.

KNOX, J.—In this case two persons were found guilty of an offence falling either under s. 297 or s. 297 read with s. 107 of the Indian Penal Code. It was established against the two persons that they had ploughed up land which up to within a short period of the act had been used as a graveyard. It is not denied by Subhan that he did plough up the land, and Sabir admits that, knowing that Subhan was going to do so, he lent him bullocks for the purpose.

I am asked to revise the conviction and sentence on the ground that there was no proof that trespass was committed or contemplated, and that there was no intention of wounding the feelings of any one. S. 297 does not make an act committed in defiance of it an offence when that act is committed with the intention of wounding the feelings of any person; it is equally an offence if committed with the knowledge that the feelings of any person are likely to be wounded or the religion of any person is likely to be insulted thereby. The real question on which this contention was raised in the present case is whether the acts of the accused can be considered to amount to trespass or abetment of trespass.

The persons who were convicted went upon the property with the knowledge of the owner, and further, apparently with his wish [396] that the graveyard should be ploughed up and turned into agricultural land. My attention was directed by the learned counsel who conducted the case to the precedent—*In the matter of the petition of Khaja Mahomed Hamin Khan and another* (1). That case differs from the present in that no proof had been given of actual disturbance of a grave, and no proof had been given that any specific portion of the plot entered upon was set apart as a place of sepulture. No difficulty touching these points arises in the present case. The ground ploughed up was used as a burial-ground and graves were as a fact disturbed. It is still, however, contended that as Subhan entered on the property with the permission of the owner, therefore he could not be said to have committed trespass. The point is not free from difficulty, and, although I have taken time to consider my judgment and to consult reports, I can find no case in point, nor have I been referred to any. At the same time I am not prepared to construe the word "trespass" in the present section as it is defined in the case of criminal trespass under the Penal Code. In a section of this kind I see no reason for restricting the original meaning of the word, which covered any injury or offence done, and to couple it with entry upon property. The act of the petitioners was an act of injury to the place of sepulture, and it was an act which they must have known would have been likely to wound the feelings of others.

I do not consider it a case in which I should interfere. Let the record be returned.

(1) 3 M. 178.

18 A. 396 = 16 A.W.N. (1896) 102.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox and
Mr. Justice Banerji.

RAJIT RAM AND OTHERS (*Defendants*) v. KATESAR NATH
AND OTHERS (*Plaintiffs*).^{*} [26th May, 1896.]

Civil Procedure Code, ss 52, 53, 578—*Plaint—Verification of plaint—Result of defective verification—Amendment—Procedure.*

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18 A. 396 =
16 A.W.N.
(1896) 102.

If the verification of a plaint is discovered to be defective at any time whilst the suit is before the Court of first instance, the plaint may be amended by the Court.

[397] If such defect be not discovered until the suit comes on appeal before an appellate Court, such Court may, if it thinks fit, return the plaint to the Court of first instance to be amended by it. But where the defect is such that it is covered by the provisions of s. 578 of the Code of Civil Procedure, there is no necessity for the appellate Court to take any steps to procure the amendment of the plaint.

In any event a defect in the verification of a plaint will not of necessity result in the dismissal of the suit. *Balgobind Das v. Ganno Bibi* (1) referred to.

A plaint filed by three joint plaintiffs was verified by each in the form :—
“The contents of the petition of plaint are true to the best of my knowledge and belief.” Held that this form of verification, though not free from ambiguity, was in substantial compliance with the provisions of s. 52 of the Code of Civil Procedure.

[F., 5 C.W.N. 91 ; R., 22 A. 55 ; 23 A. 167 (171) ; 7 Ind. Cas. 75 (78).]

THE facts of this case sufficiently appear from the judgment of the Court.

The Hon'ble Mr. Colvin and Babu Jogindro Nath Chaudhri, for the appellants.

Mr. D. N. Banerji and Munshi Ram Prasad, for the respondents.

The judgment of the Court (EDGE, C. J., KNOX and BANERJI, JJ.) was delivered by EDGE, C. J. :—

JUDGMENT.

The plaint in the suit in which this reference has arisen on appeal was signed by the three plaintiffs and was verified by them in the following form :—“The contents of the petition of plaint are true to the best of my knowledge and belief.” Owing to a case recently reported, namely, *Balgobind Das v. Ganno Bibi* (1) the Bench, hearing the appeal referred the following questions to a Full Bench :—“(1) Whether a plaint verified in the terms in which the plaint in this case is verified is defective in law ? (2) If so, whether such a plaint can be amended after settlement of issues ? (3) Should an objection as to the form of verification be entertained after settlement of issues and when a case has gone to trial ? (4) Is a defect in verification such as that in this case a sufficient ground for the dismissal of the suit ?

There is no doubt that the verification in the present case might raise a doubt in some persons' minds as to whether the plaintiffs [398] verifying it meant that all the averments in the plaint were true to their knowledge. The use of the expression “to the best of my knowledge

* First Appeal No. 175 of 1894.

(1) 16 A.W.N. (1896) 75.

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(1896) 102.

and belief " might raise a doubt on that point, and where a plaintiff does verify a plaint as true to his knowledge, he had better do so in the simple words of s. 52 of the Code of Civil Procedure, and simply say that the plaint is true, or the statements in the plaint are true, to his knowledge. It is not necessary for a plaintiff to say that the facts which he alleges to be true to his knowledge are also true to his belief. If matters alleged as facts are true to the plaintiff's knowledge they must be true to his belief. Where a plaint contains averments of fact, some of which are within the plaintiff's knowledge and others of which are made upon information which he believes to be true; if for example, the averments in the first three paragraphs are made on his own knowledge, and the averments in paragraphs 4, 5 and 6 are made upon information and not on the knowledge of the plaintiff, the verification should be, as to the averments in paragraphs 1, 2 and 3, that they are true to my knowledge, and as to paragraphs 4, 5 and 6, that they are made on information which I believe to be true. There could be no misapprehension as to what such a verification meant. Probably the verification in this case was intended by the plaintiffs to be a verification that all the facts stated were true to their knowledge. As was pointed out in *Girdhari v. Kanhaiya Lal* (1), the vernacular copy of the Code of Civil Procedure is not, so far as s. 52 of the Code is concerned, an absolutely correct translation, and is likely to mislead persons trusting to the vernacular copy. Although the verification in the present case is not in strict compliance with the Code, it substantially complies with it, and after the trial had commenced with the settlement of issues, the defect, if it was a defect, need not have been taken notice of. This is our answer to the first question.

For the purpose of answering the remaining questions we will assume that the verification is defective and not in compliance with s. 52 of the Code, and that it omitted to indicate which [399] matters were true to the knowledge of the plaintiffs and which matters, if any, were stated on information believed to be true. Now under s. 53 the Court of the first instance, unless acting under the orders of an appellate Court, could not return a plaint to be amended after the settlement of issues; but if the plaint required amendment and the fact was only discovered after issues had been settled, the Court could, under s. 53, clause (c), amend the plaint or cause it to be amended at any time before judgment. Under clause (c) the plaint would still remain on the file and be part of the file, although the Court of first instance might depute any person selected by it to take the plaint, for example, to a *pardanashin* woman who was plaintiff, or to a person who, through illness, was unable to attend Court, for the purpose of the order of the Court being complied with. Any amendment made under such circumstances would, in our opinion, be an amendment by the Court itself. Under clause (b) the plaintiff need not amend at all after the plaint is returned to him, but if he does not, he incurs the penalty of s. 54. Under clause (c) the amendment is made by order of the Court and the party has to comply with it. Further, if the amendment is one going to the maintenance of the suit and the defect in the plaint is not discovered until the suit gets into a superior Court on appeal, the appellate Court, in our opinion, can either order the amendment to be made in that Court, or, for example in a case in which there has been not only misjoinder of parties but misjoinder of causes of action, the appellate Court may order the Court of first instance to do

(1) 15 A. 59.

what it ought to have done at the proper stage of the suit, when the suit was before it, and return the plaint to the parties so that they may make their election as to which of them is to continue the suit and may make the necessary amendments. Such a course was pursued by this Court in *Salima Bibi v. Sheikh Muhammad* (1). Even where a Court of first instance should have returned the plaint under clause (b) of s. 53 of the Code of Civil Procedure for amendment and did not do so, but tried the suit without amend-[400]ment, and the suit is before an Appellate Court in appeal, the appellate Court need take no notice of the defect of verification if the case comes under s. 578 of the Code of Civil Procedure. It would be difficult to imagine any case in which a defective verification of a plaint could affect the merits of the case or the jurisdiction of the Court; so that practically, in our opinion, on a mere question of defect of verification, it is not necessary for an appellate Court to pay any attention or take any steps to rectify a defect in the verification of the plaint.

The case which was reported in the *Weekly Notes* for 1896, p. 75, was a peculiar one. In that case the plaint had been returned for an amendment, and when the case was before this Court on appeal the plaint was not on the record, but was with the plaintiff in her private custody, and not in the custody of the Court. We are authorized to say that the learned Judges who were parties to the decision did not intend to suggest that the result of defective verification must necessarily be the dismissal of the suit.

What we have said answers the four questions referred to the Full Bench. With these answers the appeal will go back to the Bench which made the reference.

18 A. 400 = 16 A.W.N. (1896), 115.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

SHANKAR DIAL (Plaintiff) v. MUHAMMAD MUJTABA KHAN AND OTHERS
(Defendants).* [27th May, 1896.]

Civil Procedure Code, s. 17 — Jurisdiction — Muhammadan law — Dower — Suit for recovery of dower debt from the assets of a deceased Muhammadan.

A suit for the recovery of a dower debt from the assets of a deceased Muhammadan being a suit on a contract is subject to the provisions as to jurisdiction contained in s. 17 of the Code of Civil Procedure, 1882.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Abdul Majid* and *Babu Jogindro Nath Chaudhri*, for the appellant.

[401] *Maulvi Ghulam Mujtaba* and *Babu Satya Chandar Mukerji*, for the respondent.

JUDGMENT.

BANERJI and AIKMAN, JJ.—This appeal arises out of a suit brought by *Shankar Dial*, the appellant, who purchased from *Musammat Afsari Begam*, the wife of *Sadar-ud-din Khan*, deceased, a portion of the dower

* First Appeal No. 96 of 1894, from a decree of *Syed Muhammad Jafar Husain Khan*, Subordinate Judge of Bareilly, dated the 12th February 1894.

(1) 18 A. 191.

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16 A.W.N.

(1896) 102.

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18 A. 400 =
16 A.W.N.
(1896) 115.

debt alleged by her to be due out of her husband's estate, and her one-fourth share in that estate as heir to her deceased husband, by a sale-deed, dated the 1st of January 1893. He claimed Rs. 30,000 on account of dower, and he further claimed a one-fourth share in certain moveable and immoveable property alleged to have been left by the deceased Sadar-ud-din. The lower Court dismissed the claim in regard to Rs. 25,000 out of the amount of the dower claimed and decreed the rest of the claim. This appeal has reference only to the dower debt.

On behalf of the respondents objections have been taken under s. 561 of the Code of Civil Procedure, but the only objection argued by Mr. *Ghulam Mujtaba* is that the Court below had no jurisdiction to entertain the claim in so far as it related to the dower debt. This objection was raised in the Court below, but was overruled by that Court. The grounds on which the objection is founded are, that the claim for dower is a claim based on a contract; that the contract in this case was not entered into within the jurisdiction of the Court of the Subordinate Judge of Bareilly; that it was not to be performed within the limits of the jurisdiction of that Court; that the defendants do not, and did not at the time of the institution of the suit, actually and voluntarily reside or carry on business or personally work for gain within the jurisdiction of that Court, and that under s. 17 of the Code of Civil Procedure the suit could not be instituted in the Court of the Subordinate Judge of Bareilly.

The Subordinate Judge was of opinion that the objection was untenable, inasmuch as one of the defendants had a temporary residence in the Bareilly district, and under s. 44 of the Code of Civil Procedure the Court had granted leave to the plaintiff to unite different causes of action in the same suit.

[402] The learned counsel who has appeared here for the appellant does not support the decree of the Court below on the ground set forth in the judgment of the learned Subordinate Judge. Indeed the ground cannot be sustained. The authority of a Court to grant permission to a plaintiff to unite different causes of action in the same suit presupposes the existence of jurisdiction in the Court to entertain suits founded on all those causes of action. The learned counsel for the appellant takes his stand on clause (d) of s. 16 of the Code of Civil Procedure. He argues that although the plaintiff might or might not succeed in the claim advanced by him, his claim as put in the plaint was one for the sale of the moveable and immoveable property of Sadar-ud-din, deceased, in satisfaction of the dower debt, and was therefore a suit for a declaration of right to or interest in immoveable property, within the meaning of the section mentioned above.

We are unable to accede to this contention. It is nowhere alleged in the plaint that the plaintiff's assignor had a charge for her dower debt on any property of her husband, and the prayer in the plaint amounted to no more than a mere claim to recover a money debt out of the assets of a deceased debtor. The plaint contains no prayer for the establishment and enforcement of a charge. All that it asks for is that a decree "may be passed against all moveable and immoveable property, left by Sadar-ud-din Khan, deceased, and that the said amount may be caused to be paid to the plaintiff by attachment and sale of the said property." As we understand the plaint, the prayer is simply for the money claimed and for the recovery of that money by execution in the ordinary course by attachment and sale of the property of the deceased, and not to enforce the claim personally against the defendants. In no sense can such a

case be regarded as a suit for a declaration of a right to or interest in immoveable property within the meaning of clause (d) of s. 16 of the Code of Civil Procedure. In our judgment the Subordinate Judge of Bareilly had no jurisdiction to entertain the claim for the dower debt and on that ground the claim for dower ought to have been dismissed.

[403] We allow the objection under s. 561 of the Code of Civil Procedure and set aside so much of the decree of the Court below as decrees to the plaintiff, Rs. 5,000 on account of the dower debt. The result is that the appeal, which relates only to the dower debt, must fail and it is hereby dismissed with costs. The objections under s. 561 are allowed to the extent indicated above and *quoad ultra* they are dismissed. The respondents will pay and receive costs proportionate to their failure and success.

Appeal dismissed.

18 A. 403 = 16 A.W.N. (1896) 132.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blennerhassett.

SHEO PRASAD AND ANOTHER (*Plaintiffs*) v. LALIT KUAR
(*Defendant*).^{*} [28th May, 1896.]

Cause of action—Plaintiff confined to cause of action set out in his plaint—Burden of proof—Civil Procedure Code, s. 50—Plaint, contents of.

A plaintiff is only entitled to succeed upon the cause of action alleged by him in his plaint. So where plaintiffs came into Court alleging a mortgage of the year 1854 made by their predecessor in title in favour of the defendant and seeking to redeem the mortgage of 1854, and it was found that the plaintiffs had failed to prove the mortgage of 1854, it was held that the plaintiffs were not entitled in that suit to a decree for redemption of other mortgages which might be found to subsist between the parties, but which formed no part of the cause of action upon which the plaintiffs came into Court. *Read v. Brown* (1), *Murti v. Bhol Ram* (2), *Salima Bibi v. Sheikh Muhammad* (3), *Ratan Kuar v. Jiwan Singh* (4), *Parmanand Misr v. Sahib Ali* (5), *Zingari Singh v. Bhagwan Singh* (6), *Krishna Pillai v. Rangasami Pillai* (7), *Govindrav Deshmukh v. Ragho Deshmukh* (8), and *Eshenchunder Singh v. Shamachurn Bhutto* (9), referred to, *Lakshman Bhisaji Sirsekar v. Hari Dinkar Desai* (10), and *Chimnaji v. Sakharam* (11), dissented from.

[F., 3 O.C. 173 ; R., 129 P.L.R. 1904 ; D., 19 A.W.N. 132.]

THE facts of this case sufficiently appear from the judgment of Edge, C. J.

[404] Mr. G. E. Foy, for the appellants.

Mr. Amir-ud-din, for the respondent.

JUDGMENT.

EDGE, C. J.—This was a suit in which the plaintiffs, alleging a mortgage of 1854, claimed the relief of redeeming that mortgage. The defendant denied by his pleadings that there was any mortgage of 1854, and alleged that the plaintiffs held three mortgages over the lands, the first of which

* Second Appeal No. 380 of 1894, from a decree of Maulvi Muhammad Ismail Khan, Subordinate Judge of Ghazipur, dated the 23rd January 1894, confirming a decree of Maulvi Syed Abbas Ali, Additional Munsif of Korantadih, dated the 11th October 1893.

(1) L.R. 22 Q.B.D. 128.

(2) 16 A. 165.

(3) 18 A. 131.

(4) 1 A. 194.

(5) 11 A. 438.

(6) 9 A.W.N. (1889) 187.

(7) 18 M. 462.

(8) 8 B. 543.

(9) 11 M.I.A. 7.

(10) 4 B. 584.

(11) 17 B. 365.

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was made in 1859. The first Court was of opinion that there probably had been a mortgage of 1854, and that the money due under that mortgage was part of the consideration of the mortgage of 1859, and dismissed the suit. If that finding is correct, it is needless to observe that the suit was properly dismissed. If the mortgage of 1859 was in substitution of the mortgage of 1854, part of the consideration being a fresh advance, as was found, and part of the consideration being, as thought by the Munsif, the money due under the mortgage of 1854, the mortgage of 1854 ceased to have any effect in law or in equity, except that the defendant, and not the plaintiffs, could, if necessary, rely on it as a shield. If the Munsif's finding was correct, the plaintiff's claim was a fraudulent one. They were endeavouring to get possession from a usufructuary mortgagee on payment or redemption of the mortgage which had ceased to exist and which had merged in a mortgage for a larger amount. However, this being a second appeal, it is not the finding of the first Court on questions of fact to which we have to attend and which is binding on us; it is the finding of the Court of first appeal, which, according to law and according to the Code of Civil Procedure, is the finding of fact behind which we cannot go in second appeal. Where the finding of the first appellate Court is one of fact and not dependent on the construction of a document or of documents, we have a decision of the Privy Council to bind us, and that decision tells us that a High Court in such circumstances in second appeal must accept, and is bound by, the findings of fact of the lower appellate Court. Now when I come to the finding of fact of the lower appellate Court, it is this, that the plaintiffs have failed to prove any mortgage of 1854. The lower appellate Court rightly apply-
[405]ing the law to that finding dismissed the plaintiffs' appeal which was before it. The plaintiffs have appealed here.

It has been contended by Mr. Foy that, notwithstanding that his clients the plaintiffs failed to prove their cause of action, I use the term advisedly, which they alleged in their plaint, namely, a cause of action, one essential ingredient of which was the proof of the mortgage alleged by them of 1854, they are entitled to a decree to redeem something. They cannot be entitled to a decree to redeem a mortgage which they had failed to prove. It was not their case that there was any other mortgage than the mortgage of 1854. I have said that I use the term "cause of action" advisedly, and I do. No lawyer in England is under any misapprehension since the ruling of the Court of Appeal in *Read v. Brown* (1) as to what the meaning of "cause of action" is. The Full Bench of this Court in 1894 had to consider what was the meaning of the term "cause of action" in the case of *Murti v. Bhola Ram* (2). Five Judges of this Court adopted the view expressed by the Court of Appeal in England in *Read v. Brown*. One Judge of this Court took a slightly different view. In the case of *Salima Bibi v. Sheikh Muhammad* (3) the meaning of the term "cause of action," as employed in the Code of Civil Procedure, was considered by a Division Bench of this Court, which followed the view taken by the majority of the Court in *Murti v. Bhola Ram* and by the Court of Appeal in England in *Read v. Brown*.

The Legislature, conceiving, and I think rightly, that there ought to be some kind of procedure which plaintiffs and defendants should be bound to follow in suits in Civil Courts in India, by a variety of Regulations and Acts attempted to provide from time to time a Code of Civil Procedure.

(1) L.R. 22 Q. B. D. 128.

(2) 16 A. 165.

(3) 18 A. 131.

The present Code of Civil Procedure is known as Act No. XIV of 1882. In s. 50 of that Code the Legislature imperatively directed that plaints should contain certain particulars. The Legislature used the word "must," and, as has been pointed out by a judgment of this Court, which [406] we presume is known in these Provinces, when the Legislature uses "must" instead of "shall," it uses a word which is most strongly imperative. Amongst the particulars which the Legislature has enacted that the plaint must contain is "a plain concise statement of the circumstances constituting the cause of action and where and when it arose." Applying the decision in *Read v. Brown* and the decision of the Full Bench in *Murti v. Bhola Ram* to this case, one essential particular of the plaintiffs' cause of action in this case was the mortgage of 1854. In the cause of action alleged in the plaint or as forming part of it there was absolutely no suggestion of any mortgage other than the mortgage of 1854. That mortgage has been found by the lower appellate Court not to be proved. I do not suppose that any one would suggest that when a plaintiff brings his suit for redemption of a mortgage and the fact is denied that that mortgage ever was made, the *onus* of proof is on the defendant. Any such suggestion as that would be to revolutionize all the principles upon which the rules of evidence have been based for centuries. It is not and never was any part of a defendant's duty to make out a case for the plaintiff either by evidence or admission.

Now it was held by the majority of a Full Bench of this Court in 1876, in the case of *Ratan Kuar v. Jiwan Singh* (1), that plaintiffs who failed to prove the averments upon which their suit was based were not entitled to relief in respect of a portion of the property in suit of which the defendants admitted that they were mortgagees. That was a case in which the plaintiffs alleged a mortgage of 1842 for a certain amount. The defendants denied that mortgage and put it in issue, and on their side alleged a mortgage of the same year of different parcels of land and for a different amount. In *Parmanand Misr v. Sahib Ali* (2) three Judges of this Court agreed in a judgment in which I endeavoured to point out where lay the *onus* of proof in a suit on a mortgage, and that if the plaintiff in a suit on a mortgage failed to prove the mortgage upon which he relied and which he alleged in his plaint, [407] he could not succeed upon the mere fact that the defendant admitted that he was a mortgagee of the land. I also endeavoured to point out that that was the necessary corollary from a decision of the House of Lords in England, and that it was necessary for a plaintiff suing upon a mortgage to prove, if not admitted, that he had, when he brought his suit, a subsisting cause of action. In *Zingar Singh v. Bhagwan Singh* (3) a Division Bench of this Court held in a suit which was for redemption of a mortgage that a plaintiff in such a suit is not entitled to succeed merely because the defendant fails to prove the case he sets up, unless the defendant's pleadings show that on failure to prove a particular defence the plaintiff must be entitled to a decree. The right claimed there was redemption, and part of the cause of action was a mortgage alleged of 1852. On this point Straight, J., said:—"If he (the plaintiff) failed to establish that mortgage, which he as the party seeking relief was bound to do and was the most competent person to do, then his suit must fail."

Although the judgments of this Court upon these points are binding upon this Bench, it is just as well that in this case I should refer to one

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18 A. 403 =
16 A.W.N.
(1896) 132.

(1) 1 A. 194.

(2) 11 A. 488.

(3) 9 A.W.N. (1889) 187.

1896
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18 A. 403=
16 A.W.N.
(1896) 132.

or two judgments of other Courts to show that the views which have been expressed and maintained of recent years by most of the Judges of this Court are not absurd views to the minds of others and are not views which are peculiar to the Judges of the High Court at Allahabad. In *Krishna Pillai v. Rangasami Pillai* (1) a Division Bench of the Madras High Court said:—"We agree with West, J., in *Govindro Deshmukh v. Ragho Deshmukh* in holding that the plaintiff failing to establish the mortgage upon which the suit was based should not be allowed to fall back on some other, as to which admissions may have been made by the defendants in other proceedings." The case which was referred to is reported in I.L.R., 8 Bom., 543. In that case West and Nanabhai Haridas. JJ., held that "where a particular instrument is sued upon as the basis of a right, it is incumbent on a plaintiff to establish his case on that particular cause of action, and not on a [408] cause of action merely bearing the same name or of the same description and so included in the same class." That, in my opinion, is good law, and sound common sense and sound justice. If it were otherwise, a plaintiff might come into Court and seek to redeem a fictitious mortgage, and he might succeed on some other mortgage which was not in suit at all in the particular case. The object of s. 50 of the Code of Civil Procedure is to give information to the defendant as to the case which he has got to meet. In order to provide as far as possible that that information shall be truthfully given, the Legislature has enacted that the plaint must be signed and must be verified by some one possessing a knowledge of the facts. The Legislature had some object in so enacting. Their Lordships of the Privy Council as far back as 1866 in *Eshenchunder Singh v. Shama Churn Bhutto* (2) at p. 24 said:—"Their Lordships are obliged to disapprove of the decision come to by the High Court. They desire to have the rule observed that the state of facts and the equities and ground of relief originally alleged and pleaded by the plaintiff shall not be departed from." The state of facts alleged by the plaintiffs in this case was a mortgage to the defendant made in 1854. The equities alleged were that the time had arrived for redemption of that mortgage and that the plaintiffs were entitled to redeem. The ground of relief was the right to redeem a mortgage of 1854, and no other mortgage. Applying that ruling of the Privy Council to this case, we should not be at liberty, even if we were not bound by the rulings of our own Court, to give the plaintiffs redemption of a mortgage which they had not asked to redeem, and to decree a suit in which all the facts going to the plaintiffs' alleged cause of action had been found against them.

Mr. Foy relied upon two cases to be found in the Bombay Reports. The first of those cases was that of *Lakshman Bhisaji Sirsekar v. Hari Dinkar Desai* (3) in which the Bombay High Court, of course not having before them the guidance of the decision in *Read v. Brown* in the Court of Appeal in England, apparently [409] held that it was immaterial to a plaintiff's cause of action on a mortgage that he failed to prove the mortgage which he alleged. I cannot help thinking that if the learned Judges who decided that case had had an opportunity of considering the judgments of the present Master of the Rolls and of Fry and Lopez, L.JJ., as to what constituted a cause of action, they never could have come to the decision at which they arrived. The other Bombay case was *Chimanji v. Sakharam* (4). In that case a Division Bench of the Bombay

(1) 18 M. 462.

(2) 11 M.I.A. 7.

(3) 4 B. 584.

(4) 17 B. 365.

High Court, without considering what was the cause of action on which the plaintiffs came into Court and whether they had proved that cause of action, apparently followed the decision in *Lakshman Bhisaji Sirsekar v. Hari Dinkar Desai* (1). So far as one can really understand the decision in the case reported in I. L. R., 17 Bombay, it would appear to be immaterial whether a plaintiff proved the cause of action which he alleged when suing on a mortgage or in respect of a mortgage, so long as he did not resort to dishonest artifices to procure evidence for his case and the position of mortgagor and mortgagee was admitted by the defendants, but not under the mortgage alleged by the plaintiff. If that were the law, clause (d) or s. 50 of the Code of Civil Procedure might as well be struck out of the statute book.

In this case the rulings of this Court bind us as to the view of the law which we should follow; and whether I agreed with them or not I should feel myself bound by them and should not question them. Settled principles of law administered by a Court of Justice ought not to be lightly disturbed or doubt cast upon them without very sufficient reason. Not only do I see absolutely no reason for the slightest doubt as to the correctness of those decisions of this Court, but I entirely approve of them. They are in accordance with the views of the Privy Council; they are in accordance with the intentions of the Legislature and with principles of sound common sense and justice, according to which a man who brings a false case, or even brings a true case and fails to prove it, should not [410] get a decree on a different cause of action from that alleged by him, and a cause of action which he has repudiated in the Court of first instance and in the Court of first appeal, and only relies on as an off-chance in the Court of second appeal. I would dismiss this appeal with costs.

BLENNERHASSETT, J.—I concur.

Appeal dismissed.

18 A. 410 = 16 A.W.N. (1896) 126.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Banerji.

SUNDAR SINGH AND OTHERS (*Plaintiffs*) v. GHASI AND OTHERS
(*Defendants*).^{*} [30th May, 1896.]

Civil Procedure Code, ss. 278, 283—Execution of decree—Application in execution department—Separate suit—Remedy under s. 283 not excluded by previous application under s. 278.

The provisions of s. 278 of the Code of Civil Procedure and the sections immediately succeeding are not exclusive of the remedy by suit. *Man Kuar v. Tara Singh* (2) considered.

[F., 4 A.L.J. 574 = A.W.N. (1907) 207; Appr., 23 B. 266 (270).]

THIS was a suit brought by Sundar Singh and others, who claimed to be owners of a certain zamindari share, for a declaration that such property, which had been attached by one Ram Dayal as the property of Ghasi and others of his judgment-debtors, was not liable to attachment

^{*} Second Appeal No. 420 of 1894, from a decree of Syed Siraj-ud-din, Additional Subordinate Judge of Mainpuri, dated the 7th March 1894, reversing a decree of Babu Madho Das, Munsif of Etawah, dated the 15th December 1892.

(1) 4 B. 584.

(2) 7 A. 583.

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16 A.W.N.
(1896) 132.

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18 A. 410=
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(1896) 126.

and sale in execution of Ram Dayal's decree. The decree-holder, the judgment-debtors and certain other co-sharers in the village in which the property in suit was situated were made defendants.

The decree-holder and the judgment-debtors each filed a similar defence to the suit, that the share in question was owned and possessed by the judgment-debtors and had never been in the possession of the plaintiff.

The Court of first instance (Munsif of Etawah) found twelve years' adverse possession in favour of the plaintiff, and decreed the claim for removal of the attachment.

[411] The judgment-debtors appealed, and, as their principal ground of appeal, pleaded that the plaintiff's claim was bad, inasmuch as he had not taken objection to the attachment under s. 278 of the Code of Civil Procedure.

The lower appellate Court (Additional Subordinate Judge of Mainpuri), on the issue raised by the above-mentioned ground of appeal, decreed the appeal and dismissed the plaintiff's suit, holding that in view of the rulings in *Man Kuar v. Tara Singh* (1) and *Dammai Singh v. Gya Dat* (2) the suit was premature.

The plaintiff thereupon appealed to the High Court.

Mr. *J. Simeon*, for the appellants.

Pandit *Baldeo Ram Dave*, for the respondents.

JUDGMENT.

BLAIR and BANERJI, JJ.—This is a suit brought under s. 42 of the Specific Relief Act, 1877 (Act No. I of 1877). The property, which has been claimed by a decree-holder as property answerable in execution for a debt found to be due to him, is one of which attachment had taken place but possession remained with the plaintiffs. The prayer was in terms a prayer for the release of the plot attached. The suit of the plaintiff was decreed by the Munsif, and when it went on appeal before the Subordinate Judge of Mainpuri, he held that there was no cause of action because of certain rulings of this Court; that the only course open to the plaintiff was to take objection in the execution department, and on failure thereof to bring the suit contemplated by s. 283 of the Code of Civil Procedure. The ruling upon which he mainly relied is the ruling in *Man Kuar v. Tara Singh* (1). In that case Sir Comer Petheram, the then Chief Justice, in delivering the judgment of the Court, drew from the peremptory language of s. 244 of the Code the inference that all such questions which were then before him should be decided in the execution department and not otherwise. S. 244 has by a continuous stream of authorities been held to apply only to cases of dispute between decree-holders and judgment-debtors or the representatives of either of them, and in no [422] case applies to matters involving the rights and interests of third parties. The sections relating to the claims of third parties are s. 278 and the succeeding sections, and the number of cases that have arisen in cases of claim or objection by third parties is very numerous. It is quite true that that section provides a means by which, without the trouble and expense and delay of instituting fresh suits, a person whose interests are assailed in the execution department may seek his remedy, and only then, upon failure of his claim or objection, may be compelled to have recourse to the provisions of s. 283 to declare his rights. Curi-

(1) 7 A. 583.

(2) 7 A.W.N. (1887) 193.

ously enough the respondent in this case had to go back to a ruling a dozen years old to obtain colour for his suggestion that the remedy under s. 278 is an exclusive and not a cumulative remedy. It seems to us upon general principles that no person can be excluded from his right of suit by the provision of a means of a special kind in certain circumstances, and we look in vain for any indication that the provisions of s. 278 and the succeeding sections are intended to be exclusive. If in the conclusion to which we have arrived we are in conflict with the ruling in *Man Kuar v. Tara Singh*, we have the entire agreement of the present Chief Justice in the view we have taken, and we think also that the *cursus curiae* has run in the same direction for many years. Had the Legislature intended that the provisions of s. 278 of the Code of Civil Procedure and the succeeding sections should be of an exclusive kind, one short sentence would have made the necessary correction. It comes to this, that the Subordinate Judge in appeal has decided the case wrongly upon a preliminary point. We find that there is a cause of action in this case. We set aside the dismissal of the suit and remand the case to the lower appellate Court for re-trial according to law, under s. 562 of the Code of Civil Procedure. Costs to abide the result.

Appeal remanded.

18 A. 413 = 16 A.W.N. (1896) 129.

[413] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blennerhassett.

JAGAN NATH (*Plaintiff*) v. GANESH AND OTHERS (*Defendants*).
[2nd June, 1896.]

Execution of decree—Civil Procedure Code, s. 278 et seqq.—Effect of order on objection under s. 278.

An order in favour of one of several decree-holders on an objection under s. 278 of the Code of Civil Procedure does not enure for the benefit of other decree-holders who are not parties to the proceedings under s. 278. *Badri Prasad v. Muhammad Yusuf* (2) referred to.

[F, & Appr. 31 M. 163 (168) = 18 M.L.J. 26 (30) = 3 M.L.T. 256 (259).]

ONE Jagan Nath, brought a suit for a declaration that certain property, which he alleged he had purchased from Shugan Chand, was not liable to attachment and sale in execution of a decree held by Jagmandar Das against Shugan Chand. In another proceeding between this plaintiff and a different decree-holder it had been held by an order under s. 281 of the Code of Civil Procedure that the present plaintiff was not the vendee of the property claimed. The Court of first instance held that the decision upon the former application, no suit having been brought within limitation to contest that order, was final, and binding on the plaintiff in this present suit, and accordingly dismissed the plaintiff's claim. The plaintiff appealed, and the lower appellate Court affirmed the decree of the first Court and dismissed the appeal. The plaintiff appealed to the High Court.

* Second Appeal No. 476 of 1894, from a decree of H. Bateman, Esq., District Judge of Saharanpur, dated the 8th February 1894, confirming a decree of Babu Sanwal Singh, Subordinate Judge of Sharanpur, dated the 2nd November 1892.

(1) 1 A. 381.

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Pandit *Moti Lal*, for the appellant.Pandit *Baldeo Ram Dave*, for the respondents.

APPEL-

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18 A. 413=
16 A.W.N.
(1896) 129.

EDGE, C.J., and BLENNERHASSETT, J.—The order which is final under s. 283 of Act No. XIV of 1882 is final only as between the parties to the application in which the order is made and their representatives. An order in favour of a decree-holder on an objection under s. 278 does not enure for the benefit of the other decree-holders who are not parties to the proceedings. The District Judge appears to have thought that a decree-holder who obtains an order in his favour under these sections may be treated as representing all the other decree-holders holding decrees [414] against the judgment-debtor and seeking to sell the same property. This is not the case of an order having been made in favour of a decree-holder at a time when several other decree-holders had obtained attachment of the same property. We say nothing as to what might be the effect of the order under s. 280, s. 281 or s. 282 in favour of one decree-holder so far as the other decree-holders were concerned who had obtained attachment. This view is consistent with the view taken by the Full Bench of this Court in *Badri Prasad v. Muhammad Yusuf* (1). We set aside the decrees below and remand this case under s. 562 of the Code of Civil Procedure to the first Court to be disposed of according to law. Costs of this appeal and in the Court below will abide the result.

Appeal decreed and cause remanded.

18 A. 414=16 A.W.N. (1896) 116.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Blair.

RAM DHAN SINGH (*Plaintiff*) v. KARAN SINGH AND ANOTHER
(*Defendants*).^{*} [3rd June, 1896.]

Civil Procedure Code, s. 522—Award—Appeal—Grounds of appeal from a decree passed upon a judgment in accordance with an award.

Held that an appeal would not lie from a decree passed upon a judgment given according to an award merely because there might have been some irregularities in the procedure of the arbitrator, such alleged irregularities having been considered by the Court which passed the decree and having been found by that Court not to be of a such nature as to render the award no award in law. *Jagan Nath v. Mannu Lal* (2), *Bindessuri Pershad Singh v. Jankee Pershad Singh* (3) and *Lachman Das v. Brijjpal* (4) referred to.

[R., 18 A. 422 (426) ; 5 O.C. 13 (15).]

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Gobind Prasad*, for the appellant.

Mr. *J. Simeon* and Munshi *Badri Das*, for the respondents.

JUDGMENT.

KNOX and BLAIR, JJ.—This is a first appeal from an order passed by the Judge of Shahjahanpur whereby he remanded a case for decision by

^{*} First Appeal No. 5 of 1896, from an order of W. F. Wells, Esq., District Judge of Shahjahanpur, dated the 21st November 1895.

(1) 1 A. 381.

(2) 16 A. 231.

(3) 16 C. 482.

(4) 6 A. 174.

the Court of the Munsif, in which Court that case [415] was originally instituted. After institution the parties to the suit referred all the matters in dispute between them to arbitration. For some reason or another the first reference to arbitration never reached the stage of an award capable of being embodied in a decree of the Court. A second reference was made, and in this again all the matters in dispute were referred to a fresh arbitrator, and we are told that in the order of reference it was set out that the arbitrator was to decide these matters according to his good faith and conscience. The arbitrator thus selected received the reference on the 13th of February 1895. He fixed the 18th of February for the hearing, and issued a process calling upon the parties to appear on that date together with such evidence as they might have. The record shows that the process was duly served upon the defendants, who are now respondents to this appeal, and who stand to one another in the relation of father and son. The respondents said that they could not attend on the date fixed and asked for another date to be appointed. As a matter of fact another date was fixed, and the arbitrator in the return made by him to the Court says distinctly that a process was issued informing the parties of the date and that they did receive notice of it. Moreover upon the date fixed one of the defendants did appear and attend the proceedings before the arbitrator. According to the arbitrator's return that defendant produced no evidence of any kind, and the arbitrator proceeded to decide the matter upon the statements made before him by the appellant and by certain persons, whom he describes as reliable people, who had been present at the marriage ceremonies. The suit between the parties was a suit for damages on account of breach of promise of giving in marriage.

We are asked by the vakil for the respondent to regard the return made by the arbitrator as a piece of waste-paper upon which no reliance can be placed, and to hold that the various matters which he certifies as having been done in proper order were never so done at all. We see no reason why we should treat the return of a gentleman who is stated to be a man of position and reliability, who was by the act of the parties themselves elevated [416] into the position and status of a court to decide the matters in dispute between them, as though he were an unreliable and irresponsible person. It seems to us that we should extend the same consideration and courtesy, if not more, to the proceedings of arbitrators that we would to the proceedings of a Court. If indeed such proceedings should on the face of them show that they were unreasonable or manifestly improper, it might then be contended, and the contention would be listened to, that the arbitrator had been guilty of misconduct. Where the arbitrator certifies that all was done in order, and there is no evidence to show that it was not so done, we shall attach the same presumption that we would to the proceedings of a court of justice.

Upon the return being made, the respondents filed a paper setting out five objections. It appears that the Munsif considered these objections and characterised them as being absurd. Looking to the return made and to the absence of any evidence to the contrary, we consider that the epithet which the Munsif applied to them, was under the circumstances, justified. He might have added that they were misleading, if not false. The plaintiff did produce evidence before the arbitrator. The arbitrator did inform the defendants of the date and place of arbitration. These facts were denied in the objections put forward, and, as the denial was not supported by any evidence, the learned Munsif was right in not giving the denial preference over the recorded return of the arbitrator to the

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contrary. The Munsif held that there had been no misconduct. He gave judgment according to the award.

An appeal was preferred to the learned Judge, who apparently fell into the error of considering that an arbitrator, selected and appointed as this arbitrator was, was bound to put upon the record every step taken by him with the same method and regularity which we should expect, but do not always secure, in proceedings before courts of justice. He overlooked the certificate of the arbitrator certifying that a process had been issued upon the defendants and received by the defendants, and, because he did not find the process upon the papers in the record, he held that there was [417] no proof that the defendants were informed of the date fixed for arbitration. A manifest fact to the contrary which he overlooked was the fact that one of the defendants did appear before the arbitrator. Indeed, from the learned Judge's own judgment we gather that the Judge felt satisfied that both defendants had received notice, for he says about the second defendant who did not appear that he inclined to the belief that the defendant Karan Singh had notice of the date of arbitration and purposely absented himself in order to have a ground for objection to the award if adverse to him. It would be no wonder if gentlemen of position and respectability were to decline the office of arbitrator if they understood that their award was so completely at the mercy of shifty litigants, and that such persons had only to absent themselves to put an end to the award if it proved adverse to them. The Judge admitted the appeal, and on the ground that the award was not a valid one set it aside and passed the order of remand objected to.

In appeal before us it is contended that no appeal lay to the Judge. We think that under the circumstances no appeal did lie. The decree passed by the Munsif was in accordance with the award, it was not in excess of it, and it was passed after the objections raised under s. 521 of the Code of Civil Procedure had been decided by the Munsif and held to be of no effect. It was not therefore the case of a decree given without a judicial determination whether there had or had not been an award. Mr. Simeon, who appears for the respondents, pressed us with the case of *Jagan Nath v. Mannu Lal* (1). In that case the contention was that the person who had made the reference to arbitration was not competent under the circumstances to make the reference, and that, as it was he who was dead, the reference and the award were not binding after his death. In other words, the Judge who entertained that appeal had to deal with a memorandum which raised the question whether there had been any valid submission to arbitration, and whether in consequence there had been any arbitration or award [418] at all, not whether there had been in the course of the arbitration certain irregularities of procedure, or whether there had been any mis-appreciation of evidence. We are also referred to the case of *Bindessuri Pershad Singh v. Jankee Pershad Singh* (2). The learned Judges who decided that case held that an appeal did lie under the circumstances. The case they had to deal with was that of an award filed under the provisions of s. 526 of the Code of Civil Procedure, and the contention raised in the appeal was that the Subordinate Judge had no jurisdiction to entertain the application, that the submission to arbitration was indefinite and vague, and the powers given to the arbitrator were not defined. These were matters which, as they went to the root of the question

(1) 16 A. 231.

(2) 16 O. 482.

whether there had been any submission to arbitration, and in consequence any award, the Judge had jurisdiction to enter upon and determine in appeal. The only plea in that case which at all corresponds with the plea taken in the present case was the plea that the arbitrator took no evidence and proceeded in the absence of the objector. The learned Judges passed this plea over in entire silence, and, we think, rightly so, for we find that the Subordinate Judge had considered the last named objections and come to a determination upon them. The raising of them in appeal under such circumstances would not by itself give room for an appeal to be entertained. The Full Bench decision of this Court in *Lachman Das v. Brijpal* (1) laid down that an appeal lies from a decree passed in accordance with an award when such decree is impugned on the ground that there was no award in law or in fact upon which judgment and decree could follow under s. 522 of the Code of Civil Procedure. To use the words employed by Mr. Justice Oldfield:—“An appellate Court must so far look behind the decree as to see whether the thing called an award is an award which the Code of Civil Procedure contemplates.” The objection in that case was that an umpire had been appointed by the Court to sit with the arbitrators when the reference gave no power to the Court to appoint an umpire. We have looked into [419] every one of the pleas raised before the lower appellate Court in appeal. They are all pleas which raise the question of misconduct or corruption or irregularity in procedure. Not one of them raised the question that there had been any defect in submission or any want of determination by the Subordinate Judge upon the pleas raised. So far as the pleas were concerned, there had been a valid submission to arbitration, and the only defects alleged in the award were defects of detail and procedure which the Court below held to be unfounded. There had been an award proved good and valid in spite of the objections raised. Judgment had been given in accordance with that award and no appeal lay. We accordingly decree this appeal with costs, set aside the decree of the lower appellate Court and restore that of the Munsif.

Appeal decreed.

18 A. 419 = 16 A.W.N. (1896), 121.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Aikman.

RAM DAS (*Objector*) v. THE SECRETARY OF STATE FOR INDIA IN
COUNCIL (*Decree-holder*.)* [5th June, 1896.]

Civil Procedure Code, s. 411—Suit in forma pauperis—Court fee payable out of the subject-matter of the suit—Mode of realization of Court-fee by Government.

In a suit brought in *forma pauperis* the plaintiff was successful, and the decree directed that the court-fee which would have been payable had the suit not been in *forma pauperis* should be the first charge on the property the subject-matter of the suit and should be recoverable from the defendant in the same manner as the costs of the suit. *Held*, that it was not necessary for Government to bring a separate suit to recover the court-fee, but that the same might be realized from the property the subject of the suit by proceedings in execution.

[R., 33 C. 1040 (1046) = 10 C.W.N. 857 (861).]

* First Appeal No. 44 of 1894, from an order of Babu Baijuath, Subordinate Judge of Agra, dated the 2nd December 1893.

(1) 6 A. 174.

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Knox, J.

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(1896) 121.

THE facts of this case sufficiently appear from the judgment of

Babu *Durga Charan Banerji* for the appellant.

Mr. *E. Chamier* for the respondent.

JUDGMENT.

KNOX, J.—This is a first appeal from an order passed by the Subordinate Judge of Agra. The circumstances which led up to the order appealed from are as follows :—

[420] Mahant Ram Das was permitted to use in *forma pauperis* one Ram Anuj Das. He obtained a decree for the property claimed, and that decree further directed that “under s. 411 of the Code of Civil Procedure the amount of court-fee due to the Government be the first charge upon the property the subject-matter of this suit, and be recoverable from the defendant in the same manner as the costs of this suit.” Execution proceedings were instituted by the Secretary of State with a view to the recovery of the court-fees, and the Court in which they were instituted was asked to realize the amount decreed by attachment and sale of the judgment-debtor's property entered in the inventory annexed to the petition. The property entered in the inventory was property the subject-matter of the original suit. Orders were issued to an amin to attach the property mentioned above. That officer returned a report to the effect that the property in question was no longer in the possession of the judgment-debtor, but had passed into the possession of Ram Das. Ram Das filed an objection stating that the application for execution should not be granted in the manner prayed for, inasmuch as the decree distinctly specified that the costs asked for should be recovered from Ram Anuj Das, and the property applicant sought to attach was no longer the property of Ram Anuj Das. This objection was disallowed by an order, dated the 2nd of December, 1893, and it is from this particular order that the present appeal has been filed.

The Subordinate Judge holds that the property was liable and could be attached irrespective of the fact whether or not it was in the possession of the person ordered by the decree to pay the court-fees.

It is contended that the Secretary of State is not authorised to recover court-fees from any person other than the person ordered by the decree to pay the same, and that if the property be liable on the ground that the court-fees have been declared a first charge upon it, then the liability, if it can be enforced at all, can only be enforced by a separate suit in the same way as any other charge.

[421] It is unfortunate that the language used in the decree did not follow the language of s. 411. The word “also” has been omitted, and its omission has no doubt helped the contention advanced by the appellant. By s. 411 of the Code of Civil Procedure the court-fees which would have been payable had not the plaintiff been allowed to sue as a pauper are to be calculated by the Court should the plaintiff succeed. When so calculated the amount is declared by operation of law to be a first charge on the subject-matter of the suit. But this is not all that the law provides. The amount is also one which shall be recoverable by the Government from any party ordered by the decree to pay the same in the same manner as costs of a suit are recoverable.

Mr. Justice West in delivering judgment in *Ganpat Putaya v. The Collector of Kanara* (1) upon the law as it stood in 1875, when s. 309

of Act No. VIII of 1859 was in force, said that the provision in that section declaring that the fees shall be recoverable by Government from any party ordered by the decree to pay the same in the same manner as costs of suit are recoverable did not preclude the Crown from urging its prerogative and insisting upon its right to precedence. He gave the Crown the first claim on the proceeds of the pauper suit. It was upon this case probably that the words :—"Such amount shall be a first charge on the subject-matter of the suit" were introduced into s. 411 of the present Code.

I am not prepared to accede to the contention that the first charge thus created can only be enforced by a separate suit brought by the Government. I do not think this was the intention of the Legislature. The intention appears to me to have been to give the Secretary of State a right to recover the court-fees in the same way as if they had been costs in the suit, either generally from the person or property of any one ordered by the decree to pay the same, or from the property the subject-matter of the suit. It may be urged that if this was the intention of the Government it could have been expressed in clearer terms. This is true: but as I believe [422] this to have been the intention of the Legislature, I would give effect to it.

AIKMAN, J.—The question for decision in this appeal is one of considerable difficulty. The wording of the latter portion of s. 411 of the Code of Civil Procedure is not so clear as it might be, but I cannot think that the intention of the Legislature was to compel Government to bring a separate suit in a case like the present to recover the value of the court-fees which the plaintiff was relieved from paying on his plaint owing to his being a pauper. The result of such a suit would be a foregone conclusion, and it would only entail additional expense and trouble. I therefore concur in the order of my brother Knox. I may add that if the lower Court in its decree in the pauper suit had made the plaintiff as well as the defendant liable for the value of the Court-fees, as I think ought to be done in such cases, the present difficulty would not have arisen.

By the Court.

We dismiss this appeal with costs.

Appeal dismissed.

18 A. 422 (F.B.) = 16 A.W.N. (1896) 137.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Aikman and Mr. Justice Blennerhassett.

IBRAHIM ALI AND ANOTHER (*Plaintiffs*) v. MOHSIN ALI (*Defendants*).^{*}
[8th June, 1896.]

Civil Procedure Code, ss. 521, 522—Award—Decree on judgment in accordance with award—Appeal.

Where a decree has been made upon a judgment given upon an award and is not in excess of and is in accordance with the award, an appeal from such decree will lie on the ground that the so-called award upon which the judgment and decree are based is from one cause or another no award in law.

^{*} First Appeal No. 146 of 1894, from a decree of H.G. Pearse, Esq., District Judge of Agra, dated the 2nd April 1894.

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18 A. 419 =
16 A.W.N.
(1896) 121.

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Where an application to set aside an award on the ground of the misconduct of an arbitrator has been made under s. 521 of the Code of Civil Procedure, and such application has been refused after judicial determination and a decree made under s. 522 of the Code, which is in accordance with and not in [423] excess of the award, no appeal based upon any similar ground will lie from the decree so made. But an appeal will lie in the case last mentioned where, an application to set aside the award on the ground of misconduct of the arbitrator having been made, the Court has passed its decree without considering such application, or where the Court has not allowed sufficient time to the parties to file objections to the award. *Bhagirath v. Ram Ghulam* (1) approved. *Moharajah Joymungul Singh Bahadoor v. Mohun Ram Marwaree* (2), *Nandram Daluram v. Nemchand Jadarchand* (3) and *Luchman Das v. Brijjal* (4) referred to.

[F., 16 Ind. Cas. 595; R., 29 A. 457 = 4 A.L.J. 455 = A.W.N. (1907) 117; 29 A. 584 = 4 A.L.J. 450 = A.W.N. (1907) 184; 22 A.W.N. 195; 19 Ind. Cas. 348 (352); 2 N.L.R. 81 (83); 5 O.C. 13 (15); 6 S.L.R. 168 (175).]

THE plaintiffs in the suit out of which this reference arose were sons of a certain *waqif*, and brought their suit under s. 539 of the Code of Civil Procedure against their brother the *mutawalli* of the endowed property, charging him with various acts of misconduct in the management of the property and praying as their principal reliefs that a new manager might be appointed for the endowed property; that the defendant might be called on to render accounts, and that instructions might be given for the future management of the endowed property.

The defendant filed a lengthy written statement, into the details of which it is not necessary to enter, for after the framing of issues by the Court the parties agreed that the case should go to arbitration.

Three arbitrators were appointed, two of whom agreed in delivering an award in favour of the *mutawalli* defendant, while the third arbitrator delivered a dissentient opinion in favour of the plaintiffs. Objections were taken by the plaintiffs to the award, these objections being mainly as to certain alleged irregularities in the procedure of the arbitrators, which, it was said, amounted to misconduct on their part. The objections did not amount to an allegation of any circumstance such as would have rendered the award void *ab initio*.

The Court (District Judge of Agra) considered the plaintiffs' objections, and held that the acts attributed to the arbitrators, even if considered as proved, amounted only to irregularities, which would not vitiate the award and which must be considered to have been waived, inasmuch as no objection was taken at the time when [424] the arbitration was going on. The Court accordingly overruled the objections and passed a decree in accordance with the award of the majority of the arbitrators.

Against this decree the plaintiffs appealed to the High Court, urging similar objections to those which they had filed in the Court below against the award. On the appeal coming on for hearing before a Division Bench a preliminary objection was raised that no appeal lay under the circumstances of the case. Upon this objection being raised, the following order of reference was passed:—

BANERJI and AIKMAN, JJ.—“This is an appeal from a decree made upon a judgment given in accordance with an award of arbitrators. It is not alleged that the decree is in excess of, or not in accordance with, the award. The objections raised in the Court below in reference to the award were objections under s. 521 of the Code of Civil Procedure imputing misconduct to the arbitrators. They were considered by the

(1) 4 A. 283.

(8) 17 B. 357.

(2) 23 W.R. 429.

(4) 6 A. 174.

Lower Court and overruled. The same objections have been repeated in the memorandum of appeal before us. The first question which arises for consideration is whether an appeal lies from the decree on the grounds on which this appeal has been preferred. The question is one of difficulty, and the rulings of the different High Courts on the point are not unanimous. In this Court also there has been a conflict of decisions on the point. We may refer to the ruling of the Full Bench in *Lachman Das and another v. Brijpal and another* (1), to *Bhagirath v. Ram Ghulam* (2), *Muhammad Ismail Khan v. Imam Ali Khan* (3), *Sreenath Ghose v. Raj Chandra Paul and others* (4) and the ruling of their Lordships of the Privy Council in *Maharajah Joymungul Singh Bahadur v. Mohun Ram Marwaree* (5). In view of these conflicting rulings and the importance of the question, we refer it to a Full Bench, and we direct that this appeal be laid before the Honorable the Chief Justice for the appointment of a Full Bench to decide the question."

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[425] The reference was accordingly laid before a Full Bench of the whole Court.

Babu Jogindro Nath Choudhri for the appellants.

Munshi Ram Prasad for the respondent.

The judgment of the Court [EDGE, C.J., KNOX, BLAIR, BANERJI, AIKMAN and BLENNERHASSET, JJ.] was delivered by EDGE, C. J.

JUDGMENT.

The plaintiffs have brought an appeal from a decree which was passed on a judgment given in accordance with an award which had been made by two out of three arbitrators who had been appointed by an order of Court under Chapter XXXVII of the Code of Civil Procedure. The order of reference provided for an award being made by the majority. The grounds of appeal made allegations of misconduct against the arbitrators. It is not necessary to consider whether the matters alleged, if true, amounted to misconduct within the meaning of s. 521 of the Code of Civil Procedure. A preliminary objection was taken to the hearing of the appeal on the ground that the concluding sentence of s. 522 of the Code prohibited the appeal. The question as to whether an appeal could be entertained from a decree made in accordance with section 522 of the Code on the ground of misconduct of the arbitrator or arbitrators was referred to the Full Bench. We may mention here that against the award which was made in this case objections were duly taken under s. 521 of the Code in the Court below and that the Court heard and determined those objections, and having determined them gave judgment in accordance with the award. One of those objections raised the question of the alleged misconduct of the arbitrators.

On behalf of the respondent it was contended that a decree which was in accordance with s. 522 was under all circumstances unappealable.

On behalf of the appellants it was contended that when objections are taken under s. 521 to an award an appeal lies from a decree made under s. 522 on a judgment given in accordance with that award, whether or not the Court acting [426] under s. 522 heard and determined the objections raised under s. 521.

In the course of the argument the following cases were cited :—
Anund Mohun Paul Chowdhry v. Ram Kishen Paul Chowdhry (6), *Ramo-*

(1) 6 A. 174.

(4) 8 W.R. 171.

(2) 4 A. 283.

(5) 23 W.R. 429.

(3) 8 A.W.N. (1888) 131.

(6) 2 W.R. 297.

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noogra Chobey v. Musammut Futmoota Chobayan (1), *Sreenath Ghose v. Raj Chunder Paul* (2), *In the matter of the petition of Sheikh Ilahi Bax* (3), *Muhammad Ismail Khan v. Imam Ali Khan* (4), *Kirpa Ram v. Laljit* (5), *Ram Dhan Singh v. Karan Singh* (6), *Sashti Charan Chatterjee v. Tarak Chandra Chatterjee* (7), *Maharajah Joymungul Singh Bahadoor v. Mohun Ram Marwaree* (8), *Boonjad Muthoor v. Nathoo Shahoo* (9), *Lachman Das v. Brijpal* (10), *Venkayya v. Venkatappayya* (11), *Nandram Daluram v. Nemchand Jadavchand* (12), *Jagan Nath v. Mannu Lal* (13) and *Sujan Rai v. Jhabba* (14).

Some of these cases appear to us to have little or no bearing on the point before us. The case before their Lordships of the Privy Council, *viz.*, *Maharajah Joymungul Singh Bahadoor v. Mohun Ram Marwaree* (8) was one in which the Court which had made the order for reference had not allowed sufficient time for the filing of objections to the award. It is obvious from the judgment in that case that their Lordships of the Privy Council considered that if the Court which made an order of reference did not allow sufficient time for filing objections to the award when made, an appeal lay; and it may be inferred from that judgment that, when the Court had heard and determined objections filed to the award and then made a decree in accordance with the award, no appeal lay in respect of any of the matters included in the objections.

The decree which is unappealable by reason of section 522 of the Code is a decree made on a judgment given upon an award, and [427] which is not in excess of, and is in accordance with, the award. Now in some of the cases to which we have been referred there was no award. A decree which purports to be passed under section 522 on a document which is not in fact an award is a decree the appeal against which is not prohibited. There must be an award for the prohibition of section 522 to apply. As was pointed out by the Bombay High Court in *Nandram Daluram v. Nemchand Jadavchand* (12), where three only out of four arbitrators who were appointed to make an award, professed to make an award, the result was that there was no valid award, in fact, no award which was not void *ab initio*. Arbitrators are tribunals with limited powers. Their powers must be exercised in accordance with the agreement of reference and the order of the Court, and within the period allowed by the Court, and before the Court has by order superseded the arbitration. What we mean is that, if the order requires that the award shall be by a majority of the arbitrators agreeing, it is no award if it is not made by such majority. In the case of a private arbitration, if by the agreement of reference the award is to be made by all the arbitrators, it is no award unless it is made by all the arbitrators, and unless they all agree in it. If the power of the arbitrators is revoked, as, for example, by the Court passing an order superseding the arbitration under Chapter XXXVII of the Code, or if the period fixed for making the award has expired before the award is made, the arbitrators have no longer seisin of the reference, and they are *functi officio* and cease to have any more power to make an award than the man in the street. In such cases any award which they might purport to make would be void *ab initio*. It

(1) 7 W.R. 205.

(3) 5 B.L.R. App. 75.

(5) 12 A.W.N. (1892) 151.

(7) 8 B.L.R. 315.

(10) 6 A. 174.

(13) 16 A. 231.

(8) 23 W.R. 429.

(11) 15 M. 348.

(14) 13 A.W.N. (1893) 45.

(2) 8 W.R. 171.

(4) 8 A.W.N. (1883) 131.

(6) 18 A. 414.

(9) 3 C. 375.

(12) 17 B. 357.

would in fact be no award in the arbitration. It being a condition precedent to the non-appealability of a decree under section 522 of the Code that there should have been an award, it follows that where there was no award, in such cases as we have put, the making of the decree was without jurisdiction, and an appeal lay. We do not mean to imply that the instances to which we have referred are exhaustive of the cases in which the document purporting to be an [428] award would in reality be no award. In the case of *Lachman Das v. Brijpal* (1), which, being a Full Bench decision of this Court, was pressed upon us, there was in fact no award. An umpire whom the Court was not authorized in that case to appoint was appointed by the Court and had acted, and it followed that the award made by him was no award. Another objection was that the award was not made within the period allowed by the Court. A further objection was that Lachman Das was not a party to the reference. Now these were all four good grounds which, if substantiated in fact, showed that, so far as Lachman Das was concerned, there was no award at all, although there was a document which purported to be an award. In our opinion the observations of the Chief Justice in that case which went beyond what was necessary to show that there was no award in the ordinary legal meaning of the term affecting Lachman Das upon which a decree affecting his interests could be passed were purely *obiter dicta*. We may say that we do not agree with the *obiter dicta* which fell from the learned Chief Justice in that case. We think that the law on this particular point and the reason for it are very correctly summarized by Mr. Justice Straight in *Bhagirath v. Ram Ghulam* (2).

Another condition to a decree under s. 522 being unappealable is that there should have been a judgment in accordance with an award. In our opinion a further condition precedent to the decree is that the Court should hear and determine any objection raised under s. 521. S. 522 enables the Court to pass judgment in accordance with the award, if it sees no cause to remit the award, or if no application has been made to set aside the award, or if the Court has refused an application to set aside the award. It follows that if an application to set aside an award is made, the Court cannot proceed to give judgment in accordance with the award until it has refused the application, and the Court is not competent to refuse the application without considering and determining it. So, in our opinion, when an application to set aside an award has been made, and has not been judicially determined, the Court is not [429] competent to proceed under section 522, and if it does proceed under that section and make a decree, there is no prohibition in that section, against an appeal from a decree made under those circumstances. If, however, an application to set aside an award is made on the ground of the misconduct of an arbitrator, and that application is refused after judicial determination and a decree made under section 522 which is in accordance with the award and not in excess of it, no appeal lies. The award is not a void award in such a case, even though the Court may have wrongly decided the question of misconduct. At the most it might be a voidable award, and the Legislature has not chosen, and we think rightly, to allow an appeal from the judicial decision of a Court on a question of the corruption or misconduct of an arbitrator. The Court having decided rightly the question raised by an application under section 521 against the applicant there is an award within the meaning of section 522 in accordance with

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(2) 4 A. 283.

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which judgment can be given and a decree made under that section. We may point out in conclusion that the decision of the Privy Council to which we have referred shows that a Court before acting under s. 522 of the Code must allow the parties the time prescribed by the Indian Limitation Act for filing their applications to set aside the award.

In our view of the law the preliminary objection to this appeal is well founded and the appeal does not lie. With this opinion the appeal will go back to the Bench which made the reference.

In accordance with the above opinion the appeal was, on the 10th of July 1896, dismissed by the Division Bench (Banerji and Aikman, JJ.) which had made the reference.

18 A. 430 = 16 A.W.N. (1896) 140.

[430] APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice
Blennerhassett.*

SHAM CHAND AND OTHERS (*Plaintiffs*) v. BAHADUR UPADHIA
(*Defendant*).^{*} [9th June, 1896.]

Act No. XV of 1877 (Indian Limitation Act) Sch. ii, Arts. 62, 120—Suit to recover "haq-i-chaharum" suit for money had and received—Limitation.

Held that the limitation applicable to a suit by a zamindar to recover "haq-i-chaharum" alleged to be payable to him by custom on the sale of a house was that prescribed by art. 120 of the second schedule of the Indian Limitation Act, 1877, and not that prescribed by art. 62. *Kirath Chand v. Ganesh Prasad* (1) approved. *Nanku v. The Board of Revenue for the N.W.P.* (2) referred to. *Raghu Nath Prasad v. Girdhari Das* (3) dissented from.

THE plaintiffs brought their suit on the allegation that they were entitled under a custom prevailing in a village of which they were zamindars to one-fourth of the purchase-money received by any ryot in the village on a sale of any grove or scattered timber or the materials of a house. They alleged that the defendants had sold a certain grove in the village by a sale-deed, dated the 2nd May 1889, for a sum of Rs. 375 and had not paid them one-fourth of the price, which they accordingly claimed. The suit was filed on the 3rd January 1893.

The defendants *inter alia* raised the plea that the suit was barred by limitation.

The first Court (Munsif of Benares) held that under the ruling of the High Court in *Raghunath Prasad v. Girdhari Das* (3) article 62 of the second schedule of Act No. XV of 1877 applied, and that the suit was barred by limitation.

The plaintiffs appealed and the lower Appellate Court (Subordinate Judge of Benares), in view of the ruling mentioned [431] above, dismissed the appeal. The plaintiffs appealed to the High Court.

Mr. D. N. Banerji and Babu Jogindro Nath Chaudhri for the appellants.

Mr. Abdul Raoof and Munshi Jwalc Prasad for the respondents.

^{*} Second Appeal, No. 512 of 1894, from a decree of Babu Nilmadhub Roy, Subordinate Judge of Benares, dated the 14th March 1894, confirming a decree of Maulvi Mubarak Husain, Munsif of Benares, dated the 7th September 1893.

[In 16 A.W.N. (1896) 140, this case is cited on Second Appeal No. 512 of 1896. *Ed.*]

(1) 2 A. 358.

(3) 13 A.W.N. (1893) 65.

(2) 1 A. 444.

JUDGMENT.

EDGE, C.J., and BLENNERHASSETT, J.—This was a suit by the zamindar to recover his *haq-i-chaharum*, which was payable by the custom of the place to the zamindar on a sale. The suit was brought more than three years after the sale and within six years from the sale. The question is whether article 62 or article 120 of the second schedule of Act No. XV of 1877 applies. The Courts below applied article 62. The first Court dismissed the suit on the ground of limitation; the lower appellate Court dismissed the appeal on the same ground.

The Courts below relied upon the decision of this Court in *Raghunath Prasad v. Girdhari Das* (1). A Division Bench there decided that article 62 applied to the suit. On behalf of the plaintiffs appellants, it was contended that article 62 did not apply. Article 62 is as follows:—“For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiffs’ use.” The Full Bench of this Court in *Nanku v. The Board of Revenue for the N.W.P.* (2) decided that a suit for *haq-i-chaharum* was not a suit which could be brought in a Court of Small Causes. The claim in that case was for Rs. 115 annas 8 as *haq-i-chaharum*. Section 6 of Act No. XI of 1865 enacted the law at that time in force as to cases cognizable by Courts of Small Causes, and it is quite clear that under s. 6 of that Act, if a suit for *haq-i-chaharum* was a suit for money had and received by the defendant to the plaintiffs’ use, it was, subject to the amount being within the jurisdiction of the Court, a suit cognizable by a Court of Small Causes.

The result appears to us to be, applying the Full Bench decision, that a suit for *haq-i-chaharum* is not a suit for money payable to the plaintiff for money had and received to the plaintiffs’ use. The [432] same view of the application of the Full Bench decision was taken in *Kirath Chand v. Ganesh Prasad* (3).

Following the Full Bench judgment, which we think was right, we allow this appeal with costs here and in the Courts below, and, setting aside the decrees of the Courts below, we remand this case to the first Court under s. 562 of the Code of Civil Procedure to be disposed of on the merits.

Appeal decreed and cause remanded.

18 A. 432 = 16 A.W.N. (1896) 139.

APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice,
and Mr. Justice Blennerhassett.*

RAJJO KUAR AND ANOTHER (Defendants) v. DEBI DIAL
AND OTHERS (Plaintiffs).* [9th June, 1896.]

Civil Procedure Code, s. 53—Cause of action—Misjoinder of causes of action and of plaintiffs.

Held that several creditors, to each of whom separate debts were owing by the same debtor, could not sue jointly for the avoidance of a deed of gift executed

* Second Appeal No. 459 of 1894, from a decree of Maulvi Muhammad Ismail, Subordinate Judge of Ghazipur, dated the 16th February 1894, confirming a decree of Babu Shiva Charan Lal, Munsif of Rasra, dated the 30th September 1893.

(1) 13 A.W.N. (1893) 65.

(2) 1 A. 444.

(3) 2 A. 358.

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by the debtor, which deed was alleged to have been made fraudulently with intent to defeat or delay the executant's creditors, the cause of action of each separate creditor not being the same as that of the others.

[R., 5 Ind. Cas. 835 (839)=59 P.L.R. 1910=12 P.W.R. 1910; 2 O.C. 17 (20).]

THE suit out of which this appeal arose was brought by several decree-holders holding separate decrees against one Kishen Dial Tiwari, to obtain cancellation of a certain deed of gift whereby Kishen Dial had made over all his property to his daughter Rajjo Kuar and his son-in-law Ram Manohar Pande with the object, as alleged by the plaintiffs, of defeating his (Kishen Dial's) creditors. The decrees held by the plaintiffs were obtained on the 19th of March 1891 and the deed of gift sought to be set aside was dated the 1st of April 1891.

The defendants donees resisted the suit and pleaded *inter alia* that the deed in question was a *bona fide* and valid deed, and that the plaintiffs' suit was bad for misjoinder.

The Court of first instance (Munsif of Rasra) decided both the [433] issues raised on these pleas in favour of the plaintiffs and against the defendants, and decreed the plaintiffs' claim.

The defendants donees appealed. The lower appellate Court (Additional Subordinate Judge of Ghazipur) dismissed their appeal on grounds similar to those upon which the first Court had rejected the defence to the suit.

The defendants thereupon appealed to the High Court.

Munshi Jwala Prasad, for the appellants.

Mr. J. E. Howard, for the respondents.

JUDGMENT.

EDGE, C.J., and BLENNERHASSETT, J.—This was a suit brought by several separate creditors of a debtor to avoid a deed of gift of the 1st of April 1891 in favour of the defendants Nos. 2 and 3 and made by the defendant No. 1, on the ground that it was made with intent to defeat or delay the several plaintiffs as creditors of the transferors and was within the purview of s. 53 of Act No. IV of 1882. Objection was taken in the first Court and in the lower appellate Court, in each of those Courts unsuccessfully, that there was misjoinder of plaintiffs and of causes of action. The defendants Nos. 2 and 3 have appealed and have raised the same objections.

On behalf of the plaintiffs, s. 26 of the Code of Civil Procedure is relied on, which section in its opening clause enacts that "all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally or in the alternative in respect of the same cause of action." It is obvious that the controlling words are "the same cause of action," and that that section does not allow plaintiffs to join in one suit in respect of causes of action in which they are not all jointly interested.

On the other side, the appellants rely on the last paragraph of s. 31 of the Code, in which it is enacted that "nothing in this section shall be deemed to enable plaintiffs to join in respect of distinct causes of action."

That each of these plaintiffs had (assuming the facts relied upon by the plaintiffs to be true) a distinct cause of action in which none of the other plaintiffs were interested is certain. There can be now [434] no longer any doubt, having regard to the judgment of the Court of Appeal

in England in *Read v. Brown* (1), to the judgment of the House of Lords in *Smurthwaite v. Hannay* (2), and to the judgment of their Lordships of the Privy Council in *Mussummat Ghand Kour v. Partab Singh* (3), as to what a cause of action means and what are the limits of a cause of action. In *Murti v. Bhola Ram* (4) a Full Bench of this Court held that the cause of action of the Code of Civil Procedure was the same as the cause of action as defined by the Master of Rolls and Fry and Lopez, L.JJ., in *Read v. Brown*. In *Nusserwanji Merwanji Panday v. Gordon* (5), Sir Charles Sargent clearly indicated that it was not the final act of a series which constituted a cause of action, but all those facts which it was necessary for the plaintiff to prove, if traversed, to entitle the plaintiff to a decree. Such also was the opinion of a Division Bench of this Court in *Salima Bibi v. Sheikh Muhammad* (6), in which most of the authorities bearing upon this subject were discussed. In the latter case s. 45 of the Code of Civil Procedure was fully considered, and it was pointed out that that section did not enable plaintiffs who had separate causes of action against the same defendant to join themselves and their causes of action in one suit.

Now in the present suit the cause of action of each plaintiff consists, amongst other things, of the separate debt due to him by the defendant No. 1, a debt in respect of which the other plaintiffs are in no wise interested. That debt is in such case a material part of each plaintiff's cause of action. The fact that the defendant, we will assume for the present purposes, fraudulently and with intent to defeat his creditors, executed a deed of gift which had the effect of defeating or delaying all his creditors, was also a material fact constituting part of the cause of action of each separate plaintiff, but the making a fraudulent deed of gift with intent to defeat or delay his creditors did not give the plaintiffs a right jointly to sue the defendants or any of them.

[435] We must allow this appeal, which we do. We set aside the decrees of the Courts below with costs, and remand the suit to the first Court, and direct that Court to do what it ought to have done under s. 53 of the Code of Civil Procedure, and return the plaint to the plaintiffs, so that the plaint may be amended by the plaintiffs selecting which of them is to continue to be plaintiff in the suit, and making the necessary amendments by striking out the names of the other plaintiffs. When that is done the Court of first instance will try the issues between the parties and decide the suit according to law.

Appeal decreed and cause remanded.

1896
JUNE 9.
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APPEL-
LATE
CIVIL.
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18 A. 432 =
16 A.W.N.
(1896) 139.

(1) L. R. 22 Q.B D. 123.

(2) 15 I.A. 156.

(5) 6 B. 266.

(2) L.R. (1894) A.C. 494.

(4) 16 A. 165.

(6) 18 A. 131.

1896

JUNE 9.

APPEL-

LATE

CIVIL.

18 A. 435 =

16 A.W.N.

(1896) 130.

18 A. 435 = 16 A.W.N. (1896) 130.

APPELLATE CIVIL.

*Before Sir John Edge, Kt, Chief Justice, and Mr. Justice
Blennerhassett.*

DAN BAHADUR SINGH (*Defendant*) v. ANANDI PRASAD AND
ANOTHER (*Plaintiffs*).^{*} [9th June, 1896.]

*Civil Procedure Code, s. 257-A—Execution of decree—Agreement to give time to the
judgment-debtor—Agreement not sanctioned by the Court.*

A judgment-debtor asked for time to pay the decretal amount. The decree-holders agreed to give time on condition that the judgment-debtor gave them a hundi for Rs. 1,500, that sum representing a portion of the decree-holder's claim which had been dismissed as barred by limitation. The judgment-debtor gave the hundi, but the sanction of the Court was not obtained to the transaction. On suit by the decree-holders to recover the money secured by the hundi given under the circumstances mentioned above, it was *held* that the transaction was one contemplated by s. 257-A of the Code of Civil Procedure and that, as it had not been made with the sanction of the Court, it could not be enforced and the suit should be dismissed. *Hukum Chand Oswal v. Taharunnessa Bibi* (1) dissented from.

[F., 18 A. 479; 12 Ind. Cas. 364 (365) = 7 N.L.R. 136 (142); 88 P.R. 1904; Appr., 22 B. 693 (699); 3 O.C. 165 (167); R., U.B.R. (1897-1901) 252; D., 25 A. 317 = 23 A.W.N. 45; 2 A.L.J. 683 = A.W.N. (1905) 57.]

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Madho Prasad*, for the appellant.

Munshi *Ram Prasad*, for the respondents.

JUDGMENT.

EDGE, C.J., and BLENNERHASSETT, J.—This was a suit on a hundi given by the defendant to the plaintiffs for Rs. 1,500. The [436] plaintiffs in a previous suit had sued the defendant on a bond and had claimed a large amount for interest amongst other things. A sum of Rs. 1,500 which they claimed for interest was disallowed on the ground that the claim for interest was barred by limitation. After the decree was passed the defendant asked the plaintiffs to give him time to satisfy the amount decreed. They refused, except on the condition that the defendant gave them a hundi for the amount of their claim which was held to have been time-barred, *viz*, 1,500. The defendant agreed to those terms. The plaintiffs agreed to give time. On those terms the hundi in question was given, and is now sued on. It was a hundi given as the consideration for an agreement to give time for the satisfaction of judgment debt. The agreement was made without the sanction of the Court which passed the decree. That Court had no opportunity to consider the agreement, and in fact never did deem the consideration to be under the circumstances of the case reasonable. It was an agreement falling within the first clause of s. 257-A of the Code of Civil Procedure, and an agreement which under the circumstances of the case was void. The plaintiffs cannot recover on the hundi. If they did, the Court would be allowing them to enforce an agreement by obtaining the consideration

^{*} Second Appeal No. 506 of 1894, from a decree of J. Deas, Esq., District Judge of Mirzapur, dated the 7th March 1894, confirming a decree of Pandit Rai Indar Narain Sahib, Subordinate Judge of Mirzapur, dated the 5th September 1893.

(1) 16 C. 504.

therefor when the Legislature has declared such an agreement to be void. The District Judge considered that the decision of the Calcutta High Court in *Hukum Chand Oswal v. Taharunnessa Bibi* (1) applied. So it did apply, but we entirely dissent from the view of the law therein expounded. Where the Legislature has thought right to declare an agreement void, unless the Legislature expressly limits the application of its enactment, Courts are bound to give effect to it. There is no such limitation to be found in s. 257-A. We allow the appeal with costs in all Courts and dismiss the suit.

Appeal decreed.

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18 A. 435 =
16 A.W.N.
(1896) 130.

18 A. 437 = 16 A.W.N. (1896) 135.

[437] APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice
Blennerhassett.*

SHIB SINGH (*Plaintiff*) v. MUKAT SINGH AND OTHERS (*Defendants*).
[10th June, 1896.]

Civil Procedure Code, ss. 312, 320, 588, cl. 16—*Act No. VII of 1888*, ss. 30 and 55—*Execution of decree—Decree transferred to Collector for execution—Suit by auction-purchaser to confirm sale set aside by the Collector.*

A decree was transferred to the Collector for execution. A sale was held by the Collector under that decree. Subsequently that sale was set aside by the Collector by an order under s. 312 of the Code of Civil Procedure. A person who had been an auction-purchaser at the sale so set aside brought a suit in a Civil Court to have the sale restored and confirmed. *Held*, that such a suit would not lie.

Azimuddin v. Baldeo (2) and *Bandi Bibi v. Kalka* (3) referred to and held to be no longer applicable by reason of the changes effected in the law by Act No. VII of 1888, but the judgment of OLDFIELD, J., in the former case approved. *Madho Prasad v. Hansa Kuar* (4) referred to.

[Overruled, 20 A. 379; R., 11 C.P.L.R. 33; 3 Ind. Cas. 572 (573) = 5 N.L.R. 121 (123).]

THIS was a suit brought by an auction-purchaser for confirmation of a sale held by a Collector in execution of a decree, transferred to him under s. 320 of the Code of Civil Procedure, which sale had been set aside by an order under s. 312 of the Code owing to certain alleged irregularities in publishing and conducting it.

The original hearing of the suit was *ex-parte*, the judgment-debtors defendants not having appeared, and a decree was passed confirming the sale. But this decree was set aside on the application of the judgment-debtors.

On the re-trial of suit both the lower Courts agreed in dismissing it upon the ground that there had been irregularities in publishing the sale, which had resulted in substantial injury to the judgment-debtor, and found that the order of the Collector setting aside the sale was right. The question whether a Civil suit lay at all under the circumstances was raised in the Court of first instance, which, however considered itself concluded by the ruling in *Bandi Bibi v. Kalka* (3).

* Second Appeal No. 502 of 1894, from a decree of Babu Ganga Saran, Subordinate Judge of Aligarh, dated the 15th February 1894, confirming a decree of Pandit Bis-hambar Nath, Munsif of Aligarh, dated the 20th September, 1893.

(1) 16 C. 504.

(2) 3 A. 554.

(3) 9 A. 602.

(4) 5 A. 314.

1896

JUNE 10.

APPEL-

LATE

CIVIL.

18 A. 437=
16 A.W.N.
(1896) 135.

[438] The plaintiff auction-purchaser appealed to the High Court.
Mr. *W. K. Porter*, for the appellant.
Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

EDGE, C. J., and BLENNERHASSETT, J.—Shib Singh was the purchaser at an auction-sale held by the Collector in execution of a decree, the execution of which had been transferred under s. 320 of the Code of Civil Procedure to the Collector. The Collector acting under s. 312 passed an order setting aside the sale. Thereupon Shib Singh brought this suit to have the sale confirmed. The first Court dismissed the suit. The Court of first appeal dismissed the appeal. Shib Singh has brought this second appeal.

We were pressed by Mr. *Porter* with the decision of this Court in *Azimuddin v. Baldeo* (1) and he contended that we were bound by that decision to hold that the suit lay. There is no doubt that if the law which was applicable when that decision was passed remained unaltered until this suit was commenced, and further if it was a Civil Court which had made the order setting aside the sale in this case, we should have been bound by the decision upon which Mr. *Porter* has relied. The case in I. L. R., 3 All., 554, is a decision of the Full Bench in which Mr. Justice Oldfield dissented. It is not for us to discuss that Full Bench decision. We may say, however, that the judgment of Mr. Justice Oldfield in that case commends itself to our approval. That decision was followed by a Division Bench of this Court in *Bandi Bibi v. Kalka* (2) which gave no reason for the decision except that the point had been decided by the Full Bench. However, these two cases to which we have referred were decided, the one upon Act No. X of 1877, and the other upon Act No. XIV of 1882 before it was amended by Act No. VII of 1888. Now before the amendment of s. 588, clause (16), there was no appeal from an order passed under s. 312 setting aside a sale. Clause (16) was amended by s. 55 of Act No. VII of 1888, and a right of appeal was given from such an order. Further, in Act [439] No. X of 1877, and Act No. XIV of 1882 before its amendment in 1888, s. 320 consisted of the first two paragraphs which still appear in it, and of those only. By Act No. VII of 1888, s. 30, paragraphs 3, 4 and 5 were added to s. 320. The third and fourth paragraphs, which were two of the added paragraphs, clearly indicate in our opinion that, when a decree is transferred to the Collector for execution under s. 320, the Revenue Court becomes seised of the jurisdiction which temporarily is taken away during the execution of the decree from the Civil Court. By the third paragraph of s. 320, orders made by a Collector under s. 312 are subject to appeal to and revision by superior revenue authorities if the Local Government makes rules in that behalf. Failing such rules, there appears to be no appeal. It is not necessary for us to decide whether or not a purchaser is given a right of appeal from an order passed by a Collector under s. 312 of the Code setting aside a sale. The decree-holder and the judgment-debtor, or the person whose immoveable property has been sold, are by the rules which were made and are in force under s. 320 given a right of appeal from an order confirming or setting aside a sale of a Collector. It never could have been the intention of the Legislature that there should be an appeal proceeding in a

(1) 3 A. 554.

(2) 9 A. 602.

Court of Revenue from an order of a Collector under s. 312 and a Civil suit proceeding in a Civil Court raising the same question as to the propriety or validity of that order. The result might be that the Court of Revenue in appeal might take one view, and not impossibly the Civil Court might take another view. In our opinion where a jurisdiction is transferred from the Civil Court to the Collector to execute a decree, and where the law makes the Collector's order either final or appealable to higher Revenue authorities and not to the Civil Court, the intention of the Legislature is that the order of the Collector shall not be questioned either by appeal or suit in the Civil Court. We presume that if Act No. VII of 1888 had been passed before the two decisions to which we have referred, this Court might have taken a different view of the law from that expressed in those cases. [440] The Full Bench decision in *Madho Prasad v. Hansa Kuar* (1) supports the view which we have adopted. We dismiss this appeal with costs.

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Appeal dismissed.

18 A. 440 (F.B.) = 16 A.W.N. (1896) 162.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Aikman and Mr. Justice Blennerhassett.

SITA RAM AND OTHERS (*Defendants*) v. RAM LAL
(*Plaintiffs*). [11th June, 1896.]

Landlord and tenant—Zar-i-peshgi lease—Sub-lease by zar-i-peshgi lessee—Default by sub-lessee who lets into possession the original lessor and denies the zar-i-peshgi lessee's title—Suit by zar-i-peshgi lessee for possession in a Civil Court—Form of decree—Civil Procedure Code, ss. 263, 264.

Two occupancy tenants granted a *zar-i-peshgi* lease of their occupancy holding to one R. L., for a term of sixteen years. R. L. sub-let the holding for a term slightly less than his own. The sub-lessees made default in payment of rent. R. L. distrained their crops. Thereupon the original lessors intervened claiming the crops as theirs. The question of the distraint having been decided by the Court of Revenue against him, R. L. then brought a suit in a Civil Court asking for ejectment of both his lessors and his lessee, and to be put into actual possession himself.

Held by the Full Bench (*dissentiente* BLENNERHASSETT, J.) that the plaintiff was precluded by reason of the lease granted by him, the term of which had not expired, from obtaining actual possession, unless the sub-lessees were ejected, which could only be done through the Court of Revenue. But the plaintiff was entitled to a decree declaring his title as *zar-i-peshgi* lessee and putting him into possession of the rents and profits of the holding as *zar-i-peshgi* lessee; the decree for possession to be executed under s. 264 of the Code of Civil Procedure.

[F., 31 A. 271 = 6 A.L.J. 177 (179).]

THIS was a reference to a Full Bench of the whole Court arising out of the following circumstances. Sita Ram and Hardeo defendants Nos. 1 and 2, executed on the 5th June 1889, a *zar-i-peshgi* lease of some 44 bighas 1 biswa of their occupancy holding in favour of Ram Lal, the plaintiff. Ram Lal in his turn let the land held by him under the *zar-i-peshgi* lease for a term [441] slightly less than the term of that lease to

* First Appeal No. 24 of 1896, from an order of Maulvi Siraj-ud-din, Subordinate Judge of Agra, dated the 31st January 1896.

(1) 5 A. 314.

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Mannu and Nund Ram, defendants Nos. 3 and 4, who were brothers of the first two defendants. The defendants Nos. 3 and 4 began to cultivate the land, and at first paid rent regularly, but after a short time fell into arrears.

The plaintiff distrained the crops which were growing on the said 44 bigahs as those of defendants Nos. 3 and 4 but on their doing so the defendants Nos. 1 and 2 intervened claiming the crops as theirs, and their objection was sustained both in the Court in which it was made and on appeal. The plaintiff thereupon filed the present suit claimed actual possession of the land in question after ejectment of the defendants.

The defendants pleaded *inter alia* that the claim was not cognizable by a Civil Court. The Court of first instance (Munsif of Agra) accepted this contention and dismissed the suit.

On appeal by the plaintiff, the lower appellate Court (Subordinate Judge of Agra) reversed the Munsif's decree and remanded the case to the first Court for trial on the merits. Against this order of remand, the defendants appealed to the High Court.

On this appeal coming before a Bench for disposal, the Bench while agreed that the suit, so far as it concerned the defendants Nos. 3 and 4, was not cognizable by a Civil Court, differed as to the decree to which the plaintiff was entitled as against the defendants Nos. 1 and 2. That question, namely, as to the form of the decree to which the plaintiff was entitled as against the defendants Nos. 1 and 2, was accordingly referred to a Full Bench.

Mr. D. N. Banerji, for the appellants.

Munshi Madho Prasad, for the respondent.

The following judgments were delivered :—

JUDGMENT.

BLANNERHASSETT, J.—The defendants Nos. 1 and 2 granted to the plaintiff a lease for sixteen years on the 5th June 1889, of an occupancy holding. One the next day the plaintiff granted a sub-lease for sixteen years to the defendants Nos. 3 and 4, who are brothers of the defendants Nos. 1 and 2, for the same land. The [442] net result of these leases was that the plaintiff was to benefit to the extent of about Rs. 100 per annum for sixteen years.

The transaction appears to have been one of mortgage, though the parties have not directly stated this fact. Perhaps they thought that a mortgage of an occupancy holding would be held invalid by the Court, and so thought it better to draw up the two leases already mentioned. The plaintiff alleged that defendants Nos. 3 and 4 paid rent regularly till 1297 Fasli. They defaulted in 1298 and 1299 Fasli. The plaintiff distrained the crops. The defendants Nos. 1 and 2 filed an objection claiming the crops as their own and denying the plaintiff's title. The Revenue Court released the crops in favour of the defendants Nos. 1 and 2. The plaintiff sues for possession of the holding alleging that the defendants Nos. 3 and 4 are in collusion with the defendants Nos. 1 and 2. The Court of first instance found that the Civil Court had no jurisdiction; that the lease was a valid document; that the plaintiff was entitled to possession of the land. The defendants did not press any argument on this latter point. The Court of first appeal found that the Civil Court had jurisdiction and remanded the case for disposal on the merits.

The defendants appealed to this Court urging (1) that the suit was triable exclusively by the Revenue Court, and (2) that the remand

should not have been made and the decree of the first Court should have been affirmed.

In the course of the hearing a question arose which has been referred to the Full Bench; it is as follows:—

“Assuming for present purposes that the defendants Nos. 1 and 2 have, either with or without collusion with the defendants Nos. 3 and 4, entered into possession of the lands, the subject of the *zar-i-peshgi* lease mortgage, without the consent of the plaintiff, that mortgage being still in existence, what is the decree which the plaintiff is entitled in a Civil Court to obtain against defendants Nos. 1 and 2. Is it a decree in ejectment for possession of the mortgaged lands or is it a decree for a declaration of title?”

[443] The suggestion in this case is that the plaintiff having granted a sub-lease for sixteen years is thereby debarred from suing for possession against his lessors, even though the lessors may have ejected the sub-lessees. The same principle would apply even if the land were held by year to year tenants.

The principle comes to this, that no suit for ejectment and possession of land can be brought unless the plaintiff was the actual cultivator at the time of ejectment; if he was not, his only remedy is to sue for rent against his tenants. As long as they pay, he has no other remedy, and must leave the trespasser in possession; if his tenants fail to pay, he can eject them according to law, and then he will have a cause of action against the trespasser, but not till then.

I may remark in commencing that that is not the view of the law taken by the parties in this case. The plaintiff alleged a cause of action for recovery of possession. The defendants did not press any argument against this view. There was in fact no proposition of law put forward by the defendants, such as that now raised.

The appellant has not explained the policy on which the suggested rule is founded, or the reason why a tenant should voluntarily or involuntarily let into possession a person denying the landlord's title, fail himself to enforce the landlord's possession, and then be permitted to debar the landlord from doing so, or how a suit by the landlord to eject a trespasser and replace the tenant can in any way injure the tenant's rights under a tenancy which has not been forfeited by the tenant's conduct.

The principle now suggested may be that followed in England; but I think it is new to India. The action of ejectment in England was only rendered possible by the adoption of the most extraordinary string of legal fictions that any system of law can produce. I mean that connected with the names of John Doe and Richard Roe.

The Civil Courts have been in existence in India for more than a hundred years. To the best of my belief they have managed to decree possession of land during that time without impleading [444] John Doe and Richard Roe, and I think that the action for recovery of land in India has a history and a character of its own, and that it is not bound by the highly technical rules prevailing in England regarding actions at law on the tenure of land.

There can be no doubt that the Courts in this country decree possession of land in ejectment to a landowner, notwithstanding the fact that the land is held by tenants of different classes. The law has been uniformly administered in this manner and in no other, as far as my memory serves me.

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I can see no mischief requiring a remedy in the present practice. The real dispute is rapidly brought to an issue, the contending parties are joined, those not interested are not harassed by being made parties. The decree is easily enforced and is intelligible by the Revenue authorities in amending the record of rights. I can see no reason for introducing any new system, and I should regret to see the law which is well established and well understood by the people subverted unless some very good reason for so doing can be put forward.

Assuming, however, that the principle suggested is the correct one, it may be worth notice to see how it would work in practice. Take the case of a landowner dispossessed from a property in which there are fifty tenants. He must first bring fifty suits under the Rent Act. The trespasser will intervene under s. 148, Rent Act. The intervenor succeeds. The landowner will then institute fifty suits in the Civil Court, and if he succeeds he gains by a hundred suits exactly what he now gains by one. The costs of processes and legal expenses are needlessly increased; a large number of tenants who have no interest in the matter are harassed for no good reason. The main interest of the tenant is to learn as quickly as possible whom it is that the Court decides to be the legal successor of his former landlord, and to whom he can with safety pay his rent. Supposing 5 per cent. of the tenants desire to contest the plaintiff's claim, they can do so after a decree for possession. That course is preferable to making 95 per cent. of the tenants parties to a litigation they have no desire to join in.

[445] Such decrees when obtained do not appear to be capable of being readily used for amending the record of rights. If the principle suggested is the correct one, I think there would be no difficulty in depriving a landlord of his land in twelve years in collusion with the tenant. The trespasser can enter and claim adverse possession. The rent can be paid for twelve years. The tenant can then go on a pilgrimage. The land becomes the property of the trespasser. The land may be worth twenty-four years' purchase; but the landowner's only remedy is a personal one against a tenant who may abscond or become insolvent.

In England the tenant is bound under penalty to give notice to his landlord when served with an ejectment. I know of no law in these Provinces calculated to check collusion on the part of the tenant.

As I understand the Civil Law the possessor of land did not lose possession by letting the land to a tenant. He retained possession and all his legal remedies. So far as possession consisted in bodily acts, the acts might be those of some other person. So far as it consisted of mental acts, the mind was that of the possessor, the dispossession of the tenant dispossessed the landlord. The idea that there can be no possession or dispossession of land except that of the person who walks over it or ploughs it with his bullocks seems to be rather a primitive one, not sanctioned by the Civil Law. I fail to see that a landowner who lets his land out to a tenant for cultivation, thereby covenants with the tenant that he will not resist a rival landowner who takes possession, or that he makes the tenant his agent for the purposes of resisting his rival, with power to resist or not as he thinks proper. Landlords in this country are the very last people who would enter into any such covenants.

In this country when a tenant is ejected by a trespasser the landlord has an implied right of entry in order to recover possession for himself and his tenant.

The matter is not governed by covenants, but by custom. Local usage is a better guide to the incidents of a tenancy than analogies drawn from English Law.

[446] I understand local usage to be that when a tenant is ejected by a trespasser he is not bound to sue him, but he is bound to inform his landlord and to do nothing to hinder the landlord from recovering possession.

The landlord can recover possession from the trespasser and must readmit the tenant if the tenancy subsists. If the tenant has forfeited his holding by collusion or otherwise the landlord can also eject the tenant. The tenant, who is the custodian of the landlord's possession and who forfeits his tenancy by any voluntary act directed against the landlord's possession, has under this usage no opportunity of aiding a trespasser by using his term, not in his own but in the trespasser's favour, against the landlord, if the ejected tenant has not colluded with the trespasser. I cannot understand his objecting to the landlord's suit. If he has colluded, he has thereby forfeited his tenancy. In the present case the plaintiff alleges that the sub-lessees are in collusion with his lessors; he therefore made them co-defendants. Collusion, if proved, forfeits the tenancy. The sub-lessees did not appear to contest the claim; it is admitted that they might have appeared and asked to be joined as plaintiffs seeking to have the original lessors ejected from the holding: they have not done so. They could only do so by denying the truth of the defence put forward by their brothers, the defendants Nos. 1 and 2, which perhaps they are unwilling to do. Defendants Nos. 3 and 4 have made no defence either in fact or in law to the plaintiff's claim. Defendants Nos. 1 and 2 have made a defence only on propositions of fact. It is to be observed that defendants Nos. 1 and 2 do not claim under defendants Nos. 3 and 4. They deny their title as well as that of the plaintiff. Defendants Nos. 1 and 2 are in possession adversely to defendants Nos. 3 and 4. Defendants Nos. 1 and 2 have no title of their own against the plaintiff. I do not see how they can defend their possession by putting forward the title of defendants Nos. 3 and 4, the existence of which they deny; a title which defendants Nos. 3 and 4, though parties to the case, do not put forward themselves in answer to the [447] plaintiff's claim; a title which, if vindicated at all, is consistent with the plaintiff's case and destructive of the title of the defendants Nos. 1 and 2. If the appellants' argument is correct, in none of the cases for possession of land decreed by the highest courts can there have been any outstanding term or tenancy from year to year, or the suit would have failed. I cannot accept this view. I would answer the question by saying that if the plaintiff succeeds he is entitled to a decree for delivery of the property leased to him and for the removal of the defendants Nos. 1 and 2 therefrom, but that the defendants Nos. 3 and 4 are not bound under the decree to vacate the same. I regret that my view is not in accordance with that of my learned colleagues.

EDGE, C. J.—In this suit the plaintiff made four persons defendants. The defendants Nos. 1 and 2 had on the 5th of June 1889, granted a *zar-i-peshgi* lease to the plaintiff for a term of sixteen years of their occupancy holding. A *zar-i-peshgi* lease is a mortgage. Subsequently to the granting of that lease the plaintiff granted a lease to the defendants Nos. 3 and 4 for a term to expire one day before the expiration of his own term. After some years had elapsed the defendants Nos. 3 and 4 made default in payment of rent to the plaintiff. Thereupon the plaintiff distrained the

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crops on the ground, and the defendants Nos. 1 and 2, who were in law and in fact the mortgagors, the grantors of the *zar-i-peshgi* lease, intervened and claimed the crops as theirs. The Court of Revenue, misapplying the law, decided the question in favour of the defendants Nos. 1 and 2. On that the plaintiff brought the present suit. In the present suit he asked as his first relief that the defendants be dispossessed of 40 bighas odd, that being the extent of the land which was granted to them as *zar-i-peshgi* mortgagees, and that he, the plaintiff, be put into possession of that land.

The Division Bench rightly came to the conclusion that, as the tenancy created by the plaintiff in favour of the defendants Nos. 3 and 4 had not been determined by surrender or by process of law, it was still subsisting, and could only be determined by proceedings in a Court of Revenue, and not in a Civil Court. There remained [448] the question as to what was the decree to which the plaintiff was entitled as against the defendants Nos. 1 and 2, who were the grantors to him of the *zar-i-peshgi* lease mortgage. Now there is no doubt that what the plaintiff asked for in his suit was a decree for *khas* possession, that is, not merely a decree declaring his title or decreeing his possession as mortgagee subject to the lease granted by him, but a decree under which he should be placed in actual physical possession of the lands. That decree in my opinion the plaintiff was not entitled to get. The plaintiff had himself, before this suit was filed, parted with the actual or physical possession of the lands to defendants Nos. 3 and 4, to whom he had granted a lease of those lands. That lease and the term created by it had not been determined, and the plaintiff cannot be entitled to the physical possession of lands, the possession of which he had granted to another under a lease which is still current. A landlord can no doubt be correctly said to be in possession of his property through his tenants, but that is not such a possession as entitles him to enter upon the lands, or to cultivate them, or to treat his tenants and those holding under them as trespassers.

We are instructed by the Privy Council, and are bound to obey their instruction, that when we do not find law in India applicable to the case before us, we are to follow the principles of the law of England so far as they are applicable. The law of England on this point is consistent with commonsense, notwithstanding that some of the earlier procedure in ejectment is now out of date. Suffice it to say that John Doe and Richard Roe have not been necessary parties to actions in ejectment in England for a great many years. The principle of the law was always the same, although the procedure which required John Doe and Richard Roe was necessary at one time, and is not necessary now. The principle, it appears to me, must be the same all the world over, and certainly must be the same in India as in England. That principle is that where a man, whether the owner or merely a tenant, creates a tenancy under him which entitles the tenant to the exclusive use of the land or of the house, as it may be, the man creating [449] the tenancy cannot have any right to actual possession, unless he has by the lease or by agreement with his tenant reserved to himself a right to re-enter and take possession. He has of course a right by due process of law, if the facts arise, to have the tenancy created by him determined and his tenant ejected; but, so long as the tenant is entitled to possession, the landlord cannot be entitled to possession. That right to possession he has parted with by the creation of the tenancy. It is no new proposition of law, and the application of that proposition of law,

which I believe to be correct, does not introduce into India any new system either of law or of procedure. A landlord whose title is denied by his tenant has got a right to have the tenancy determined. A landlord whose title is questioned by any one else than the tenant has got a right to a declaration under s. 42 of the Specific Relief Act; and if any one enters on the receipt of the rents and profits of the land and takes from his tenants the rents which were due to him, he is entitled as against such person, not only to a declaratory decree declaring his title and that the other person has no title, but to a decree putting him into possession, that is, what is known as formal possession, as contradistinguished from actual or *khas* possession, of the lands as against the person wrongfully taking the rents and profits to which he, the landlord, is entitled. It is an error to consider that any new system of procedure is required. Section 263 of the Code of Civil Procedure provides for the delivery of *khas* possession when the plaintiff is entitled to be put into actual possession as against the defendant. The Legislature in enacting s. 263 of the Code must have been aware that if they stopped there they would not have provided for a case such as this, in which the plaintiff, by reason of an outstanding term in a tenant, is not entitled to have his decree executed by being put into *khas* possession. Accordingly the Legislature, not intending to introduce any new system of procedure, and intending to give plaintiffs who succeeded in suits like this an opportunity of obtaining the qualified possession to which they were entitled, enacted s. 264 of the Code. That is a section under which, for example, a plaintiff [450] who has been dispossessed of the rents and profits of his tenants, but who, by reason of there being tenants in with a lawful title, is not entitled to be put into actual or *khas* possession, is enabled to be put into that possession of his zamindari, his tenancy, or whatever it may be, of which he has been deprived by the defendant. The procedure under s. 264 does not require fifty, sixty or a hundred defendants to the suit, and it certainly does not require that any of the plaintiff's tenants or any of the tenants who derive title from the plaintiff or from his predecessors in title should be made defendants to the suit. To bring s. 264 into operation it is only necessary that the plaintiff should have as the defendant or defendants to the suit the man or men who have dispossessed him of the receipt of the rents and profits. When a plaintiff has no outstanding term against him, such as an existing tenancy created by himself or his predecessor in title, he can obtain his decree for *khas* possession, and that decree can be executed under s. 263; and what is more, he can have as defendants to that suit all persons who are in possession of his lands and are conjointly in collusion holding adversely to him, that is, not under a title granted by him or by his predecessor in title. When, however, there are in possession of the lands tenants holding under a title which the plaintiff cannot dispute, for example, a tenancy created by himself or his predecessor in title having title to create it, and some person has come in and deprived him of the rents and profits by getting his tenants to pay over the rents to some person other than the real landlord, the landlord's remedy in such case is distress for his rent or suit for arrears of rent, if the holding is an agricultural one; suit for rent followed by ejectment if the arrears be not paid; and suit against the outsider who has interfered with his rights for a declaration of his title and the want of title in the outsider and for possession as landlord to be delivered to him under s. 264 of the Code of Civil Procedure.

There is no one more averse than I am to the introduction of unknown

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and novel principles of law either into this country or into England, principles which have not been hallowed by the [451] careful consideration of generations of lawyers. On the other hand, I think it is no light matter to depart from all known principles of law, and to suggest that a man, whether he be owner in fee in England or zamindar here, or whether his title be that of a tenant, is entitled to be put into actual possession under s. 263 of the Code of Civil Procedure of lands, the right to occupy which and the exclusive possession of which he himself had granted to another for a term which is still current and not expired. If such a principle were introduced, it would revolutionize the principles of law by which tenants hold their houses, if the tenancy is of a house, and their lands, if the tenancy is of lands. No man is bound to create in favour of another a tenancy of his house or of his lands. If he does, he can by the use of proper words no doubt reserve a right to re-enter at any time and determine the tenancy, unless where notice or procedure in a Court is required in order to the determination of the tenancy. It may be, and indeed probably is, the fact that in the present case the defendants Nos. 3 and 4 are colluding with the defendants Nos. 1 and 2. The facts, if it be one, that there is such collusion, and even if such collusion be of the most fraudulent kind as against the landlord of the defendants Nos. 3 and 4, the plaintiff, does not entitle him to the possession of the holding until the tenancy created by him in favour of the defendants Nos. 3 and 4 has been determined. That tenancy, the holding being an agricultural one to which Act No. XII of 1881 applies, can only be determined by proceedings in the Court of Revenue; and, those proceedings not having been taken, it follows in law that at the commencement of this suit that term or tenancy was outstanding and was a bar to the plaintiff's obtaining *khas* possession of the lands.

In my opinion, and in the opinion of four other Judges of this Bench, the plaintiff is entitled to two decrees in this suit, *viz.*, (1) a decree declaring that the plaintiff is the *zar-i-peshgi* lessee, mortgagee, of the defendants Nos. 1 and 2 of the occupancy holding under the *zar-i-peshgi* lease of the 5th of June 1889, and that the defendants Nos. 1 and 2 are not during the continuance of that [452] mortgage entitled to interfere with the plaintiff's possession as *zar-i-peshgi* mortgagee, or to receive the rents and profits from any tenant or tenants of the plaintiff, or to do any act in denial of the plaintiff's title as *zar-i-peshgi* mortgagee; and (2) a decree that the plaintiff be put into possession of the rents and profits of the occupancy holding as *zar-i-peshgi* mortgagee of the defendants Nos. 1 and 2 subject to the conditions of the *zar-i-peshgi* lease: the decree for possession to be executed under s. 264 of the Code of Civil Procedure. That is my opinion.

KNOX, J.—I concur fully in the reasons given by the learned Chief Justice, and in the answer which he would make to the questions referred to us.

BLAIR, J.—I concur in the decree proposed by the learned Chief Justice as an answer to the reference, and in the reasoning on which that answer is based.

BANERJI, J.—My answer to the reference is the same as that of the learned Chief Justice. The title of the plaintiff as *zar-i-peshgi* mortgagee having been denied by the defendants Nos. 1 and 2, he was entitled to claim a declaration of his title as against those defendants, and he was entitled to such possession as the nature of his title in the property admitted of. After he had granted a lease of the property to the defendants

Nos. 3 and 4, and so long as that lease subsisted, the only possession which he could have in respect of the property was the receipt of rents and profits, and not actual physical possession of the property. So long as the lease in favour of the defendants Nos. 3 and 4 remained outstanding the only persons who were entitled to actual physical possession were these defendants. They were competent to allow anyone else to cultivate the lands unless the terms of their lease precluded them from so doing; but in the absence of such terms the mere fact of their permitting a third person to cultivate the lands did not entitle the plaintiff to resume physical possession of them. If actual possession was taken during the currency of the lease by a trespasser, such a person would be a trespasser as against the tenants, and not as against the plaintiff, so as to [453] justify the plaintiff in claiming the ejectment of the trespasser. If the plaintiff's title was denied, he could certainly defend that title by claiming a declaration of his right; but, so long as he did not himself possess the right to enjoy physical possession, he could not eject the trespasser. I agree in the decree proposed.

AIKMAN, J.—I also agree in the decree proposed and in the reasoning upon which that decree is based. It appears to me that the difficulty experienced by my brother Blennerhassett, which has prevented him from concurring in the judgment of the majority of the Court, would disappear if the distinction between the two kinds of possession which has been pointed out by the learned Chief Justice, and which is recognized by the Legislature in ss. 263 and 264 of the Code of Civil Procedure, is borne in mind. If a person is wrongfully ousted from possession he is entitled to a decree replacing him in such possession as he had when his cause of action arose. If at that time he had a right to immediate, or what is called in this country *khas*, possession, then he is entitled to a decree replacing him in such possession. If, on the other hand, his possession was only derived from the enjoyment of the rents and profits, then the possession to which he is entitled is that provided for by s. 264 of the Code.

BY THE COURT.—With these opinions the case will go back to the Bench which made the reference.

DECREE OF THE DIVISION BENCH.

On the appeal being again laid before the Division Bench which had made the reference, that Bench (Edge, C. J., and Blennerhassett, J.), on the 11th June 1896, made a decree in accordance with the opinion of the majority of the Full Bench.

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18 A. 453 = 16 A.W.N. (1896) 141.

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APPELLATE CIVIL.

APPEL-
LATE
CIVIL.*Before Mr. Justice Blair and Mr. Justice Banerji.*AMAR NATH (*Plaintiff*) v. RAJ NATH (*Defendant*).^{*}
[12th June, 1896.]

18 A. 453 =

16 A.W.N.

(1896) 141.

Civil Procedure Code. s. 505—Receiver—Power of District Court under s. 505 as to appointment of receiver.

The concluding words of s. 505 of the Code of Civil Procedure—"or pass such order as it thinks fit"—must be read as controlled by the words [454] preceding them and do not confer upon the District Court the power itself to appoint a receiver not nominated by the Subordinate Court.

[R., 31 C. 495]

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Jogindro Nath Chaudhri and Babu Satya Chandar Mukerji, for the appellant.

Maulvi Mahmud-ul-Hasan, for the respondent.

JUDGMENT.

BLAIR and BANERJI, JJ.—This is an appeal from an order of the learned District Judge of Allahabad appointing a receiver of the property in suit in a case to which the present appellant and respondent are parties. That is a case which is pending in the Court of the Subordinate Judge. The learned Subordinate Judge had conceived the case to be one in which the property needed the exceptional protection provided for by s. 503 of the Code of Civil Procedure. He considered the circumstances so exceptional that he considered it expedient to apply the exceptional remedy of appointing a receiver in the suit. He was not, however, empowered by law to make such an appointment himself without the sanction of the District Judge to whom he was subordinate. He accordingly forwarded to the District Judge a nomination of the person he considered fit for such appointment, and submitted that person's name with the ground for the nomination to the District Court. It was open then under s. 505 to the District Judge to authorize the Subordinate Judge to appoint the person so nominated, or "pass such other order as the District Court thinks fit." It was contended before us on behalf of the appellant that these words in no way authorize a District Judge to nominate upon his own motion any person to be a receiver and himself to appoint such person as receiver. On the other hand, our attention was called to the wide generality of the words used. We think, however, that we ought to apply to this, as to other provisions of Acts, the principle that large general words should be read in connection with, and as qualified and restricted by, the more specific words which stand in collation with them. It seems to us therefore that the District Judge could either authorize or refuse to authorize the appointment of the person nominated, could regulate his functions as set forth [455] in s. 503 at its discretion, or could determine whether the appointment of a receiver was at all expedient or necessary. We think that if the Legislature had intended

^{*} First Appeal from Order No. 35 of 1896, from an order of J. Denman, Esq., District Judge of Allahabad, dated the 18th April 1896.

to confer on a District Court the power of appointing without nomination by a Subordinate Court any person as receiver, appropriate words for that purpose would have been used in the Act. The expression used in s. 505 is not that the District Court may appoint, but may authorize the Subordinate Judge to appoint. Those words, it seems to us, are inconsistent with the wide powers contended for by the respondent. The decision of the first point urged on behalf of the appellant renders the decision of the other points unnecessary. We allow the appeal and set aside the order of the District Judge with costs.

Appeal decreed.

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18 A. 455 = 16 A.W.N. (1896) 130.

APPELLATE CIVIL,

Before Mr. Justice Banerji.

CHIRANJI LAL AND OTHERS (*Decree-holders*) v. DHARAM SINGH
(*Judgment-debtor*). [16th June, 1896.]

Mortgage—Prior and subsequent mortgages—Decree giving a defendant, second mortgagee, a right to redeem a prior mortgage within a fixed period—Appeal—Limitation.

When a decree gives a right of redemption within a certain specified period with a certain specified result to follow if redemption is not made within such period, the mere fact of an appeal being preferred against it will not suspend the operation of such decree, and, unless the appellate Court extends the period limited by the original decree, the right of redemption will be barred if not exercised within the period so limited. The principle in *Jaggar Nath Pande v. Jokhu Tewari* (1) applied.

[R., 17 C.L.J. 120 (123) = 17 C.W.N. 457 (459); 11 C.P.L.R. 115; 18 Ind. Cas. 747 (749); 17 M.L.J. 44-N; 48 P.R. 1906 = 104 P.L.R. 1906.]

THE facts of this case are fully stated in the judgment of Banerji, J.

Munshi Gobind Prasad, for the appellants.

Babu Jogindro Nath Chaudhri, for the respondent.

JUDGMENT.

BANERJI, J.—This appeal arises out of proceedings relating to the execution of a decree passed in favour of the appellants. The facts of the case are these. One Moti Singh made a simple mortgage of some property in favour of one Durga Prasad in 1871. [456] He afterwards made a usufructuary mortgage of the same property in favour of Dharam Singh, the respondent, in 1878. In 1881, a decree for sale was obtained on the first mortgage. The second mortgagee was not joined as party to the suit for sale. In execution of that decree a part of the mortgaged property was sold, and it was purchased by the predecessor in title of the appellants. As the second mortgagee was in possession under his usufructuary mortgage, the appellants brought a suit against him for possession of the property purchased by them at auction in satisfaction of the prior mortgage. That suit was resisted on the ground that the second

* Second Appeal No. 889 of 1895, from a decree of Babu Bepin Behari Mukerji, Subordinate Judge of Aligarh, dated the 26th June 1895, reversing a decree of Babu Gauri Shankar, Munsif of Haveli, Aligarh, dated the 17th November 1894.

(1) 18 A. 223.

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18 A. 455 =
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(1896) 130.

mortgagee, not having been made a party to the first mortgagee's suit, had not been foreclosed of his right to redeem the first mortgage, and therefore the purchaser in execution of the decree made on the first mortgage was not entitled to possession as against him. The suit was dismissed by the Court of first instance, but the lower appellate Court made a decree for possession in favour of the appellants on the 1st of April, 1892, subject to the condition that the defendant, the second mortgagee, would have the option of redeeming the prior mortgage and retaining the property by payment of Rs. 150 to the plaintiff within six months from the date of the decree. The decree was thus one for possession subject to a condition, and if that condition failed it was a decree for absolute possession. That decree was affirmed by this Court on the 18th of April, 1894. The defendant, the present respondent, did not pay the Rs. 150 referred to above within six months from the 1st of April, 1892, the date of the decree of the first appellate Court. Thereupon the decree-holders, present appellants, applied for execution of the decree and delivery of possession to them. The respondent, judgment-debtor, raised objections in regard to the application, urging that he was entitled to compute the six months within which he was entitled to pay Rs. 150 from the date of the decree of the High Court, and, as those six months had not expired on the date of the application for execution, the decree-holders were not entitled to obtain possession. It is admitted that the decree of this Court dated the 18th of April, 1894, by which the decree of [457] the first appellate Court was affirmed, did not extend the period within which the defendant was to redeem the prior mortgage. The Court of first instance disallowed the objections of the judgment-debtor, but the lower appellate Court allowed them on the strength of certain rulings to which it has referred in its judgment. The learned Subordinate Judge was of opinion that the objection was not a valid one, but he considered himself bound by the rulings cited by him and therefore allowed the objection.

It is contended in second appeal that the judgment-debtor was not entitled to compute the six months within which he was to redeem the prior mortgage from the date of the decree of this Court, that decree not having extended the time for the payment of the money. Mr. Gobind Prasad has relied on the recent ruling in *Jaggar Nath Pande v. Jokhu Tewari* (1). In my judgment, the principle of that ruling fully governs the present case. In that case it was held with reference to a decree for pre-emption that if the sale price decreed to be paid by the plaintiff was not paid within the time allowed by the Court of first instance, and if that time was not extended by the appellate Court, the plaintiff could not pay the pre-emptive price after the expiry of the time allowed by the decree of the first Court. The same principle applies to this case. The decree of the 1st of April 1892 was a decree for possession subject to a condition, that condition being that Rs. 150 were to be paid by the defendant within six months. If the condition were fulfilled, that decree would be one dismissing the suit for possession. In the event of default being made in payment, the decree was, on the expiry of the six months, to be an unconditional decree for possession. If no appeal was preferred from that decree, and if the payment provided for by it was not made within six months, there can be no question that the decree-holder would be entitled to obtain possession by execution of the decree. By the mere fact of appealing

(1) 18 A. 223.

from the decree the defendant could not extend the time allowed to him by the decree. If that time expired before the decision of the appeal by this Court, the decree for [458] possession became thereupon a decree absolute, and the confirmation of that decree in second appeal by this Court could not alter the position of the parties. Before such confirmation the decree had become an absolute decree for possession, and unless the defendant obtained in his second appeal an extension of the time allowed to him for redeeming the prior mortgage, he became foreclosed of his right to redeem that mortgage. If the law were otherwise, the defendant in a suit for sale or the plaintiff in a suit for redemption would be able to obtain an extension of the time allowed to him to pay the mortgage money merely by the fact of preferring an appeal. The cases to which the learned Subordinate Judge referred were considered in the case of *Jaggur Nath Pande v Jokhu Tewari* mentioned above and the principles enunciated in them were not accepted.* In my judgment, in the absence of any specific extension by the appellate Court of the time allowed by the Court of first instance for the redemption of a mortgage, the time within which redemption could take place is to be computed from the date of the decree of the Court of first instance. I allow this appeal, and, setting aside the decree of the Court below, restore that of the Court of first instance with costs here and in the Court below.

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18 A. 455 =
16 A.W.N.
(1896) 130.

Appeal decreed.

* [The cases upon which the judgment of the Subordinate Judge was based were the following:—*Daulat and Jagjivan v. Bhukandas Manakchand* (1) *Noor Ali Chowdhuri v. Koni Meah* (2) and *Rup Chand v. Shams-ul-jehan* (3).]

18 A. 458 = 16 A.W.N. (1896) 147.

APPELLATE CIVIL.

Before Mr. Justice Banerji.

DHARMA AND OTHERS (*Defendants*) v. BALMAKUND AND OTHERS
(*Plaintiffs*).^{*} [18th June, 1896.]

Mortgage—Redemption—Limitation—Acknowledgment—Act No. XIV of 1859, s. 1, cl. 15—Act No. XV of 1877, Sch. ii, Art. 148.

Held that an acknowledgment of the title of the mortgagor made by one only of two, mortgagees would not avail to save the mortgagor's right of redemption being barred by limitation, where the mortgage was a joint mortgage and not capable of being redeemed piecemeal. *Bhogilal v. Amrillal* (4) referred to.

[F., 34 A. 371 (374) = 9 A.L.J. 386 (389) = 14 Ind. Cas. 132 (133); 1 Ind. Cas. 203 (204); R., 19 M.L.J. 288 = 5 M.L.T. 208; D., 11 Bom. L.R. 318 (324) = 2 Ind. Cas. 469 (470); 15 C.L.J. 251 (252) = 16 C.W.N. 493 (494) = 13 Ind. Cas. 702 (703).]

[459] THE facts of this case were as follows:—

The plaintiffs alleging themselves to be the descendants of the original mortgagors, sued for redemption of a mortgage said to have been made by their ancestors in favour of two persons, Udai Ram and Khush-hali, whose representatives the defendants were alleged to be.

* Second Appeal No. 40 of 1896, from a decree of H. G. Pearse, Esq., District Judge of Agra, dated the 9th January 1896, reversing a decree of Babu Prithi Nath, Munsif of Muttra, dated the 21st November 1895.

(1) 11 B. 172.

(2) 13 C. 13.

(3) 11 A. 346.

(4) 17 B. 173.

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(1896) 147.

The defendants pleaded that the mortgage was more than one hundred years old and that the claim for redemption was consequently barred by limitation.

The Court of first instance (Munsif of Muttra) found that the date put forward by the plaintiffs as the date of the mortgage was unreliable, and, applying the principle of the case of *Parmanand Misr v. Sahib Ali* (1) dismissed the suit.

The plaintiffs appealed. The lower appellate Court (District Judge of Agra) found that, although the date of the mortgage was not proved, at the revision of settlement, which took place in 1852, both Udai Ram and Khushhali acknowledged the title of the plaintiffs' predecessors in title, although the settlement records were signed by one only. The District Judge held that this acknowledgment was sufficient to save limitation, and accordingly decreed the appeal, relying on the case of *Jamna Prasad v. Gokla* (2).

The defendants appealed to the High Court.

Mr. *E. A. Howard* and Babu *Badri Das*, for the appellants.

Mr. *T. Conlan*, for the respondents.

JUDGMENT.

BANERJI, J.—The suit out of which this appeal has arisen was brought for the redemption of a mortgage, which was alleged by the defendants to have been made more than one hundred years before the date of the suit. The averment of the defendants as to the date of the mortgage was not repudiated by the plaintiffs. The mortgage having thus been made more than sixty years before suit, the claim for redemption would be barred by limitation under article 148 of schedule II of Act No. XV of 1877, unless it could be shown that an acknowledgment of the mortgagor's [460] right had been made before the expiry of the period of limitation in the manner required by law. What happened in this case, as found by the learned Judge below, was that at the time of the revision of settlement the title of the mortgagor was acknowledged by Udai Ram and Khushhali, the two mortgagees, but the settlement *khewat* was signed by only one of them. This, it is alleged, took place in 1852. Had the mortgage been only in favour of the person who signed the *khewat*, there can be no doubt that an acknowledgment by him of the title of the mortgagor would have given the mortgagor a fresh start for the computation of limitation. Before Act No. XIV of 1859 came into operation there was no limitation for a suit for redemption. It was under cl. 15 of s. 1 of that Act that a limitation of sixty years was for the first time provided for such a suit, to be computed from the date of the mortgage, unless an acknowledgment of the title of the mortgagor, or of his right of redemption, had been given in writing signed by the mortgagee, or some person claiming through him, in which case limitation would run from the date of acknowledgment. Act No. XIV of 1859 applied to the mortgage in question, and, as the said mortgage was more than sixty years old when that Act came into operation, a claim to redeem the mortgage would have been barred by limitation, had no acknowledgment of the mortgagor's title been made by the mortgagees and signed by them. In this case only one mortgagee signed the acknowledgment, and therefore the acknowledgment could not avail against the mortgagee who had not signed it, and the mortgagor's right of

(1) 11 A. 435.

(2) 14 A.W.N. (1894) 87.

VIII.] UNCOVENANTED SERVICE BANK LTD., v. ABDUL BARI 18 All. 462

redemption was not saved as against that mortgagee. The mortgage was made in favour of two mortgagees jointly, and it was not a mortgage in which the interests of each mortgagee could be apportioned so as to allow of the mortgage being redeemed piecemeal. In the case of such a mortgage an acknowledgment by one only of the mortgagees could not be effectual for the purpose of saving the operation of limitation. This view is in accord with the ruling [461] of the Bombay High Court in *Bhogilal v. Amritlal* (1). The plaintiff's claim was therefore barred by limitation and was properly dismissed by the Court of first instance. I allow the appeal with costs, and, setting aside the decree of the Court below with costs, restore that of the Court of first instance.

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18 A. 458 =
16 A.W.N.
(1896) 147.

Appeal decreed.

18 A. 461 = 16 A.W.N. (1896), 151.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

THE UNCOVENANTED SERVICE BANK, LIMITED (*Defendant*) v. ABDUL BARI (*Plaintiff*).^{*} [3rd July, 1896.]

Civil Procedure Code, s. 317—Execution of decree—Application for execution against a person alleged to be the beneficial owner though not the certified purchaser.

The provisions of s. 317 of the Code of Civil Procedure contemplate suits between the certified purchaser and the beneficial owner, and will not operate so as to bar a third party from asserting that the certified purchaser is not the beneficial owner. *Sohn Lall v. Lala Gya Pershad* (2), *Puran Mal v. Ali Khan* (3), and *Subha Bibi v. Hara Lal Das* (4), referred to.

[*Appr.*, 26 A. 82 (88) ; *R.*, 21 A. 29 (50) = 18 A.W.N. 187 ; 21 A. 238 = 19 A.W.N. 42 ; 8 O.C. 306.]

THE plaintiff in this case sued for a declaration that certain property which had been attached in pursuance of a decree held by the defendant Bank against his father, Abdullah, was his own property and not liable to attachment in execution of the said decree.

The property in suit had been put up to auction as the property of one Rahim Bakhsh and had been purchased by the plaintiff on the 20th of July, 1889, Abdullah, the plaintiff's father, acting for him in the transaction. The sale certificate was granted in the plaintiff's name and he obtained possession.

The defendant Bank pleaded that the real purchaser of the property was Abdullah and not the plaintiff.

The Court of first instance (Munsif of Allahabad) found on the facts against the plaintiff and dismissed the suit. The plaintiff appealed.

[462] The lower appellate Court (District Judge of Allahabad) decreed the plaintiff's claim on the following finding:—

"I observe that the law strongly protects an auction-purchaser. He is put into possession, and no suit can be maintained against him on the ground that the purchase was made on behalf of any other person or on behalf of some one through whom such other person claims. In the

^{*} Second Appeal No. 453 of 1894, from a decree of W. Blennerhassett, Esq., District Judge of Allahabad, dated the 26th March 1894, reversing a decree of H. David, Esq., Munsif of Allahabad, dated the 15th January 1894.

(1) 17 B. 173.

(3) 1 A. 285.

(2) N.W.P. H.C.R. (1874) 265.

(4) 21 C. 519.

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present case there is no allegation by the Bank of fraud at the time of purchase. It is alleged that Abdullah was the real purchaser and that Abdul Bari's name was used fictitiously; a direct suit by the Bank against Abdul Bari could not therefore be maintained. I certainly do not think that where the Bank would fail in a regular suit, it can succeed by dint of a bare assertion that the property is Abdullah's and thereby deprive Abdul Bari of possession. Admitting that Abdullah paid consideration for Abdul Bari's purchase, it would still be necessary to show that he did not intend to pay it for the benefit of Abdul Bari before the latter could be deprived of the property; nor could a direct suit of this nature be brought against an auction-purchaser.

The defendant Bank appealed to the High Court.

Mr. *D. N. Banerji*, for the appellant.

Munshi *Ram Prasad*, for the respondents.

JUDGMENT.

BANERJI and AIKMAN, JJ.—The suit in which this appeal has arisen was brought by one Abdul Bari for a declaration that certain property which the appellant caused to be attached as the property of Abdullah, the judgment-debtor of the appellant Bank, was property which had been purchased at auction by the plaintiff Abdul Bari and belonged to him. The defence to the suit was that Abdullah was the real purchaser of the property and that Abdul Bari was only *benami* for him. This defence succeeded in the Court of first instance, but the learned Judge of the lower appellate Court overruled it on the ground that a suit brought by the present defendant for a declaration that the auction-purchaser was not the beneficial owner could not be maintained, and that consequently it was not open to the defendant to make such an assertion in answer to the plaintiff's claim. Although the learned Judge [463] did not refer to s. 317 of the Code of Civil Procedure, he evidently based his opinion on what he considered to be the meaning of that section. In our opinion the view taken by the learned Judge was erroneous and was not warranted by the provisions of s. 317. That section forbids a suit by a person claiming to be the beneficial owner against the certified purchaser except on the ground of fraud. There can be no doubt that the section contemplates a suit between the certified purchaser and the person claiming to be the beneficial owner, and not a suit like the present, in which a third party asserts that the certified purchaser was not the beneficial owner. This was the view taken by this Court in *Sohn Lal v. Lall Gya Pershad* (1), which was followed in *Puran Mal v. Ali Khan* (2). The same view was held by the High Court of Calcutta in *Subha Bibi v. Hara Lal Das* (3). We allow this appeal, and, setting aside the decree of the lower appellate Court, remand the case to that Court under s. 562 of the Code of Civil Procedure with directions to readmit the appeal under its original number in the register and to determine it according to law. Costs to abide the result.

Appeal decreed and remanded.

(1) N.W.P.H.C.R. (1874) 265.

(2) 1 A. 235.

(3) 21 C. 519.

18 A. 463 = 16 A.W.N. (1896), 148.

APPELLATE CIVIL.

*Before Mr. Justice Banerji and Mr. Justice Aikman.*SARJU PRASAD (*Plaintiff*) v. HAIDAR KHAN (*Defendant*).

[3rd July, 1896.]

*Act No. XII of 1881 (North-Western Provinces Rent Act) s. 189 – Appeal Rent payable by the tenant not in issue in the appeal.*1896
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Under s. 189 of Act No. XII of 1881, an appeal lies in a suit under s. 93 of the Act, where the rent payable by the tenant *has been* a matter in issue and has been determined. It is not necessary that the rent payable by the tenant should be a matter in issue in the appeal.

THIS was a suit under s. 93 (a) of Act No. XII of 1881 to recover from a tenant rent of an agricultural holding for the years 1300 and 1301 Fasli. The holding was one at fixed rates. The defendant denied that any rent was due from him, [464] and he also pleaded that the rate of rent as stated in the plaint was wrong.

The Court of first instance (Assistant Collector) found that the rate of rent was, as stated by the defendant, and not as stated by the plaintiff, and as to payment that the defendant had paid rent in respect of one of the years for which rent was claimed, but not in respect of the second year.

The defendant appealed, and his appeal was dismissed by the Collector.

Thereupon the defendant further appealed to the District Judge, who allowed the appeal and dismissed the suit with costs in all Courts.

From this decree the plaintiff appealed to the High Court; mainly on the ground that no appeal lay to the Court below. Neither in the appeal to the District Judge nor in the appeal to the High Court, was the issue as to the rate of rent payable by the defendant again raised.

Mr. T. Conlan, for the appellant.

Munshi Madho Prasad, for the respondent.

JUDGMENT.

BANERJI and AIKMAN, JJ.—The only question which arises in this appeal is whether an appeal lay to the District Judge from the decree of the Collector. The suit was one for arrears of rent and the amount claimed was below Rs. 100. In the suit the question of the rent payable by the tenant, that is, of the rate of rent, was in issue, and there was a further question as to payments made by the tenant. Both these questions were determined by the Court of first instance. The issue as to the rate of rent was decided against the landlord and that as to payments was determined against the tenant. The landlord submitted to the judgment of the Court of first instance. It was the tenant only who appealed, and his appeal had reference to the question of the payments alleged by him and disallowed by the Court of first instance. Now what we have to determine in this appeal is, whether under the provisions of s. 189 of Act No. XII of 1881, the tenant could appeal to the District Judge from the decree made against him. [465] We have to construe the section as it exists in the Act. The section provides that an appeal shall lie from a decision of a Collector of the

* Second Appeal No. 223 of 1895, from a decree of F. W. Wells, Esq., District Judge of Gbazipur, dated the 23rd January 1895, reversing a decree of J. McC. Wright, Esq., Collector of Ballia, dated the 20th August 1894.

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District, or Assistant Collector of the first class in all suits mentioned in s. 93 in which "the rent payable by the tenant has been a matter in issue and has been determined." The appeal is not limited to the question of the rate of rent, but it is given in every suit in which that question having been in issue has been determined. In this case, the question of the rate of rent was in issue in the Court of first instance and was determined by that Court, consequently the condition necessary to give a right of appeal under the section was fulfilled. It is true that, had no question arisen in the Court of first instance as to the rate of rent, there could have been no appeal on the question of payment, but we have to construe the section as we find it. As, according to the language used in s. 189, an appeal lies in every suit in which the question of the rent payable by a tenant has been in issue and has been determined, an appeal lay in this case to the District Judge. The point taken here cannot therefore be sustained. We dismiss the appeal with costs.

Appeal dismissed.

18 A. 465 = 16 A.W.N. (1896). 149.

REVISIONAL CRIMINAL.

Before Mr. Justice Blair and Mr. Justice Banerji.

FARZAND ALI (*Applicant*) v. HANUMAN PRASAD
(*Opposite Party*).^{*} [6th July, 1896.]

Criminal Procedure Code, s. 191 (c)—Act No. X of 1872, s. 140 (c)—Complaint—By whom a complaint of an offence may be made.

The complaint upon which under s. 191 (c) of the Code of Criminal Procedure a Magistrate may take cognizance of an offence may be made by any member of the public acquainted with the facts of the case, not necessarily by the person aggrieved by the offence to which the complaint relates. *In re Ganesh Narayan Sathe* (1) followed.

THE facts of this case sufficiently appear from the judgment of the Court.

[466] Mr. R. Malcomson and Pandit Madan Mohan Malaviya, for the applicant.

Mr. C. Dillon, for the opposite party.

JUDGMENT.

BLAIR and BANERJI, JJ.—This is a petition in revision presented on behalf of an accused person against whom proceedings have gone to the stage, first, of issuing summons, and secondly, of an order that failing the service of summons a warrant shall issue. One of the grounds of the petition having been abandoned, the only one which remains is that the complaint, which we take to be an information given with intent to set the Court in motion, was made by some person other than the person aggrieved.

A preliminary objection was made by Mr. Dillon, who appears for the opposite party, that the petition and its grounds disclosed no matter for the exercise of our revisional jurisdiction. He contended that the general principles of law having force in India, which are expressed in s. 191 of the Code of Criminal Procedure, 1882, empowered any one of the public

^{*} Criminal Revision No. 345 of 1896.

(1) 13 B. 600.

to complain to a Magistrate of any act which is in violation of the criminal law of this country, while the cases in which the proceedings could only be initiated by the aggrieved person, are set forth in ss. 195, 196, 197, 198 and 199 of the Code of Criminal Procedure. He argued that the special limitation imposed on those cases excludes the idea that any such limitation was applicable to other cases in the institution of prosecutions.

Mr. *Malcomson*, who appears for the petitioner, has addressed to us an argument based upon the construction of the Criminal Procedure Code of 1872, s. 140, and upon the construction of the corresponding section of the Code of Criminal Procedure now in force. The provisions of s. 191 of the present Code are *in pari materia* with the provisions of s. 140 of the Act of 1872. S. 140 of the Act of 1872 makes four divisions of the circumstances under which a Magistrate is empowered to issue a summons or a warrant. The first refers to those cases in which a report has been made by the Police of a cognizable offence; the second to the information or report by a Police officer as to a [467] non-cognizable offence; the third, which is the one which is suggested to us as applicable to the present matter, is in the following words:—"Upon a complaint by a private person. Any person acquainted with the facts of a case may make a complaint." The fourth division deals with cases in which a Magistrate entertains suspicion and makes no reference to the information or other grounds upon which that information is based. We are asked by Mr. *Malcomson* to put upon the third division a construction which at first sight seems somewhat violent. We are asked to say that by the words in the first sentence "upon a complaint by a private person" must be meant an aggrieved person and nobody else. In the second sentence of that clause we are asked to put upon the words "any person acquainted with the facts of the case" the interpretation "any person other than the one aggrieved." We have not had cited to us any authority for the bifurcation of that clause. Indeed, if Mr. *Malcomson's* interpretation were correct, power would be given to a Magistrate to issue a warrant or summons upon the complaint of the party aggrieved, while the second sentence on Mr. *Malcomson's* construction would enable other parties to make a complaint, although there are no words in the section empowering a Magistrate to issue a summons or a warrant upon such a complaint. It seems to us that the construction of those words is obvious, that whereas in the previous clause informations of the Police officer receive the explanation that for the purpose of this section they must be regarded as complaints, so in the third clause the complaint by a private person receives the explanation that such complaint may be made by any person who is acquainted with the facts of the case. That seems to us to be the easy, ordinary and natural construction to put upon the words of that section. Mr. *Malcomson* argued that clause (c) of s. 140 of the Act of 1872 was reproduced and subdivided into two clauses in the corresponding section, *viz.*, s. 191 of the Act of 1882. He suggested that the first clause "upon receiving a complaint of facts which constitute such offence," meant a complaint by a person aggrieved, and by him only, [468] that is to say, those words were the equivalents for the explanations in the Act of 1872 upon a complaint by a private person, *i.e.*, as interpreted by Mr. *Malcomson*, a private person aggrieved.

It was suggested to us that the words of the complaint itself suggested that the person who made it was the person injured. With such an interpretation, it is unnecessary to deal. Mr. *Malcomson* informs us that

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(1896) 149.

he did not contend that the persons mentioned in ss. 195, 196, 197, 198 and 199 of the Code of Criminal Procedure, 1882, were outside of, but they were included in the general provisions of clause (a) of s. 191. We confess to feeling some difficulty in understanding why in certain cases the initiation of prosecutions should have been confined expressly to persons aggrieved if they were already included in the general enactment of s. 191. Mr. *Malcomson* contended that clause (c) of s. 191 included and provided for the case of complaints by persons other than persons aggrieved, and in that respect covered the same grounds as the second sentence in clause (c) of s. 140 of the Act of 1872. They do not, however, cover the same ground in this respect, that whereas in clause (c) of s. 140 of the Act of 1872 the information tendered by a private person must be of the nature of a complaint intended to set the Court in motion, clause (c) of s. 191 of the Act of 1882 includes information of all kinds and without restriction, except that it must be from some person other than a Police officer. In our opinion Mr. *Malcomson's* construction will not hold water. Clause (c) of s. 191 would not be applicable to complaints at all, and the only complaint upon which the Court could act would be a complaint under clause (a) of that section. It would be in our opinion, having regard to the general policy of the law, an impossible restriction to impose upon the right of all persons interested in the due administration of the law to debar them from making complaints of the violation of law and setting the Court in motion in case of such violation. It would require clear and positive words, which are wholly absent in the Code of Criminal Procedure, to induce us to put what appears to us such a forced and unnatural construction on the words of that section. [469] To the best of our knowledge Mr. *Malcomson's* ground for revision is not one that has ever been heretofore entertained by this Court, nor has he laid any foundation for the exercise of our revisional jurisdiction. Our attention has been called to a case (*In re Ganesh Narayan Sathe*) reported in I.L.R., 13 Bom., 600, in which two learned Judges lay down that as a general principle the right to complain of violations of law belongs, unless expressly restricted, to every member of the public. This seems to us to be a thoroughly sound proposition and one which is the basis of our present decision. Our finding on the preliminary point being in favour of Mr. *Dillon's* client, this petition is rejected.

18 A. 469 = 16 A.W.N. (1896) 154.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blennerhassett.

SHEO CHARAN LAL (*Plaintiff*) v. SHEO SEWAK SINGH AND ANOTHER
(*Defendants*).^{*} [15th July, 1896.]

Execution of decree—Validity of sale in execution—Civil Procedure Code, ss. 268, 274—Attachment.

Held that a sale of the mortgagee's rights under a mortgage duly held and confirmed was effectual to pass the mortgagee's rights to the auction-purchaser, even though the attachment subsequent to which such sale was held might have been made under

^{*} Second Appeal No. 677 of 1894, from a decree of J. Denman, Esq., District Judge of Benares, dated the 26th April 1894, modifying a decree of Babu Nil Madhub Rai, Subordinate Judge of Benares, dated the 30th June 1893.

a wrong section of the Code of Civil Procedure. *Balkrishna v. Masuma Bibi* (1), *Mahadeo Dubey v. Bhola Nath Dichit* (2), *Ram Chand v. Pitam Mal* (3), and *Karim-un-nissa v. Phul Chand* (4) referred to.

[R., 23 A. 25 (30) ; 14 C.P.L.R. 5.]

THE plaintiff sued for sale under a mortgage, alleging that he had purchased at a sale in execution of a decree, which sale had been duly confirmed and a sale certificate granted to him, the rights and interests of the mortgagees in the mortgage in question.

The defendants, one of the original mortgagors and the son of the other, resisted the suit mainly on the ground that the attachment, in pursuance of which the sale to the plaintiff had taken place, had been made under s. 274 of the Code of Civil Procedure, [470] and was consequently illegal, and the plaintiff had acquired no rights under the sale to him.

This plea was accepted by the Court of first instance (Subordinate Judge of Benares) and the suit accordingly was dismissed.

The plaintiff appealed. The lower appellate Court (District Judge of Benares), taking the same view of the law as the first Court, dismissed the appeal. The plaintiff thereupon appealed to the High Court.

Babu Jogindro Nath Chaudhri and Pandit Sundar Lal, for the appellant.

Munshi Ram Prasad and Munshi Gobind Prasad, for the respondents.

JUDGMENT.

EDGE, C. J., and BLENNERHASSETT, J.—This is a suit for sale under s. 88 of the Transfer of Property Act, 1882. The plaintiff's title is that of auction-purchaser at a sale of the rights and interests of the mortgagees under the mortgage in question. It appears that the attachment was first made under s. 268 of the Code of Civil Procedure. The Court executing the decree having ruled that the attachment should be made under s. 274, the attachment under s. 268 was withdrawn and an attachment under s. 274 took place. Subsequently to that attachment the rights and interests of the mortgagees in the mortgage were brought to sale and sold. The sale was confirmed and a certificate of sale granted to the plaintiff who was the purchaser. The present suit has been dismissed on the ground that the rights of the mortgagees judgment-debtors in the previous case, by reason of the attachment having been made under s. 274, did not pass to the auction-purchaser, the plaintiff here. In support of that contention the decisions of this Court in *Mahadeo Dubey v. Bhola Nath Dichit* (2) and *Rama Chand v. Pitam Mal* (3) have been relied on. It has also been pointed out that according to the decision of this Court in *Karim-un-nissa v. Phul Chand* (4) the attachment should have been made under s. 268. However, [471] other High Courts have taken a different view of the section under which such attachments should be made. Their Lordships of the Privy Council on the 5th of July 1882, in *Balkrishna v. Masuma Bibi* (1) held in a somewhat analogous case that, even if the Court executing a money decree had no jurisdiction to attach mortgaged lands out of its district, it had jurisdiction to sell in execution the right to enforce a mortgage held by the judgment-debtor over those lands. That decision was naturally not referred to in the case of *Mahadeo Dubey v. Bhola Nath Dichit*, which was decided on the 23rd of August 1882, and it appears to have escaped

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(1896) 154.

(1) 5 A. 142.

(2) 5 A. 86.

(3) 10 A. 506.

(4) 15 A. 134.

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18 A. 469=
16 A.W.N.
(1896) 154.

the attention of the learned Judges in *Ram Chand v. Pitam Mal*. Whether the attachment ought to have been made under the one section or under the other, all the parties interested knew that the rights and interests of the mortgagee under the mortgage were being put up for sale; and those interests having been sold and the sale having been confirmed and a certificate granted to the plaintiff, he was, so far as that point is concerned, entitled to maintain the suit.

The suit having been wrongly dismissed on this preliminary point, we set aside the decrees of both the Courts below, and remand the suit under s. 562 of the Code of Civil Procedure to the first Court. The costs of the appeals will abide the result.

Appeal decreed and cause remanded.

18 A. 471 = 16 A.W.N. (1896) 154.

APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice
Blennerhassett.*

SHIAMANAND (*Applicant*) v. HAR LAL (*Decree-holder*).^{*}
[15th July, 1896.]

*Hindu law—Hindu widow—Revenue due on account of widow's estate paid by lambardar
—Remedy of lambardar for recovery of money so paid on death of widow.*

G. D., a separated sonless Hindu, died possessed of certain zamindari property, which passed to his widow J. During J.'s possession, the lambardar of the village paid certain Government revenue due by J. in respect of the property left by G. D. J. died, and the property in question passed to S.N. as heir to G.D. On [472] suit by the lambardar to recover from S.N. the money paid on behalf of J., it was held that the only decree to which the lambardar was entitled was a decree against S. N. as J.'s representative payable out of the assets, if any, which had come to S.N. from J. *Seth Chitor Mal v. Shio Lal* (1) referred to.

[R., 19 A. 300.]

THIS was an appeal from an appellate order for disallowing the appellant's objection to the attachment and sale of certain property in his possession. It appears that one Gauri Dat, who was a separated sonless Hindu, was the owner of a certain piece of resumed muafi. Gauri Dat died, and on his death the land was taken by his widow Janki, whose name was recorded in respect thereof. During Janki's incumbency, Har Lal the lambardar paid on her behalf certain sums which were due by Janki for Government revenue. Janki died; and Shiamanand, the appellant, came into possession of the property as heir to Gauri Dat. The lambardar sued Shiamanand for the recovery of the sums which he had paid on behalf of Janki.

From the Court of first instance he obtained a decree which appears to have been a personal decree against Shiamanand. This decree was however modified by the appellate Court, which gave the lambardar a decree against the property of Janki only.

^{*} Second Appeal No. 508 of 1894, from an order of Maulvi Muhammad Jafar Husain, Subordinate Judge of Bareilly, dated the 16th April 1894, confirming an order of Pandit Giraj Kishore Dat, Munsif of Haveli, Bareilly, dated the 6th January 1894.

The lambardar attached in execution of that decree the property which had been of Janki in her lifetime. Shiamanand filed objections to the attachment, mainly on the ground that the property attached had come to him from Gauri Dat and was not liable to sale as the property of Janki.

The Court of first instance (Munsif of Bareilly) rejected the objections. Shiamanand appealed, and the lower appellate Court dismissed the appeal, holding that as Janki might have had power to alienate the property for the payment of Government revenue, the decree obtained by Har Lal was liable to be satisfied out of it.

The objector appealed to the High Court.

Mr *E. A. Howard*, for the appellant.

Mr. *Abdul Majid*, for the respondent.

JUDGMENT.

EDGE, C. J., and BLENNERHASSETT, J.—Musammat Janki, who was the widow of a sonless separated Hindu, held some zamindari [473] as his widow. Her status as his widow was her only title to the possession of the zamindari. The lambardar paid her quota of revenue. Musammat Janki died, and thereupon Shiamanand, the appellant here, who was the next reversioner to the widow's deceased husband, became entitled to and took possession of the zamindari. It is needless to say that Shiamanand did not inherit to Musammat Janki, nor did he take title through her. His title was that of reversioner to her late husband. It is also hardly necessary to say that the zamindari in question was not in the hands of Shiamanand assets of Musammat Janki. The lambardar brought his suit against Shiamanand to recover the moneys paid by him in respect of Musammat Janki's quota of land revenue. In the first Court he got a decree, the precise terms of which we do not know. The decree was, however, modified by the lower appellate Court, which exempted Shiamanand from all personal liability, and decreed the lambardar's claim against the property of Musammat Janki only. The lambardar seeks to execute that decree by sale of the zamindari which has come to Shiamanand. Shiamanand objected that the zamindari (as was the fact) was not assets of Musammat Janki.

The Court dismissed his objection. He has brought this appeal. In the case of *Seth Chitor Mal v. Shib Lal* (1) it was held by a majority of the Full Bench that a payment by a lambardar or other third person of the Government revenue of a co-sharer who was in default did not give the person who paid a charge on that co-sharer's share. The result is that, so far as the payment in question is concerned, it must be regarded as a payment of an ordinary debt, which was due by Musammat Janki. Now there is no pious obligation on a reversioner, such as Shiamanand is, to pay the debts of a Hindu widow. Consequently the reversioner can only be made liable for the debts of a Hindu widow to the extent of such assets as may have come to his hands and have not been lawfully applied by him to the payment of other creditors. The case may be a hard one for the lambardar; but hard cases make bad law, and we cannot help [474] him out of his difficulty by construing the decree which he got as a decree for the sale of the zamindari, a decree which would not have been a lawful one, there being no decree for sale except one passed under the Transfer of Property Act. We must regard the decree as lawfully

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18 A. 471=
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made, and in that light it was simply an ordinary decree against a representative, to be enforced in respect of such assets of the deceased debtor as he might have. We allow the appeal and the objection of Shiamanand, and dismiss the application for execution with costs in all Courts.

Appeal decreed.

18 A. 471=
16 A.W.N.
(1896) 154.

18 A. 474 = 16 A.W.N. (1896) 155.

APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice
Blennerhassett.*

RUSTAM SINGH (*Plaintiff*) v. MOTI SINGH (*Defendant*).^{*}
[16th July, 1896.]

*Hindu law—Mortgage by a married woman of property inherited from her father—
Legal necessity—Expenses of daughter's marriage.*

Ordinarily it is the duty of the father in a Hindu family to provide for his daughter's marriage; but where the father was not possessed of sufficient means to do so, and the mother, in order to raise money to meet the expenses of the daughter's marriage, mortgaged property of her own which had come to her from her father, it was held that the mortgage was made for legal necessity and was a valid mortgage.

[F., 37 C. 1 (9) = 10 C.L.J. 545 (553) = 13 C.W.N. 994 (1000) = 1 Ind. Cas. 945 (949); 6 M.L.T. 158; R., 16 Ind. Cas. 139 (146) = 23 M.L.J. 223 (235) = 12 M.L.T. 230 = (1912) M.W.N. 861 (870).]

THIS was a suit for sale on a mortgage made by a Hindu woman during the lifetime of her husband of property, which had come to her from her father. The mortgage was alleged by the plaintiff mortgagee to have been made in part to secure a former debt advanced for payment of Government revenue and in part to secure a present advance said to have been made to meet the expenses of the marriage of the mortgagor's daughter.

The suit was defended by one Kunjan Singh, uncle of the mortgagor's minor son, who pleaded that Musammatt Alaf Kuar, the mortgagor, had no power to mortgage the property, at any rate for any period longer than her own lifetime; that there was no legal necessity for the mortgage; that the alleged marriage took place long before the execution of the mortgage, and that the mortgage was in fact never executed by Alaf Kuar.

[475] The Court of first instance (Munsif of Mainpuri) found that the deed was genuine and that there was necessity for the loan inasmuch as the income of Chet Singh, Alaf Kuar's husband, was insufficient to defray the expenses of his daughter's marriage, and accordingly decreed the plaintiff's claim.

The defendant appealed. The lower appellate Court (Additional Subordinate Judge of Mainpuri), differing from the Munsif on the question of necessity, decreed the appeal and dismissed the plaintiff's suit.

The plaintiff thereupon appealed to the High Court.

Munshi Ram Prasad, for the appellant.

Pandit Sundar Lal, for the respondent.

^{*} Second Appeal No. 630 of 1894, from a decree of Syed Siraj-ud-din, Subordinate Judge of Mainpuri, dated the 1st June 1894, reversing a decree of Lala Ishri Prasad, Munsif of Mainpuri, dated the 7th August 1893.

JUDGMENT.

EDGE, C. J., and BLENNERHASSETT, J.—The plaintiff brought his suit for sale on a mortgage made by a married Hindu lady in the lifetime of her husband of property which had come to her from her father and was not her stridhan. The consideration for the mortgage was money advanced by the plaintiff to the lady in order to enable her to get her daughter married. Her daughter was the daughter of her husband then living. The lady also had a son living, who is still a minor, and is a defendant to this suit. Her husband was Chet Singh. The defence is that she had no power to grant the mortgage in question. The first Court decreed the claim. The Court of first appeal dismissed the suit. As we read the judgment of the Court below, the greater part of Chet Singh's property was mortgaged, and what remained was barely sufficient for the support of himself and his family. It was under these circumstances that Alaf Kuar borrowed the money and made the mortgage. There can be no doubt that it was the father's duty in this instance to get his daughter married. His son was a minor, and, so far as appears, they were the sole members of the family. The father was unable out of his resources to effect the marriage of his daughter, and thereupon Alaf Kuar, the mother of the girl, was obliged to have recourse to the property that came from her father to her. There is no doubt of its being the pious duty of the father to effect the marriage. He was unable to do so; [476] so under these circumstances we think that the money, the consideration of this mortgage was borrowed for necessary purposes, namely, the marriage of the daughter. We allow this appeal, and set aside the decree of the lower appellate Court and restore the decree of the first Court with costs in all Courts.

Appeal decreed.

18 A. 476 = 16 A.W.N. (1896) 158.

APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice
Blennerhassett.*

MANGLI PRASAD (*Plaintiff*) v. ISHARI PRASAD (*Defendant*).^{*}
[16th July, 1896.]

Partition—Usufructuary mortgage—Mortgage of different shares in an undivided area to different mortgagees—Mortgagees no right of partition inter se.

Two mortgagees held separate usufructuary mortgages the one of a two-thirds share, the other of a one-third share, in an undivided area of muafi land granted by the owners of those shares respectively. Held that one mortgagee could not, in a suit to which neither of the mortgagors was a party, obtain partition of the share mortgaged to him.

[R., 3 Ind Cas. 77 (78); D., 4 A.L.J. 253 N.; 119 P.L.R. 1903.]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Moti Lal*, for the appellant.

Mr. *Abdul Raoof* and *Munshi Madho Prasad*, for the respondent.

^{*} Second Appeal No. 698 of 1894, from a decree of Syed Siraj ud-din, Additional Subordinate Judge of Mainpuri, dated the 7th May 1894, confirming a decree of Pandit Alopi Prasad, Munsif of Phaphund, dated 22nd September 1893.

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18 A. 474 =
16 A.W.N.
(1896) 155.

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JUDGMENT.

JULY 16.

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16 A.W.N.
(1896) 158.

EDGE, C.J., and BLENNERHASSETT, J.—The owners of a two-thirds undivided share of certain muafi land granted a usufructuary mortgage of their share to the plaintiff. The owner of the remaining one-third undivided share granted a usufructuary mortgage of his share to the defendant. The plaintiff brought this suit to have the two-thirds share mortgaged to him partitioned off from the one-third share mortgaged to the defendant. The suit was brought in the Civil Court. The Court of first instance dismissed the suit on the ground that it was one for the Court of Revenue. The Court of first appeal, holding the same view as the Court of first [477] instance, dismissed the plaintiff's appeal. The plaintiff has brought this second appeal.

It appears to us that neither a Civil Court nor a Court of Revenue could grant the partition asked for in the suit. The plaintiff and the defendant are respectively mortgagees. Each is bound to keep accounts as mortgagee. The plaintiff's mortgagors, if they seek to redeem, would be entitled to an account from the plaintiff of the profits of their two-thirds undivided share. Similarly the defendant's mortgagor, if he claimed to redeem, would be entitled to an account from the defendant of the profits of his one-third undivided share, i.e., of the profits of one-third of the whole. How the parties to this suit could keep such accounts if their claim for partition is granted it is difficult to see. The mortgagors are not parties to this suit. They would not be bound by any partition which might be made in this suit. The effect of a partition between these mortgagees might possibly be that the profits of the two-thirds partitioned to the plaintiff might be more or less than the profits of the two-thirds of the whole. Further, there can be no doubt that if the partition were granted in this suit and the mortgagor subsequently sought partition of their undivided shares, the partition effected between the mortgagees in possession might seriously affect the rights of the mortgagors. Further, the defendant's mortgagor may redeem at any time the mortgage granted by him. The defendant's mortgagor would not be bound by any partition granted in this suit; the partition would cease to have effect. The defendant's mortgagor on redemption would be entitled to be put into possession of the one-third of the whole, but not of the one-third which his mortgagee might obtain on partition. We are quite clear that the suit cannot be maintained in the absence from it of the mortgagors of the plaintiff and the mortgagor of the defendant. Whether it could be maintained if they were parties to this suit as defendants we need not decide.

We dismiss this appeal with costs.

Appeal dismissed.

18 A. 478 = 16 A.W.N. (1896) 158.

[478] APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice
Blennerhassett.*

GUNJRA KUAR (*Plaintiff*) v. ABLAKH PANDE (*Defendant*).^{*}
[17th July, 1896.]

Certificate of guardianship—Minority—Evidence—Act No. XL of 1858 (Minors' Act).

A certificate of guardianship is not evidence of minority when the question of minority is in issue. *Satis Chunder Mukhopadhyaya v. Mohendro Lal Pathuk* (1) followed.

[R., 30 B. 523 = 8 Bom. L.R. 705 = 4 C.L.J. 181 = 4 Cr. L.J. 334 (P.C.); 1 M.L.T. 301; 213 P.L.R. 1910 = 86 P.W.R. 1910; 7 Ind. Cas. 505 (517).]

THE facts of this case were as follows. One Mahabir died some ten years before suit, possessed of immoveable property. He left a widow, Musammat Gunjra, and a minor son, Deo Pande. In 1886, Gunjra obtained a certificate of guardianship to Deo Pande under Act No. XL of 1858, the said certificate showing that Deo Pande's minority would not terminate until 1896. On the 9th of January 1892, Deo Pande made a registered sale-deed of a portion of his property to Ablakh Pande, the defendant, for Rs. 516, out of which Rs. 346 appears to have been set off on account of old debts due to the vendee by the vendor.

In December 1893, Musammat Gunjra filed the present suit for the cancellation of the sale-deed above mentioned, on the ground of Deo Pande's minority at the time of execution. After the suit was filed, Deo Pande applied to be added as a plaintiff, and was so added, under the guardianship of his mother.

The Court of first instance (Munsif of Ghazipur), relying on the certificate of guardianship as evidence of Deo Pande's minority, decreed the claim.

The defendant appealed. The lower appellate Court (Additional Subordinate Judge of Ghazipur) found that the plaintiff was a major at the time of the execution of the sale-deed, and dismissed the suit. Musammat Gunjra Kuar appealed to the High Court.

Babu Bishnu Chandar, for the appellant.

Munshi Gobind Prasad, for the respondent.

JUDGMENT.

[479] EDGE, C.J., and BLENNERHASSETT, J.—A certificate of guardianship is not evidence of minority when the question of minority is in issue. The same question was decided by the Calcutta High Court in the case of *Satis Chunder Mukhopadhyaya v. Mohendro Lal Pathuk* (1).

We dismiss the appeal with costs.

Appeal dismissed.

* Second Appeal No. 762 of 1894, from a decree of Maulvi Mubammad Ismail Khan, Additional Subordinate Judge of Ghazipur, dated the 18th May 1894, confirming a decree of Babu Srish Chandar Bose, Munsif of Ghazipur, dated the 1st March 1894.

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18 A. 479 = 16 A.W.N. (1896) 160.

APPELLATE CIVIL.

APPEL-
LATE*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blennerhassett.*

CIVIL.

DALU MALWAHI (*Plaintiff*) v. PALAKDHARI SINGH (*Defendant*).^{*}
[18th July, 1896.]

18 A. 479 =

16 A.W.N.

(1896) 160.

Execution of decree—Civil Procedure Code, s. 257A—Agreement as to payment of decretal money—Void agreement.

An agreement between the decree-holder and the judgment-debtor for the satisfaction of a decree by which any sum in excess of the decretal amount is payable and which has not been sanctioned by the Court which passed the decree cannot be made the basis of a subsequent suit. *Dan Bahadur Singh v. Anandi Prasad* (1), *Ganesh Shivram v. Abdulla Beg* (2), *Davlatsingh v. Pandu* (3), *Vishnu Vishwanath v. Har Patel* (4) and *Swamirao Narayan Deshpande v. Kashinath Krishna Mutalik Desai* (5) referred to.

[*Diss.*, 4 O.C. 284; *F.*, 7 Ind. Cas. 505 (516) = 86 P.W.R. 1910 = 213 P.L.R. 1910; 88 P.R. 1904; *R.*, 3 O.C. 165; *D.*, 25 A. 317 (326) = 23 A.W.N. 45 (48).]

THE plaintiff in the suit out of which this appeal arose had obtained a decree against the defendant from the Court of the Subordinate Judge of Benares. The decree was transferred to the Gorakhpur district for execution, and ultimately, the property sought to be sold in execution being ancestral, to the Collector. In the Collector's Court the parties entered into an agreement for the payment of the decretal amount by instalments, which the decree-holder, plaintiff, assented to on the condition that the judgment-debtor should pay enhanced interest on the decretal amount at the rate of 1 per cent. per mensem. The judgment-debtor went on paying instalments, but when the decree-holder applied in the execution department for the realization of the excess interest the judgment-debtor refused to pay it, alleging that the agreement was [480] void and not binding on him, being in contravention of s. 257-A of the Code of Civil Procedure. This objection was decided in favour of the judgment-debtor, and the decision was affirmed on appeal by the High Court.

The plaintiff then brought the present suit to recover enhanced interest alleged to be due under the agreement above referred to, filed and verified before the Court of Revenue, pleading that the defendant had profited by it and therefore could not plead that it was not binding on him.

The defendant pleaded that the agreement was illegal and void for various reasons; *inter alia*, that it was void by reason of s. 257-A of the Civil Procedure Code.

The Court of first instance held that having regard to the above-mentioned section the suit was unmaintainable and dismissed the suit, and the lower appellate Court affirmed the decree. The plaintiff appealed to the High Court.

Munshi Ram Prasad and Pandit Sundar Lal, for the appellant.

Munshi Jwala Prasad, for the respondent.

^{*} Second Appeal No. 701 of 1894, from a decree of V. A. Smith, Esq., District Judge of Gorakhpur, dated the 30th May 1894, confirming a decree of Syed Siraj-uddin, Subordinate Judge of Gorakhpur, dated the 21st November 1893.

(1) 18 A. 435.

(2) 8 B. 538.

(3) 9 B. 176.

(4) 12 B. 499.

(5) 15 B. 419.

JUDGMENT.

EDGE, C. J., and BLENNERHASSETT, J. — The principle of the decision in *Dan Bahadur Singh v. Anandi Prasad* (1) governs this case. It is supported by the decisions of the Bombay High Court in *Ganesh Shivram v. Abdulla Beg* (2), *Davlatsing v. Pandu* (3), *Vishnu Vishwanath v. Har Patel* (4) and *Swamirao Narayan Deshpande v. Kashinath Krishna Mutalik Desai* (5). We dismiss this appeal with costs.

Appeal dismissed.

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18 A. 479 =
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18 A. 481 (F.B.) = 16 A.W.N. (1896) 160.

[481] FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox,
Mr. Justice Blair, Mr. Justice Banerji and Mr. Justice Aikman.*

DIN DAYAL (*Decree-holder*) v. PATRAKHAN (*Judgment-debtor*).
[21st July, 1896.]

Execution of decree—Suit of the nature cognizable in Courts of Small Causes—Civil Procedure Code, s. 586.

Where the original suit is a suit of the nature cognizable in Courts of Small Causes, and the subject matter of the suit does not exceed Rs. 500 in value, no second appeal will lie in respect of an order made in execution proceedings relating thereto. *Harakh v. Ram Sarup* (6) approved. *Sri Bullov Bhattacharji v. Baburam Chattopadhyaya* (7) and *Aithala v. Subbanna* (8) referred to.

[F., 27 C. 484; 16 C.L.J. 96 (97) = 16 Ind. Cas. 975 (976); 18 Ind. Cas. 245; Appr., 12 C.P.L.R. 12; Appl. & Expl., 5 A.L.J. 84-N; 8 O.C. 405.]

THIS case was referred to the Full Bench in respect of a point other than that upon which it was ultimately decided. At the hearing before the Full Bench it was, however, brought to the notice of the Court that the case was governed by the ruling in *Harakh v. Ram Sarup* (6).

Babu Durga Charan Banerji, for the appellant.

Munshi Gobind Prasad, for the respondent.

The judgment of the Court (EDGE, C. J., KNOX, BLAIR, BANERJI and AIKMAN, JJ.) was delivered by EDGE, C. J. :—

JUDGMENT.

This is an appeal from the order of a Subordinate Judge passed in an appeal from an order of a Munsif on an objection filed to an application for execution of a decree. The suit was one of the nature cognizable by a Court of Small Causes, and the value of the subject-matter did not exceed Rs. 500. It has been held by this Court in *Harakh v. Ram Sarup* (6) that s. 586 of the Code of Civil Procedure bars such an appeal in such a case. The same view of the law was taken by the Calcutta Court in *Sri Bullov Bhattacharji v. Baburam Chattopadhyaya* (7) and by the Madras Court in *Aithala v. Subbanna* (8). We accordingly dismiss this appeal with costs.

Appeal dismissed.

* Second Appeal No. 433 of 1895.

(1) 18 A. 435.
(5) 15 B. 419.

(2) 8 B. 538.
(6) 12 A. 579.

(3) 9 B. 176.
(7) 11 C. 169.

(4) 12 B. 499.
(8) 12 M. 116.

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(1896) 142.

18 A. 482 (F.B.)=16 A.W.N. (1896) 142.

[482] FULL BENCH.

*Before Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Aikman and Mr. Justice Blennerhassett.*RAHIM ALI KHAN AND OTHERS (*Judgment-debtors*) v.
PHUL CHAND (*Decree-holder*).^{*} [23rd July, 1896.]*Execution of decree—Limitation—Civil Procedure Code, ss. 230, 235—"Subsequent application to execute the same decree"—Meaning of the term "granted."*

The "subsequent application to execute the same decree" mentioned in s. 230 of the Code of Civil Procedure means a substantive application for execution in the form prescribed by s. 235 of the Code.

Hence where an application for execution in accordance with s. 235 of the Code has been made within the period of limitation prescribed by s. 230 and has been granted, that is, execution has been ordered in accordance with the prayer of the decree-holder's application, the right of the decree-holder to obtain execution will not necessarily be defeated if, by reason of objections on the part of the judgment-debtor or action taken by the Court or other cause for which the decree-holder is not responsible, final completion of the proceedings in execution initiated by the application under s. 235 above referred to cannot be obtained within the period limited by s. 230. Further applications of the decree-holder to the Court executing the decree to go on from the point where the execution proceedings had been arrested and complete execution of his decree would be applications merely ancillary to the substantive application under s. 235 and would not be obnoxious to the bar of s. 230. *The Delhi and London Bank, Limited v. Reilly* (1) overruled.

[F., 30 A. 499=5 A.L.J. 616=A.W.N. (1909) 39; 33 A. 517 (522)=8 A.L.J. 412=9 Ind. Cas. 817 (818); 2 A.L.J. 276; A.W.N. (1908) 227; R., 36 B. 368 (372)=14 Bom. L.R. 331 (385); 37 C. 796 (804)=12 C.L.J. 328 (332)=6 Ind. Cas. 537=15 C.W.N. 337 (340); 18 A.W.N. 137; 15 C.L.J. 217 (218)=10 Ind. Cas. 355 (357); 27 P.R. 1905=79 P.L.R. 1905; 76 P.R. 1904=132 P.L.R. 1904; D., 9 A.L.J. 1277 (1281)=12 Ind. Cas. 628 (629); 11 O.C. 57; 112 P.L.R. 1902=5 Ind. Cas. 815 (816); 17 P.R. 1910=20 P.L.R. 1910=22 P.W.R. 1910.]

THIS case came originally before Aikman, J., sitting in single bench, by whom it was referred, having regard to the value of the appeal, to a Division Bench. The Division Bench made a reference to the Full Bench, which at first consisted of three Judges. In view, however, of one of the rulings of the Court bearing upon the question raised, being a ruling of a Bench of three Judges, the appeal was, on the 28th April 1896, referred, by order of the Chief Justice, to a Bench consisting of five Judges. The facts of the case are fully stated in the judgment of Knox, J.

Mr. W. K. Porter, for the appellants.

Mr. D. N. Banerji and Pandit Sundar Lal, for the respondent.

JUDGMENT.

KNOX, J.—The first appeal before us is an appeal arising out of execution proceeding consequent upon a decree for the payment of money, and the appellants are the judgment-debtors.

[483] Their contention is that the decree in question was one passed on the 9th of April 1880, and that an application to execute it had been made and granted in the year 1887. The present application was instituted on the 19th February 1894, and, as twelve years have elapsed from the date of the decree which it is sought to enforce, this application is one which cannot be granted.

^{*} First Appeal No. 127 of 1894.

(1) 13 A.W.N. (1893) 124.

Before the question whether the present application for execution of the 19th of February 1894 is an application for execution within the meaning of s. 230, Code of Civil Procedure, 1882, and is one which can, or cannot, be granted, can be determined, it will be necessary to pass in review certain events which have occurred while the decree of the 9th of April 1880 has been under execution. It will also be necessary then to consider whether the application of the 19th of February 1894 is an application to execute the decree or a petition to the Court in seisin of and already executing the decree upon an application for execution to take some step-in-aid of the execution of the decree upon that application. The respondent contends that the application for execution was filed by him on the 28th of September 1885, and that every application subsequently put in by him has been an application to the proper Court to take some step-in-aid of the execution of his decree. The application of the 28th of September 1885 was an application for execution of the decree by attachment and sale of certain property. Attachment was duly made.

Upon attachment made two ladies, Musammat Ulfat-un-nissa and Musammat Tamiz-un-nissa, raised certain objections. The objections raised by the ladies were not finally determined till December 1887. In the interim the judgment-creditor had applied to the Court to except the property claimed by the ladies and to sell the remainder of the property previously attached and still under attachment. But before sale could be made the objections raised by the ladies had been determined, and the decree-holder asked on the 7th of December 1887 that the property claimed by the ladies might be put up for sale. This was done, and the whole property sold on the 20th of December 1887. The sale of this property was [484] confirmed on the 20th of February 1888. The ladies in the meantime brought a suit to establish their right to the property claimed and obtained an order postponing the sale of that property until their suit was decided. That suit was determined on the 1st of September 1890. Musammat Ulfat un-nissa succeeded in rescuing her share of the property; Musammat Tamiz-un-nissa failed. On the 7th of October 1890 the judgment-creditor asked that now the remainder of property attached by him might be brought to sale after excluding from it that portion which had been adjudged to be the property of Musammat Ulfat-un-nissa. Notification of sale issued fixing the 20th of February 1891, as the day on which the sale should be held. On the 16th of February 1891 the judgment-debtors succeeded in getting the sale postponed, and in gaining further postponements until the date fixed for sale was the 20th of June 1891. On the 19th of June 1891, the Subordinate Judge granted at the instance of one of the judgment-debtors a further postponement of sale over the property with the exception of one siham. The order, however, did not reach the officer holding the sale in time. The sale was held, but it was set aside, and orders were issued for a new sale to be held on the 20th of November 1891. Sale was held on that date and the property was sold for Rs. 705. The judgment-debtors again asked that this sale might be set aside. Their application was heard, and on the 13th of February 1892, the sale was set aside, so far as one siham of the property sold was concerned, and as regards the rest it was confirmed. Following the order by which the sale was confirmed came an order directing that the execution proceedings be struck off as partially satisfied with leave to the decree-holder to take any further steps in execution hereafter. From the order of confirmation there was

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an appeal to the Judge and the sale was set aside by him on the 13th of December 1892.

Accordingly, on the 7th of October 1893, the decree-holder applied that the eight sihams which had been attached so far back as the 29th of September 1885, and which the decree-holder had never yet succeeded in bringing to a complete and matured sale, [485] should be sold. Some difficulty was experienced in serving the judgment-debtors with the necessary notice, and this application too was struck off the file with permission to take fresh steps in execution hereafter, the decree-holder having applied to withdraw it. Once more on the 19th of February 1894, the decree-holder presented to the Court a petition praying that the execution proceedings, which had on the 13th of February 1892 been struck off the file, might be restored to their original number and the prayer contained in the application of the 28th of September 1885 be fully granted. It is the order passed on this petition dated the 17th of March 1894, that forms the subject of this appeal. The judgment debtors, who are now appellants, as pointed out above, contended in the Court below and again contend here that the decree can no longer be executed against them. Twelve years, they say, have expired from the date of the decree sought to be enforced. An application to execute the decree was granted on the 24th of August 1887, and the present application, which was not presented until the 19th of February 1894, cannot be granted. They lay stress upon the fact that the application of the 7th of October 1893 was on the face of it an application for execution, and, as that application was by a definite order struck off, they contend that there must be a fresh application for execution. If the petition of the 19th of February 1894 be such an application, it clearly cannot be granted.

The respondents, on the other hand, maintain that the application for execution which is now before the Court is none other than the application of the 28th of September 1885. The property which is the subject-matter of these proceedings is entered in that application as property which the Court was asked to attach. The prayer for attachment in the application was granted, the attachment has subsisted ever since and has not matured into sale solely by reason of difficulties and objections which the appellant has placed in the way and which have had one by one to be removed.

In support of the contention of the appellants we were referred to the precedents *The Delhi and London Bank v. Reilly*, (1) and [486] *Ram Newaz v. Ram Charan* (2). There appears to be little if any distinction between the first of these two precedents and the case now under consideration. Both the cases cited proceed upon the assumption that the applications with which the Courts concerned had to deal were applications to execute a decree within the meaning of s. 230 of the Code of Civil Procedure. In *The Delhi and London Bank v. Reilly*, it was laid down that the words in s. 230 of the Code cover both applications to execute and applications to take some step-in-aid of execution.

Now the words of s. 230 are words which tend or operate to restrict a right, and they should be construed strictly therefor. Statutes of limitation are the creation of positive law, and nothing in them should be extended to cases which are not strictly within the enactments.

(1) 13 A.W.N. (1893) 124.

(2) 18 A. 49.

I am not prepared to apply them to any application which is not an application such as is described in s. 235 of the Code of Civil Procedure. That section lays down in great detail the form which an application to execute a decree must take, the matters which it must contain, and the mode in which the Court is asked to grant its assistance. Section 245 requires that such applications shall on receipt be examined, and if found in accordance with the law admitted on a register. The Court is after such admission to order execution of the decree according to the nature of the application. So long as that order or any further order according to the nature of the application is in progress, provided it be an order which has been evolved from the application so registered, I would hold that the application for execution is in progress. If from some obstacle imposed by the judgment-debtor or by the Court, that obstacle not being a final determination of the application, the progress of the order or subsequent orders to maturity is delayed and such obstacle is removed by an application of the decree-holder, I do not consider such latter application, unless it expressly take the form of a new application under s. 235 and be registered, as a subsequent application, any more than I would [487] consider a petition by a plaintiff in the course of a suit asking the Court to reconsider an order to be a fresh plaint. Moreover, I would hold that the application under s. 235 is granted at the moment when the order is passed ordering execution according to the nature of the application. Except where that order expressly refused any portion of the relief applied for, I would hold that order to cover and govern all subsequent orders to complete execution according to the nature of the application as registered and over the property specified therein. The decree-holder may in his application extend the relief he asks for over a wide area of property, but the fact that he has done so does not make it necessary that he should proceed to deprive the judgment-debtor of more of that property than is at first sight sufficient to satisfy the decree. There is nothing irregular or contrary to the spirit of the law that property attached should be sold in parcels. If the sale of one parcel of attached land is found insufficient, an application that a second parcel of the attached land be sold is not an application to execute the decree, nor is the granting of the request, save and except there has been a previous order refusing such requests still subsisting, a granting of the application to execute which was put in under s. 235 of the Code of Civil Procedure. It is a mere continuation to completion of the first order.

This view appears to be in accord, so far as the interpretation of the word "application" in s. 230 is concerned, with the view taken by the learned Judge who decided the case *Biswa Sonan Chunder Gossyamy v. Binanda Chunder Dibingar Adhikar Gossyamy* (1). In that case an application for execution was filed on the 13th of June 1879. It does not appear from the head-note that any order granting attachment issued before an order passed on the 19th of August whereby the application was struck off, the decree-holder having failed to take the necessary steps. On the 4th of March 1882, the decree-holder filed an application asking that the case which had been struck off and sent to the record room might be brought again on the file and property specified in the [488] application might be attached and sold. If the property specified was property not specified in the application of the 13th of June 1879, this case would go even further than I am prepared to go. There is nothing to

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show whether it was or was not. The application was again struck off on the 2nd June 1882, apparently without attachment granted. The application was readmitted, and attachment ordered on the 5th of March 1883. The District Judge held that all these proceedings were one continuous proceeding throughout, and the High Court found no ground upon which to question the Judge's finding upon this matter.

Under the Limitation Act of 1871 applications for execution of a decree had to be instituted within three years of the date of applying to a Court to enforce or keep in force a decree, and in construing the word "applying" the Calcutta and Madras High Courts both held that the word referred to applications under s. 212 of Act VIII of 1859, or otherwise, whereby proceedings in execution are *commenced* and not applications of an incidental kind made during the pendency of such proceedings. *Chunder Coomar Roy v. Bhogobutty Prosonno Roy* (1), *Prabhacararow v. Potannah* (2).

The way in which I would construe the words "application" and "granted" would not do any violence to the language of the Act, and is moreover to my mind a fair and equitable construction. What the section aims at effecting is that a limit should be put to the period within which the holder of a money decree may put in force the decree he holds. If the decree-holder says in his application to the judgment-debtor—"I press for payment of my decree and will enforce it against such and such property of yours,"—and if he does this within twelve years of the date of the decree and in sufficient time to get an order from the Court to the effect that he may enforce it in the terms of the application, it cannot be presumed that the Legislature intended him to suffer because, either from a desire not to harass unnecessarily, or owing to obstacles for which the decree-holder is not responsible, the property covered by [489] the application is sold piecemeal, and the Court has to be reminded to complete the assistance it ordered. Such an interpretation would be an infringement of the decree-holder's right and would be construing the Act not in favour of but against the decree-holder.

For the above reasons I would hold that the application to execute is not time-barred and would dismiss this appeal with costs.

BLAIR, J.—I also am of opinion that this appeal should be dismissed. The argument upon the hearing quite convinced me that the case of *The Delhi and London Bank v. Reilly* (3) in which I took part was wrongly decided. I have been confirmed in that opinion by the judgments of my brethren which I have had the advantage of perusing. I would dismiss this appeal.

BANERJI, J.—This appeal has arisen out of proceedings relating to the execution of a decree for the payment of money, dated the 9th of April 1880. The question we have to determine is whether the application of the decree-holder presented on the 19th of February 1894, is barred under the third paragraph of s. 230 of the Code of Civil Procedure, more than twelve years having elapsed from the date of the decree when the aforesaid application was made.

In order that the twelve years' bar of that section may apply two conditions are essential, first, that an application to execute the decree was previously made under the section and was granted; and, second, that the present application to which the bar is sought to be applied is an

(1) 8 C. 235.

(2) 2 M. 1.

(3) 13 A.W.N. (1893) 124.

application to execute the same decree. I agree with the ruling of Burkitt, J., in *Tilashar Rai v. Parbati* (1), that the previous application referred to in the section is not necessarily the last previous application, and that the section will apply if any previous application for execution has been made under the section and has been granted. I am also of opinion that an application for execution is granted within the meaning of the section when, after admitting the application under s. 245 and taking such preliminary measures as may be necessary, the Court orders the decree to be executed by the issue of its warrant for execution. I cannot accede to Mr. Sundar Lal's contention, if I understood him [490] rightly, that an application cannot be held to have been granted unless the assistance of the Court sought in the application was actually and completely given.

In the present case an application was made on the 24th of August 1885 for the execution of the decree by the arrest of the judgment-debtor. A warrant of arrest was ordered to be issued, and was actually issued, but the judgment-debtor could not be apprehended. That application was made under s. 230 of Act No. XIV of 1882 and it was undoubtedly granted. If therefore the application now in question, namely, that of the 19th of February 1894, can be held to be an application to execute the decree within the meaning of s. 230, the prohibition of that section will undoubtedly apply to it.

We have therefore to consider whether the application of the 19th of February 1894 is an application for the execution of the decree dated the 9th of April 1880. In terms it is an application praying that the execution case No. 413 struck off on the 13th of February 1892 "be restored to its original number and sale notification be formally issued in respect of the properties previously attached." In form it is not an application for execution containing the particulars required by s. 235. We have to see whether in substance it is an application for execution such as is contemplated by s. 230. In my judgment the application for execution referred to in that section is an initial application of the nature provided for in s. 235 upon which an order has to be made by the Court for granting or refusing execution. An application ancillary or incidental to an application already made for execution in the mode prescribed in s. 235 cannot, in my opinion, be regarded as an application to execute a decree within the meaning of s. 230. An application, for example, praying the Court which has issued a notice under s. 248 to issue its warrant for the attachment of the property specified in the original application for execution under s. 235, or an application asking the Court to issue a proclamation for the sale of property already attached, is not "an application to execute" contemplated [491] by s. 230, but is only an application to proceed with the application for execution already made and granted. Similarly an application to proceed with execution proceedings suspended or stayed by an injunction or other order or by reason of the institution of a suit has been held by this and other High Courts to be not an application for execution but an application to revive a previous application for execution. The words "application to execute" in s. 230 have, in my judgment, the same sense as the words "applying for execution" in clause (4) of the third column of art. 179, sch. II, of the Indian Limitation Act. 1877, and contemplate, as I have said above, an initial substantive application for execution, and not an application to revive an application already made.

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FULL
BENCH.

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18 A. 482
(F.B.) =
16 A.W.N.
(1896) 142.

(1) 15 A 198.

1896
JULY 23. In this view I am unable to agree with the ruling in the *Delhi and London Bank, Ltd. v. Reilly* (1). In my judgment, if the application of the 19th of February 1894 was not an application to execute the decree held by the decree-holder, it was not obnoxious to the twelve years bar of s. 230.

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FULL
BENCH. —
18 A. 482 That application was, as I have said, in terms an application to revive
(F.B.)= “the execution case No. 413 of 1890 struck off on the 13th of
16 A.W.N. February 1892.” The execution case No. 413 was initiated by an appli-
(1896) 142. cation made on the 7th of October 1890 for the sale of a portion of the property for the attachment and sale of which the decree-holder had applied on the 28th of September 1885, but the sale of which had been stayed by reason of objections raised by two ladies in regard to that property under s. 278 and the institution of a suit under s. 283 upon the dismissal of the objections. The proceedings which took place upon the filing of the two applications referred to above have been detailed at length in the judgment of my brother Knox, and it is not necessary for me to recapitulate them. Suffice it to say that when a sale of the property mentioned in the application of the 7th of October 1890 finally took place on the 20th of November 1891, an application was made under s. 311 to set aside the sale. The Court of first instance set aside the sale in respect of one siham out [492] of nine sihams sold and affirmed it in respect of the remaining eight sihams, and on the 13th of February 1892 struck off the execution case, the decree having been partially satisfied.

The judgment-debtors appealed to the District Judge from the order confirming the sale, and on the 13th of December 1892 that order was reversed, and the sale of the remainder of the property was set aside. In my opinion the effect of that order was to put back the execution proceedings to the point where they were before the sale of the 20th of November 1891, and the only application which it was necessary, if at all, for the decree-holder to make was an application to proceed with the execution proceedings which the Court of first instance had terminated by its order of the 13th of February, 1892, but which were resuscitated by reason of the order of the District Judge dated the 13th of December 1892. Such an application was made on the 19th of February 1894, and I agree with my brother Knox in holding that it was not an application to execute the decree within the meaning of s. 230 and is not barred by the provisions of that section. The decree-holder, it is true, made an application for execution on the 7th of October 1893, but, as he withdrew that application with the leave of the Court, that application may well be excluded from consideration. For the above reasons I would affirm the order of the Court below and dismiss this appeal.

In this view it is not necessary to consider the question which was raised in *Ram Newaz v. Ram Charan* (2). Were I called upon to decide that question I would hold with the ruling of Turner, C. J., and Muttusami Ayar, J., in *Virarama v. Annasami* (3) and the dictum of Field, J., in *Pana-ul-huq v. Kishen Mun Dabee* (4) that the twelve years prohibition of the third paragraph of s. 230 refers to the words “application to execute the decree” and not to the word “granted.” Any other construction would lead to results which could not possibly have been

(1) 13 A.W.N. (1899) 124.
(3) 6 M. 359.

(2) 18 A. 49.
(4) 9 O.L.R. 297.

contemplated by the Legislature. If, for instance, an applica- [493]
 tion for execution was made within the twelve years, but the Court
 through negligence omitted to make an order for execution before the
 expiry of that period, the decree-holder's right to execute the decree
 would be gone through no fault of his own. Take again the not unfre-
 quent case of an application for execution made several years before the
 expiry of the twelve years but rejected by the Court of first instance on
 the ground of limitation under Act No. XV of 1877. If the appeal from
 the order of the Court of first instance be decided by the appellate Court
 after the expiry of twelve years from any of the dates mentioned in the
 third paragraph of s. 230 the appellate Court, which might be the
 Judicial Committee of the Privy Council, would not have the power to
 grant execution of the decree, although it might hold that the ruling of
 the Court of first instance was erroneous and that the decree-holder was
 entitled to obtain execution of his decree on the date on which he made
 his application. I must concede that the section as it stands is not
 happily worded and needs improvement, but I am unable to hold that
 the intention of the Legislature was to create a prohibition of the nature
 referred to above, and that its true intention cannot at all be gathered
 from the section as it exists at present in the Act.

AIKMAN, J.—This is an appeal arising out of proceedings taken in
 execution of a decree for money which was passed on the 9th of April
 1880. It is admitted that a previous application to execute has been
 made and granted. When this is the case, s. 230 of the Code of Civil
 Procedure provides that no subsequent application to execute the same
 decree shall be granted after the expiration of twelve years from any of
 the following dates, namely, "(a) the date of the decree sought to be
 enforced, or of the decree (if any) on appeal affirming the same, or (b) when
 the decree or any subsequent order directs payment of money, * * *
 the date of the default in making the payment."

In the present case the date from which the twelve years is to be
 reckoned is the date of the decree sought to be enforced. In the lower
 Court the judgment-debtors pleaded that under the above [494] provision
 of law, execution of the decree against them is barred. The lower Court
 overruled this objection. They appeal to this Court, relying on the same
 plea which was overruled by the Court below. I concur with my learned
 colleagues in thinking that the appeal must fail.

In my decision in the case of *Ram Newaz v. Ram Charan* (1) I
 held that what was forbidden by s. 230 was not the making or receiv-
 ing an application to execute after the expiry of the time fixed, but
 the granting of such an application after the expiry of that period. I do
 not think it can be denied that making an application is not the
 same thing as granting an application. As Straight, J., observed in
Paraga Kuar v. Bhagwan Din (2)—"It is one thing to ask for execu-
 tion of a decree and another to have such application granted." When
 I decided the case of *Ram Newaz v. Ram Charan* I was not aware
 that an opposite interpretation had been put upon the words of the
 section by the Madras High Court in the case *Senra Disai Venra*
Jagath Virarama Dhikku Vijaya Sethurayar v. Annasami Ayyar (3).
 I have now carefully considered that judgment, but with all defer-
 ence to the learned Judge who delivered it, I am unable to agree with
 him in thinking that the words of the section can possibly admit of the

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 18 A. 482
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 16 A.W.N.
 (1896) 142.

(1) 18 A. 49.

(2) 8 A. 301.

(3) 6 M. 359.

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interpretation which he has put upon it. The way in which he would read the words is as follows:—"When an application to execute a decree for the payment of money has been made and granted no subsequent application to execute made after the expiry of twelve years from the dates given shall be granted." This in my opinion is legislation, not interpretation. I am quite ready to admit that the words of the Statute as they stand may in some cases result in a decree-holder being for no fault of his own deprived of his rights. For instance, an application to execute may have been presented in good time, but owing to negligence on the part of the Court or the Court officials may not have been granted within the prescribed period after the expiry of which, according to [495] the plain meaning of the words of the section, it cannot be granted. This in all probability escaped the attention of the Legislature when it framed the section as it did. But we must not on that account violate the leading canon of construction, which is to take words in their natural meaning, and according to the ordinary rules of grammatical construction. If this canon is obeyed it is impossible, in my opinion, to put upon the words of the section the meaning which the learned Judges of the Madras High Court think it capable of bearing.

As Wilberforce in his work on Statute law observes (p. 116)—"If the Courts were at liberty to travel out of the words of any particular Act of Parliament and to consider what would in any case be the consequence of giving those words their natural meaning they would become legislators and not interpreters." In other words, to use the expression of Coleridge, J., this would be "to make, not to interpret, law."

But although I adhere to the view I took in *Ram Newaz v. Ram Charan* (1) as to the meaning of s. 230, I am of opinion that the objection of the judgment-debtors, appellants in this case, based upon that section cannot prevail.

On the 7th of December 1887 the decree-holder applied to have the property which is the subject of dispute sold in execution of his decree, and the Court by its order dated the 23rd of December 1887 granted that application. A suit having been instituted to contest the right of the decree-holder to bring the property to sale, the Court by its order dated the 19th of January 1888, postponed the carrying out of its order of the 23rd of December 1887 until the suit should be decided; but it never cancelled the order granting the application. The suit referred to was partly successful. On the 7th of October 1890 the decree-holder applied for sale of all the property referred to in the order of the 23rd of December 1887, save that in regard to which the suit of the intervenors had been successful. The application was granted on the 17th of December 1890. After various delays the sale took place on the [496] 20th of November 1891, but the sale was set aside by the District Judge owing to some irregularity. The decree-holder now moves the Court to carry out the sale regularly. Here then we have the case of an application to execute granted within the statutory period but not carried out owing to causes for which the decree-holder is in no way responsible. Under such circumstances I am of opinion that it is no violation of s. 230 for the Court now to proceed upon the application which was granted by an order passed within time, but which order for no fault of the decree-holder and owing to circumstances beyond his control has not

yet been carried out. This cannot be said to be granting a fresh application to execute. I do not think it can seriously be contended that the meaning of s. 230 is that not only must the application to execute be granted within the twelve years, but that all execution proceedings following upon the grant must be terminated within that period.

In support of the view that the decree-holder's petition to proceed with the sale is no fresh application, I may refer to the decision in *Kalyanbhai Dipchand v. Ghanasham Lal Jadunathji* (1) and *Paras Ram v. Gardner* (2). Subject to the above explanation, I adhere to all that I said in *Ram Newaz v. Ram Charan*. For the reasons set forth above, I am of opinion that this appeal should be dismissed with costs.

In conclusion, I would express a hope that the Legislature may see its way to amend s. 230 of the Code of Civil Procedure so as to avoid cases of hardship to decree-holders such as those referred to above.

BLENNERHASSETT, J.—For the reasons stated by my learned colleagues I concur in holding that the present is not a “subsequent application to execute the same decree” within the meaning of s. 230 of the Code of Civil Procedure. An application to execute the decree had been made. Certain objections had been raised against the application for execution and proceedings under that application were stayed. After the disposal of those objections the decree-holder by the present application prayed the Court to [497] continue proceedings under the previous application. The present application is not barred by s. 230 of the Code of Civil Procedure. I concur in the order proposed.

By the Court.

The order of the Court will be that this appeal is dismissed with costs.

Appeal dismissed.

18 A. 497 = 16 A.W.N. (1896) 161.

APPELLATE CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blennerhassett.

QUEEN-EMPRESS v. CHUNNI.* [24th July, 1896.]

Act No. XLV of 1860 (Indian Penal Code), s. 304—Culpable homicide not amounting to murder—Grave and sudden provocation.

A person accused of murder under s. 302 of the Indian Penal Code pleaded in defence that he had found his sister having illicit connection with a man named Thakuri and had in a fit of passion killed them both on the spot. The statement being accepted was held to be a good plea of grave and sudden provocation so as to reduce the offence to one of culpable homicide not amounting to murder.

THE facts of this case sufficiently appear from the judgment of the Court.

The Public Prosecutor (for whom *Ryves*), for the Crown.

The appellant was not represented.

JUDGMENT.

EDGE, C. J., and BLENNERHASSETT, J.—The Sessions Judge accepted Chunni's statement, and so do we, that he caught his sister and a

* Criminal Appeal No. 601 of 1896.

(1) 5 B. 29.

(2) 1 A. 355.

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(F.B.) =
16 A.W.N.
(1896) 142.

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(1896) 161.

man, Thakuri, having illicit connection. In a case of this kind it would have been advisable for the Sessions Judge to recommend the prisoner to plead "not guilty," so that the evidence, showing what the real offence was, might come on the record of the Sessions Court.

Chunni came home at night and found his sister and Thakuriuct having connection. He heard some rumours about their misconduct before, but did not believe them. In his sudden passion he seized upon a *gandasa* with which he killed Thakuri and then he killed his sister. Of course there is a difference between the [498] provocation which a man receives when he finds another man committing adultery with his wife and the provocation which he receives when he finds his sister dishonoring his family by having illicit intercourse with a man ; still the latter provocation cannot, in common sense and in one's experience of the world, be looked upon as a light one. The law of England is no doubt very strict in these matters.

In our opinion Chunni received very grave and sudden provocation that night, and quite sufficient to reduce the case from one of murder to one of culpable homicide not amounting to murder. We, under our powers of revision, set aside the conviction and sentence under s. 302 of the Indian Penal Code ; and convicting Chunni under s. 304 of the Indian Penal Code, sentence him to five years' rigorous imprisonment, which will be counted from the date of his conviction in the Sessions Court.

Formally the appeal is dismissed, and it did not lie after a plea of guilty, when the sentence passed was the minimum which the law allowed.

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Abatement.

- (1) Of appeal—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 16 A. 211.
- (2) Of suit—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 17 A. 172.

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- (1) See LETTERS PATENT, 17 A. 498.
- (2) See PENAL CODE (ACT XLV OF 1860), 16 A. 389.

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- (1) Of debt—See CIVIL PROCEDURE CODE, 1882, 17 A. 198.
- (2) Of part payment of decretal money—See EXECUTION OF DECREE, 16 A. 228.
- (3) See LIMITATION ACT (XV OF 1877), 18 A. 384.

1.—Imperial Acts.

Act XXXII of 1839 (Interest).

Act No. IV of 1882, ss. 88, 89—Mortgage—Non-contractual post diem interest—Such interest not part of the mortgage money—Act No. XV of 1877, sch. ii, art. 116—Limitation.—When in a suit for sale under ss. 88 and 89 of Act No. IV of 1882 a Court allows, under Act No. XXXII of 1839, interest *post diem*, its decree so far as such *post diem* interest is concerned is not a decree for sale under s. 89, but is a decree for money which can be executed in the manner provided for the execution of simple money decrees.

Art. 116 of sch. ii of Act No. XV of 1877 applies to a claim to have interest allowed under Act No. XXXII of 1839 in respect of the non-payment on the due date of the money due under a registered mortgage deed, if the suit is not brought within six years of the breach of contract. *NARINDRA BHADUR PAL v. KHADIM HUSAIN*, 17 A. 581 (F.B.) = 15 A.W.N. (1895) 128.

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Act XI of 1857 (Offences against the State).

See EVIDENCE ACT (I OF 1872), 17 A. 465.

Act XL of 1858 (Minors).

See EVIDENCE, 18 A. 478.

Act XXVII of 1860 (Succession Certificate).

S. 2—See SUCCESSION CERTIFICATE ACT (VII OF 1889), 16 A. 259.

Act XX of 1863 (Religious Endowments).

S. 14—*Bengal Reg. No. XIX of 1810—Civ. Pro. Code, section 539—Trust—Suit to remove trustees of Hindu religious endowment—Jurisdiction—Hindu Law—Right of representative of founder of trust to nominate trustee.*—The Maharaja of B in 1862, assigned certain lands situated in Bengal for the maintenance of a temple at Chauria in the Gorakhpur district, and appointed certain trustees of the endowment. Those trustees dealt with the property in a manner inconsistent with the trust by making alienations thereof as if it were their own private property. In 1893, the representative-in-title of the original settlor sued in the Court of the District Judge of Gorakhpur to have certain alienations made by the said trustees set aside and the property restored to its original uses, and for the appointment of a new trustee or new trustees in place of the trustees, defendants to the suit.

Held, that such a suit was rightly brought under section 14 of Act No. XX of 1863, and that it was not essential for the application of that Act, that the endowment should ever have been taken under the control of the Board of Revenue.

Held also that section 539 of the Code of Civil Procedure was not applicable to the above suit.

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<i>Held</i> , also that, there being no special provision in the endowment for the appointment of trustees, the right of nomination remained vested in the founder of the endowment, and that the right to nominate continued to his heirs. <i>SHEORATAN KUNWARI v. RAM PARGASH</i> , 18 A. 227 = 16 A.W.N. (1896) 37. ...	858
Act III of 1867 (Gambling).	
S. 6—"Instrument of gaming"— <i>Cowries</i> .— <i>Held</i> that cowries are not "instruments of gaming" within the meaning of section 6 of Act No. III of 1867. <i>QUEEN-EMPRESS v. BHAWANI</i> , 18 A. 23 = 15 A.W.N. (1895) 139 ...	719
Act I of 1868 (General Clauses Act).	
S. 6—See SUCCESSION CERTIFICATE ACT (VII OF 1889), 16 A. 259.	
Act IV of 1869 (Divorce).	
(1) S. 3, cl. (5)— <i>Minor children—Age of majority—Alimony—Application for refund of alimony paid by mistake after the period during which it was payable had expired.</i> —In 1882 a decree for dissolution of marriage between E. M. and S. M. was passed by the High Court on the wife's petition, and the husband was ordered to pay alimony for the wife and certain minor children of the marriage. On the 26th of August 1895, a petition was presented to the Court on behalf of E. M. stating that S. M. had married again on the 3rd of August 1895; that one of the children in respect of whom alimony was payable had come of age on the 16th of April 1895; and that another of such children had married in April 1893, and it was prayed that certain sums which had been paid into Court after the respective dates mentioned above as alimony in respect of the three persons above referred to might be refunded. <i>Held</i> , that E. M. was not entitled to any refund of alimony, except as to sums, if any, paid into Court after the date of the filing of petition for refund and relating to a period subsequent to that date. <i>In the matter of the petition of E. MORGAN</i> , 18 A. 238 = 16 A.W.N. (1896) 52 ...	65
(2) S. 3, sub-s. (2), ss. 8, 9, 13, 17, 55— <i>Notification No 1203, dated the 23rd September 1874—Statute 28 Vict., Cap. XXV, s. 3—Act No. XIII of 1879 (Civil Courts Act, Oudh), s. 27—Act No. XX of 1890 (North-Western Provinces and Oudh Act), s. 42—Act No. XIV of 1891 (Oudh Courts Act), s. 8—Divorce—Appeal—Jurisdiction.</i> —The High Court of Judicature for the North-Western Provinces has no jurisdiction to entertain an appeal from the decree of a District Judge in Oudh, dismissing a suit for dissolution of marriage. <i>PERCY v. PERCY</i> , 18 A. 375 = 16 A.W.N. (1896) 110...	957
Act XV of 1872 (Indian Christian Marriage).	
Ss. 18, 66— <i>False declaration—Act No. XLV of 1860 (Indian Penal Code), s. 193—Maxim "Ignorantia juris non excusat."</i> —The maxim <i>ignorantia juris non excusat</i> cannot be applied to a declaration, though in fact false, made under s. 18 of Act No. XV of 1872, inasmuch as the declaration required by that section to be made is a declaration as to the belief only of the person making it; and further, in order to entail the penal consequences provided for by s. 66 of the said Act, such false declaration must be made "intentionally." <i>QUEEN-EMPRESS v. ROBINSON</i> , 16 A. 212 = 14 A.W.N. (1894) 49 ...	137
Act X of 1873 (Oaths).	
S. 8— <i>Oath purporting to affect a third person - Revocation of consent to be bound by statement made on oath taken in a particular form.</i> —The plaintiff in a civil suit offered to be bound by the statement which the defendant might make on oath holding the arm of his son. The defendant accepted the proposal, took the required oath, and made a statement which had the effect of defeating the plaintiff's claim. When the defendant came into Court to take the oath the plaintiff attempted to revoke his proposal, but alleged no further reason than that he did not understand what he had intended and did not think the defendant would speak the truth.	
<i>Held</i> , that the form of oath above indicated ought not, having regard to section 8 of Act No. X of 1873, to have been administered, but as it had been administered and was a form of oath especially binding upon Hindus, the statement made upon it should be accepted.	

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Held also that when one party to a suit offers to be bound by the oath of the other party, and such other party accepts the proposal, the party so offering to be bound should not be allowed to revoke his proposal except upon the strongest possible grounds proved to the satisfaction of the Court to be genuine grounds for revoking the proposal. *RAM NARAIN SINGH v. BABU SINGH*, 18 A. 46 = 15 A.W.N. (1895) 158 ...

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Act XI of 1878 (Arms).

S. 19—*Unlawful possession of arms—Temporary custody of arms not for use as such*—The mere temporary possession without a license of arms for purposes other than their use as such, as, for instance, where a servant is carrying his master's gun to a blacksmith for repairs, or where a blacksmith has a gun left with him for repairs, is not an offence within the meaning of s. 19 of the Indian Arms Act, 1878. *QUEEN-EMPRESS v. TOTA RAM*, 16 A. 276 = 14 A.W.N. (1894) 82 ...

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Act XVIII of 1879 (Legal Practitioners).

S. 36.—See *LETTERS PATENT*, 17 A. 498.

Act V of 1881 (Probate and Administration).

(1) *Will made by a Hindu Probate—Suit by legatee before taking out probate—Probate not a condition precedent to maintainability of suit.*—Save where the Hindu Wills Act, 1870, is in force, it is not obligatory on a person claiming under the will of a Hindu to obtain probate of the will before instituting his claim. *KANHAIYA LAL v. MUNNI*, 18 A. 260 = 16 A.W.N. (1896) 44 ...

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(2) *Ch. V—Letters Patent, s. 10—Probate—"Order"—"Decree"—Civ. Pro. Code, ss. 2,591—Appeal.*—An appeal will lie under s. 10 of the Letters Patent of the High Court of Judicature for the North Western Provinces from the judgment of a single Judge of the Court in appeal from an order of a District Judge granting probate of a will under Ch. V of Act No. V of 1881, and the Bench hearing such an appeal under s. 10 of the Letters Patent is not debarred from reconsidering the findings of fact arrived at in the judgment under appeal. *UMRAO CHAND v. BINDRABAN CHAND*, 17 A. 475 = 15 A.W.N. (1895) 104 ...

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Act I of 1887 (General Clauses).

S. 3, cl. (13)—See *CIV. PRO. CODE (ACT XIV OF 1882)*, 17 A. 69.

Act XII of 1887 (Bengal, Agra and Assam Civil Courts).

(1) Ss. 19, 21—See *CIV. PRO. CODE (ACT XIV OF 1882)*, 17 A. 69.

(2) S. 22, cl. 3—See *ACT XII OF 1881 (AGRA RENT)*, 16 A. 363.

(3) S. 37—See *PRE-EMPTION*, 16 A. 344.

(4) *Chapter III—Jurisdiction—Valuation of suit—Valuation put by plaintiff in plaint—Amount of decree awarded.*—The pecuniary jurisdiction of a Civil Court on its original or appellate side is, ordinarily speaking, governed by the value stated by the plaintiff in his plaint; and if a suit, having regard to the valuation in the plaint, is within the jurisdiction, such jurisdiction is not ousted by the Court finding that a decree for a sum exceeding the limit of its pecuniary jurisdiction should be given to the plaintiff. There is nothing in Act No. XII of 1887, to confine the sum for which a Civil Court may pass a decree to the limit of its jurisdiction to entertain a suit. *MADHO DAS v. RAMJI PATAK*, 16 A. 286 = 14 A.W.N. (1894) 84 ...

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Act V of 1888 (Inventions and Designs Act).

Ss. 4, 30—*Invention—Improvement—Combination of known substances to produce a known result—Burden of proof.*—*Held*, that a combination, effected by placing one known material side by side with another known material not involving the exercise of any special inventive power, and ending in a result which differed from previous results only because the materials so placed produced an improved article, did not amount to an "invention" as defined by Act No. V of 1888.

Held further, that it is for the person who claims an exclusive privilege under the Inventions Act to prove that the facts exist which entitle him to the privilege claimed. *THE ELGIN MILLS COMPANY v. THE MUIR MILLS COMPANY*, 17 A. 490 = 15 A.W.N. (1895) 113 ...

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<p>S. 72—<i>Contract saving liability of Company for loss of goods carried by it—“Risk note.”</i>—The contract embodied in what is commonly known as a “risk note,” i.e., a contract whereby in consideration of goods being carried by a Railway Company at a reduced rate the consignor agrees that the Company shall be free of all responsibility for any loss or damage to the goods, is a valid and legal contract within the terms of s. 72 of Act No. IX of 1890. <i>EAST INDIAN RAILWAY COMPANY v. BUNYAD ALI</i>, 18 A. 42 = 15 A.W.N. (1895) 150</p>	732
<p>Act VI of 1892 (Limitation Act and Civ. Pro. Code, Amendment).</p> <p>Ss. 4, 5—See EXECUTION OF DECREE, 17 A. 106.</p>	
<p>II.—N.W.P. and Oudh Acts.</p>	
<p>Act XIX of 1873 (Agra Land Revenue).</p>	
<p>(1) S. 3, cl. 8—See INTERPRETATION, 18 A. 388.</p> <p>(2) S. 62—See PRE-EMPTION, 17 A. 447.</p> <p>(3) S. 77—<i>Landholder and tenant—Determination of rent—Suit for arrears of rent as so determined for a period prior to such determination.</i>—An order of a Settlement Officer under s. 77 of Act No. XIX of 1873 determining rent is a purely prospective order and will not entitle the landlord to sue his tenant for rent at the rate fixed thereby for any period antecedent to the 1st of July next following the date of such order. <i>DEBI SINGH v. JHANNO KUAR</i>, 16 A. 209 = 14 A.W.N. (1894) 22</p> <p>(4) Ss. 111, 114, 214, 219—<i>Decision of question of title by a Court of Revenue, effect of such decision when ex parte—Appeal—Objection filed after time limited by Court but before action taken under s. 113.</i>—Held, that the provisions of ss. 214 and 219 of Act No. XIX of 1873 do not apply to an <i>ex parte</i> decision of a question of title by a Court of Revenue acting under s. 113 of the said Act.</p> <p style="padding-left: 20px;"><i>Held</i>, also that a Court of Revenue acting under s. 113 of Act No. XIX of 1873, was not precluded from dealing with an objection brought before it merely by reason of such objection not having been filed within the time limited by the Court for filing objections, the Court not having up to that time taken any action under s. 113 of the said Act. <i>TULSI PRASAD v. MATRU MAL</i>, 18 A. 210 = 16 A.W.N. (1896) 30</p> <p>(5) Ss. 113, 114—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 16 A. 464; 18 A. 59.</p> <p>(6) Ss. 222 to 231—<i>Arbitration—Award by one arbitrator only, effect of such award and of the decision of the Settlement Officer thereon.</i>—The provisions of ss. 222 to 231 of Act No. XIX of 1873 contemplate that the award therein dealt with should be an award made by more arbitrators than one. Where therefore a Settlement Officer had delivered a decision under s. 230 upon what purported to be an award by one arbitrator only, it was held that such so-called award and the decision thereon of the Settlement Officer would not prevent the matters dealt with therein being reopened in a civil suit. <i>PARSIDH RAI v. RAJI NAIN RAI</i>, 18 A. 172 = 16 A.W.N. (1896) 14</p> <p>(7) S. 241—See CIVIL AND REVENUE COURTS, 18 A. 340.</p> <p>(8) S. 257—See PRE-EMPTION, 17 A. 226.</p>	<p>135</p> <p>846</p> <p>820</p>
<p>Act XII of 1881 (Agra Rent).</p>	
<p>(1) See LANDLORD AND TENANT, 18 A. 440.</p> <p>(2) S. 7—<i>Ex-proprietary tenant—Ex-proprietary tenancy arising on sale of part of the zamindar's share.</i>—In order that the provisions of s. 7 of Act No. XII of 1881 may come into operation, it is not necessary that the zamindar should lose or part with his proprietary rights in respect of the whole of his interest in the <i>mahal</i>. <i>BHAWANI PRASAD v. GHULAM MUHAMMAD</i>, 18 A. 121 = 16 A.W.N. (1896) 12</p> <p>(3) S. 7—<i>Usufructuary mortgage of zamindari including sir—Losing or parting with proprietary right in a mahal—Ex-proprietary tenant.</i>—A zamindar who makes a usufructuary mortgage of his zamindari including his <i>sir</i> land does not so “lose or part with his proprietary rights” within the meaning of s. 7 of Act No. XII of 1881, as to become an <i>ex-proprietary</i> tenant of his <i>sir</i> land. <i>MADHO BHARTHI v. BARTI SINGH</i>, 16 A. 337 (F.B.) = 14 A.W.N. (1894) 160</p>	<p>787</p> <p>219</p>

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| (4) S. 9— <i>Occupancy-tenant—Simple mortgage by occupancy-tenant—Surrender of holding by heirs of mortgagor—Suit on mortgage, sale, and purchase by mortgagee—Subsequent suit by zemindar for recovery of occupancy holding</i> —A, an occupancy-tenant, to whom the second and third paragraphs of s. 9 of Act No. XII of 1881 applied, gave a simple mortgage of his occupancy holding to one S. During the continuance of the mortgage, A died, and his sons surrendered the occupancy-holding to the zemindar. S then brought a suit for sale on his mortgage, obtained a decree, had the mortgaged property sold and purchased it himself. On suit by the zamindar, who had not been made a party to any of the previous proceedings, against S. for recovery of the holding, it was held that S. took nothing by his purchase under the decree obtained as above described and that the zamindar was entitled to recover. <i>SUKRU v. TAFAZZUL HUSAIN KHAN</i> , 16 A. 393=14 A.W.N. (1894) 130 | 259 |
| (5) S. 9— <i>Occupancy tenant—Succession—Collateral—Sharer in cultivation.</i> —Where a collateral relative claims to be entitled to succeed to an occupancy-holding on the death of the occupancy-tenant without direct heirs it is incumbent on him to prove, both that he is the heir according to the law to which he is subject, and also that he shared in the cultivation of the occupancy-holding during the lifetime of the deceased occupancy-tenant. But <i>non sequitur</i> that if there is a more remote collateral who was a sharer in the cultivation of the occupancy-holding, he is entitled to succeed in preference to a nearer collateral who did not so share in the cultivation. <i>SHANKAR LAL v. DALIP SINGH</i> , 17 A. 33=14 A.W.N. (1894) 194. | 345 |
| (6) S. 31— <i>Landlord and tenant—Occupancy tenant—Lease of occupancy holding—Relinquishment of holding pending term of lease.</i> —Where an occupancy tenant grants a lease of lands forming part of his occupancy holding for a term of years he cannot during the subsistence of such term relinquish his holding to the zamindar so as to put an end to his lessee's rights under the lease. <i>BADRI PRASAD v. SHEODHIAN</i> , 18 A. 354=16 A.W.N. (1896) 109 | 943 |
| (7) S. 34, cl. (a)— <i>Act No. IX of 1872, s. 73—Thekadar—Liability of defaulting thekadar to pay interest.</i> —The non-application of clause (a) of section 34 of Act No. XII of 1881 to a "thekadar" does not exempt the thekadar from his liability under section 73 of Act No. IX of 1872. Hence where a thekadar makes default in payment of his rent he is liable to be charged with interest on the sums due up to the date of payment. <i>GHANSHIAM SINGH v. DAULAT SINGH</i> , 18 A. 240=16 A.W.N. (1896) 55. | 867 |
| (8) Ss. 36, 39, 95 (e), 96 (h)— <i>See CIVIL AND REVENUE COURTS</i> , 18 A. 270. | |
| (9) S. 93— <i>Suit by recorded co-sharer for recorded share of profits—Adverse possession.</i> —The mere circumstance that a co-sharer's name is recorded in the Revenue papers will not prevent a suit by him for his share of profits being barred by limitation if in fact he has received no profits for more than twelve years prior to such suit. <i>MUHAMMAD HUSAIN v. BADRI PRASAD</i> , 17 A. 423=15 A.W.N. (1895) 88 | 593 |
| (10) Ss. 93 (b), 94— <i>Suit for a settlement of accounts—Suit for a share in the profits of a mahal—Limitation.</i> —With reference to the periods of limitation prescribed by s. 94 of Act No. XII of 1881, a suit for a share of the profits of a mahal does not become a suit for a settlement of accounts, because in order that a Court may give the plaintiff a decree it is necessary for the Court to settle disputed items of credit and debit: but where the main object of the suit is to obtain a settlement of accounts between the plaintiff, recorded co-sharer, and the lambardar, or between such plaintiff and one or more or all of the co-sharers in the village, although the ulterior object of obtaining such statement of accounts may be that the plaintiff may obtain a decree for a share, if any, of the profits due to him, then the suit must be regarded as a suit for a settlement of accounts to which a period of one year's limitation applies. <i>ROHAN v. JWALA PRASAD</i> , 16 A. 333 (F.B.)=14 A.W.N. (1894) 118 | 216 |
| (11) Ss. 93 (h), 64— <i>Suit by a recorded co-sharer for recorded share of profits—Suit for a settlement of accounts—Limitation.</i> —Where one collecting co-sharer in a mahal sued other collecting co-sharers, not being lambardars of the mahal, for a refund of profits which the plaintiff alleged the defendants to have collected over and above the shares which they were entitled to collect. Held by <i>Tyrrell and Knox, JJ.</i> , that this was not a suit by a recorded co-sharer for | |

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- a recorded share of the profits of a *mahal* within the meaning of the former portion of s. 93, cl. (h) of Act No. XII of 1881, but was a suit for a settlement of accounts within the meaning of the latter portion of the same clause; and, that, such being the case, the period of limitation applicable was that prescribed by the third paragraph of s. 94 of the above-mentioned Act. *Per Burkitt, J., contra.* "The suit" * * "may be considered to be a suit for profits within the meaning of the opening words of s. 93 (h) of the Rent Act, and cannot be considered to be a suit for 'a settlement of accounts' within the meaning of the concluding words of that clause."
 INDO v. INDO, 16 A. 28 (F.B.)=13 A.W.N. (1893) 214 ... 20
- (12) Ss. 93, 206, 207, 208—*Act XII of 1887 (Bengal Civil Courts Act), s. 22, cl. 3—Transfer of appeal in a Rent Court suit from the District Judge to the Subordinate Judge—Powers exercisable by the Subordinate Judge.*—Clause (3) of s. 22 of Act XII of 1887, makes ss. 206, 207 and 208 of Act No. XII of 1881 applicable to appeals in suits within s. 93 of Act No. XII of 1881 when such appeals have been transferred under s. 22 of Act No. XII of 1887 by a District Judge to a Subordinate Judge and are being heard by such Subordinate Judge. BABU NANDAN PRASAD v. CHANGUR, 16 A. 363 (F.B.)=14 A.W.N. (1894) 113 ... 236
- (13) S. 95 (a)—See CIVIL AND REVENUE COURTS, 18 A. 340.
- (14) S. 189—*Appeal—Landholder and tenant—Rent payable by tenant—Rate of rent.*—The criterion to be used in deciding whether an appeal lies under s. 189 of Act No. XII of 1881 is whether the decision would merely affect a particular year, or whether it would supply a plea of *res judicata*, if not appealed against for all succeeding years in which the landlord and tenant stood in the same relation as when the suit was brought. MOHIB ALI KHAN v. F. S. MARTIN, 16 A. 51=13 A.W.N. (1893) 204 ... 34
- (15) S. 189—*Appeal—Suit to recover arrears of revenue.*—The term "rent," as used in section 189 of Act No. XII of 1881, cannot be extended so as to include revenue.
 Hence where a plaintiff sued to recover arrears of revenue alleged to be payable to the plaintiff by the defendants under an agreement, the defendants being admitted to be inferior proprietors of the land in respect of which the revenue claimed was payable, it was *held* that no appeal lay to the District Judge under section 189 of Act No. XII of 1881. TILAKDHARI RAI v. SOGHRA BIBI, 18 A. 302=16 A.W.N. (1896) 71 ... 907
- (16) S. 189—*Appeal—Rent payable by the tenant not in issue in the appeal.*—Under section 189 of Act No. XII of 1881, an appeal lies in a suit under section 93 of the Act, where the rent payable by the tenant *has been* a matter in issue and has been determined. It is not necessary that the rent payable by the tenant should be a matter in issue in the appeal. SARJU PRASAD v. HAIDAR KHAN, 18 A. 463=16 A.W.N. (1896) 148 ... 1015
- (17) Ss. 190, 191—See CIVIL PROCEDURE CODE (XIV of 1882), 16 A. 375.

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See TRANSFER OF PROPERTY ACT (IV OF 1882), 16 A. 313, 315; 18 A. 265.

Adverse Possession.

(1) See ACT XII OF 1881 (AGRA RENT), 17 A. 428.

(2) See MORTGAGE (USUFRUCTUARY), 16 A. 254.

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See PENAL CODE (ACT XLV OF 1860), 17 A. 166.

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See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 18 A. 396.

Annuity.

(1) *Maintenance—Enforcement of decree for maintenance—Limitation.*—Where a decree in a suit for maintenance gave the plaintiffs a right to recover maintenance for the year previous to the suit and also declared their right to maintenance in future, but omitted to specify any precise date on which such maintenance should become payable:—*Held* that such decree was one which could be enforced from time to time by suit. *KAM DIAL v. INDAR KUAR*, 16 A. 179 = 14 A.W.N. (1894) 17 ...

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(2) See LIMITATION ACT (XV OF 1877), 16 A. 189.

Appeal.

(1) See ACT IV OF 1869 (DIVORCE), 18 A. 375.

(2) See ACT XIX OF 1873 (AGRA LAND REVENUE), 18 A. 210.

(3) See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 17 A. 475.

(4) See ACT XII OF 1881 (AGRA RENT), 16 A. 51; 18 A. 302.

(5) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 16 A. 19, 129, 218, 234, 252, 443; 17 A. 97, 172, 286, 518; 18 A. 19, 36, 44, 86, 101, 199, 414, 422, 481.

(6) See ACT VI OF 1882 (COMPANIES), 18 A. 215.

(7) See COURT FEES ACT (VII OF 1870), 17 A. 238.

(8) See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 17 A. 51, 241; 18 A. 301.

(9) See EXECUTION OF DECREE, 17 A. 243, 245.

(10) See LAND ACQUISITION ACT (X OF 1870), 17 A. 573.

(11) See LETTERS PATENT, 17 A. 438.

(12) See MORTGAGE (REDEMPTION), 18 A. 455.

(13) See PRACTICE, 17 A. 280.

(14) See PRE-EMPTION, 16 A. 126.

(15) See PROCEDURE, 18 A. 332.

(16) See TRANSFER OF PROPERTY ACT (IV OF 1882) 18 A. 109.

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See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 16 A. 274; 17 A. 518; 18 A. 196.

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See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 18 A. 241.

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For leave to sue in *forma pauperis*—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 17 A. 526.

Arbitration.

(1) See ACT XIX OF 1873 (AGRA LAND REVENUE), 18 A. 172.

(2) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 16 A. 231; 17 A. 21.

(3) See HINDU LAW (JOINT FAMILY), 16 A. 231.

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See PENAL CODE (ACT XLV OF 1860), 18 A. 246.

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Of decree. See EXECUTION OF DECREE, 16 A. 228.

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(1) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 16 A. 186, 286; 17 A. 82, 162, 198.

(2) See EXECUTION OF DECREE, 16 A. 228; 18 A. 469.

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See PENAL CODE (ACT XLV OF 1860), 17 A. 120, 123, 409.

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See COMPANIES ACT (VI OF 1882), 18 A. 12.

Award.

- (1) See ACT XIX OF 1873 (AGRA LAND REVENUE), 18 A. 172.
- (2) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 16 A. 231 ; 18 A. 414, 422.

Benamidar.

- (1) *Suit by benamidar on title for possession of immoveable property—Right of benamidar to sue in his own name.*—A benamidar suing for the recovery of immoveable property on title, can sue in his own name, and when such a suit is instituted by a benamidar it must be held to have been instituted with the consent and approval of the beneficiary, against whom any adverse decision on the title set up will take effect as a *res judicata*. *NAND KISHORE LAL v. AHMAD ATA*, 18 A. 69 = 15 A.W.N. (1895) 160 ...
- (2) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 18 A. 461.

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See STAMP ACT (I OF 1879), 17 A. 211.

Burden of Proof.

- (1) *Execution of decree—Civ. Pro. Code, ss. 278, 279—Objections to attachment—Objections disallowed—Regular suit.*—In proceedings under s. 278 of the Code of Civil Procedure the objector pleaded that the property sought to be attached was his by virtue of a certain registered sale-deed. This objection was disallowed on the finding that the deed relied upon was fictitious. The objector then brought a separate suit to have the property declared not liable to be taken in execution ; but he did not file the sale-deed in question or account for its non-production.

Held that under the circumstances of the case it was in this instance for the plaintiff to prove that the deed he relied on was not fraudulent and collusive, as had been found in the previous proceedings. *RAM NATH v. BINDRABAN*, 18 A. 369 = 16 A.W.N. (1896) 106 ...

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- (2) *Mortgage deed—Recitals in instrument—Act No. III of 1877, ss. 59, 60—Evidence.*—In a suit brought by a mortgagee upon a mortgage by conditional sale for payment of the mortgage-debt or in default for foreclosure, one of the defendants, not being one of the original mortgagees, but a purchaser at auction sale under a Rent Court decree, resisted the suit and put the plaintiff to proof on the document under which he claimed. *Held* that the mere production of the deed of mortgage which had been thus questioned and the fact that that deed of mortgage contained an endorsement certificate by the Registrar in the usual manner under s. 59 of Act No. III of 1877 were not sufficient to shift the burden of proof on to the defendants.

Recitals in an instrument may be conclusive and are always evidence against the parties who make them, but they are not evidence against third parties. *MANOHAR SINGH v. SUMIRTA KUAR*, 17 A. 428 = 15 A.W.N. (1895) 93 ...

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- (3) See HINDU LAW (JOINT FAMILY), 18 A. 90.
- (4) See MUHAMMADAN LAW (DOWER), 17 A. 93.

Cause of Action.

- (1) *Definition of—Misjoinder of causes of action—Civ. Pro. Code, ss. 31, 45, 53.*—The term 'cause of action' as used in ss. 31 and 45 of the Code of Civil Procedure is there used in the same sense as it is used in English law, i.e., a cause of action means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact but every fact which is necessary to be proved.

Where three plaintiffs brought a joint suit for the possession of immoveable property, in which two of them were claiming half the property under a title by inheritance, and the third was claiming the other half of the property in virtue of a sale thereof to him by the first two plaintiffs, *held* that the suit so framed was bad for misjoinder of causes of action, and that the

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- plaint should be returned, that the plaintiffs might elect which of them should proceed with the suit. *SALIMA BIBI v. SHEIKH MUHAMMAD*, 18 A. 131=16 A.W.N. (1896) 2 ... 794
- (2) *Misjoinder of causes of action and of parties—Civil Procedure Code, s. 53.—Held* that several creditors, to each of whom separate debts were owing by the same debtor, could not sue jointly for the avoidance of a deed of gift executed by the debtor, which deed was alleged to have been made fraudulently with intent to defeat or delay the executant's creditors, the cause of action of each separate creditor not being the same as that of the others. *RAJJO KUAR v. DEBI DIAL*, 18 A. 432=16 A.W.N. (1896) 139. 993
- (3) *Misjoinder of—Suit by one plaintiff claiming by inheritance and another claiming as assignee from the first—Civ. Pro. Code, ss. 31, 45, 53.—Where* two plaintiffs joined in a suit for the recovery of immoveable property, the one claiming a title by inheritance and the other a title by assignment from the first plaintiff, it was *held* that the suit was bad for misjoinder of causes of action. *RAHIM BAKHSH v. AMIRAN BIBI*, 18 A. 219=16 A.W.N. (1896) 33 ... 853
- (4) *Plaintiff confined to cause of action set out in his plaint—Burden of proof—Civil Procedure Code, s. 50—Plaint, contents of.—A plaintiff is only* entitled to succeed upon the cause of action alleged by him in his plaint. So where plaintiffs came into Court alleging a mortgage of the year 1854 made by their predecessor in title in favour of the defendant and seeking to redeem the mortgage of 1854, and it was found that the plaintiffs had failed to prove the mortgage of 1854, it was *held* that the plaintiffs were not entitled in that suit to a decree for redemption of other mortgages which might be found to subsist between the parties, but which formed no part of the cause of action upon which the plaintiffs came into Court. *SHEO PRASAD v. LALIT KUAR*, 18 A. 403=16 A.W.N. (1896) 132 ... 975
- (5) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 16 A. 165, 279; 17 A. 533; 18 A. 233, 256.
- (6) See TRANSFER OF PROPERTY ACT (IV OF 1882), 18 A. 325.

Certificate.

- (1) See EVIDENCE, 18 A. 478.
- (2) See SUCCESSION CERTIFICATE ACT (VII OF 1889), 16 A. 21; 18 A. 34.

Circular Order.

of Board of Revenue, N.W.P. and Oudh. See PRE-EMPTION, 16 A. 40.

Civil and Revenue Courts.

- (1) *Jurisdiction—Act No. XII of 1881, ss. 36, 39, 95 (e), 96 (b)—Suit in a Civil Court for a declaration on a question of title decided by a Court of Revenue under s. 39 of Act No. XII of 1881—Res-judicata.—The defendants served a notice of ejectment under section 36 of Act No. XII of 1881 on the plaintiffs, alleging the plaintiffs to be their sub-tenants and themselves to be tenants with a right of occupancy. The plaintiffs objected that they, and not the defendants, were the tenants in chief of the land in question. This objection was decided, under s. 39 of the said Act, by a Court of Revenue adversely to the plaintiffs. The plaintiffs thereupon sued in a Civil Court for a declaration that they were tenants with a right of occupancy and for maintenance of possession.*

Held that, inasmuch as section 96 (b) of Act No. XII of 1881 gave to a decision of a Court of Revenue under section 39 the effect of a judgment of a Civil Court, the hearing of the plaintiffs' present suit by a Civil Court was barred.

The principle of the decision in *Tirapat Ojha v. Ram Ratan Kuar* affirmed. The jurisdiction of Civil Courts and Courts of Revenue in the North-Western Provinces considered. *SHEO NARAIN RAI v. PARMESHWAR RAI*, 18 A. 270 (F.B.)=16 A.W.N. (1896) 59 ... 886

- (2) *Jurisdiction—Suit for maintenance of possession as tenants at fixed rates—Act No. XII of 1881, s. 95 (a)—Act No. XIX of 1873, s. 241.—The plaintiffs sued in a Civil Court alleging that they were tenants at fixed rates of a cultivatory holding and that at the settlement the settlement officer had entered the defendants in the village papers as the tenants at fixed rates*

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and the plaintiffs merely as mortgagees, and they asked for a decree for maintenance of possession "invalidating the proceeding of filling up the columns at the recent settlement."

Held by the Full Bench (BANERJI, J., *dubitante*) that the suit so framed was not within the cognizance of a Civil Court. **AJUDHIA RAI v. PARMESWAR RAI**, 18 A. 340=16 A.W.N. (1896) 95 ...

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(3) See JURISDICTION, 16 A. 325.

Civil Procedure Code (Act X of 1877).

S. 39—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 16 A. 240.

Civil Procedure Code (Act XIV of 1882).

(1) Ss. 1, 2, 19, 24—See JURISDICTION, 17 A. 483.

(2) Ss. 2, 591—See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 17 A. 475.

(3) S. 13—*Res judicata*—"Court of jurisdiction competent to try such subsequent suit."—The words "a Court of jurisdiction competent to try," as used in s. 13 of the Code of Civil Procedure, mean a Court having jurisdiction not only as to the nature but also as to the amount of the suit. **SHEIKH HASSU v. RAM KUMAR SINGH**, 16 A. 183=14 A.W.N. (1894) 18 ...

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(4) S. 13—*Res judicata*—"Court of jurisdiction competent to try the suit in which such issue has been subsequently raised"—Act XIX of 1873 (*N.W. P. Land Revenue Act*), ss. 113, 114.—One H. S. mortgaged in 1864, by two mortgages of the same date, certain immoveable property to one A. S. In 1877 A. S. applied for foreclosure of these mortgages and obtained an order under s. 8 of Regulation XXVII of 1806, but these proceedings were, it was alleged, never brought to a legal conclusion. Subsequently, the mortgagee applied in a Court of Revenue for partition in his favour of the mortgaged property. The mortgagor resisted that application on the ground that the foreclosure proceedings had not been completed; but the Court, acting under ss. 113 and 114 of Act No. XIX of 1873, overruled that objection and granted partition in favour of the mortgagee. In 1892 the mortgagor sued the representatives of the original mortgagee in a Civil Court for redemption of the mortgages of 1864. The defendants resisted the suit principally on the plea that s. 13 of Act No. XIV of 1882 applied and was a bar to the suit; but no plea of *res judicata* outside s. 13 was raised. The plaintiff's suit was dismissed as barred by the principle of *res judicata*. The plaintiff appealed.

Held by Tyrrell, J., that, the Court of Revenue being incompetent to determine the suit in which the issue whether the mortgage had been foreclosed or not was subsequently raised, s. 13 of Act No. XIV of 1882 did not apply, and no plea of *res judicata* outside s. 13 could be entertained, inasmuch as no such plea had been put forward in the Court below or in the High Court.

Per Burkitt, J., *contra*. The provisions of s. 13 of Act No. XIV of 1892 are not exhaustive, and, the plaintiff not having appealed therefrom, the decision of the Court of Revenue must be held, upon the principle of *res judicata*, to be a bar to the present suit. **HAR CHARAN SINGH v. HAR SHANKAR SINGH AND OTHERS**, 16 A. 464=14 A.W.N. (1894) 187 ...

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(5) S. 13—*Res judicata*—"Court of jurisdiction competent to try the suit in which such issue has been subsequently raised"—Act No. XIX of 1873, ss. 113, 114.—Where a Court of Revenue, acting under s. 113 of Act No. XIX of 1873, has decided a question of title or of proprietary right, such decision, being the decision of "a Court of Civil Judicature of first instance," will operate as *res judicata* in a subsequent civil suit in which the same question is being litigated. **HAR CHARAN SINGH v. HAR SHANKAR SINGH**, 18 A. 59=15 A.W.N. (1895) 164 ...

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(6) S. 13—*Res judicata*—*Finding in judgment not embodied in decree and not essential to the making of the decree as framed*—Act No. I of 1877 (*Specific Relief Act*), s. 42.—A finding in a judgment to operate as *res judicata*, the Court being a Court of jurisdiction competent to try the subsequent suit, must be material and necessary to support the precise and particular ground or grounds on which the decree or some operative part of it was made, otherwise the finding must be considered either as superseded by the decree, or as entirely immaterial, or as no more than incidental and

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subsidiary to the main question in the suit, although in the latter case the finding may have been necessary to the decision of the suit.

The finding of fact to operate as *res judicata* need not have been the sole finding of fact upon which the decree was made, but it must have been a material and necessary finding of fact, material and necessary in the sense that the fact must have been found as it was found in the judgment, and could not have been found otherwise, for the decree as it was made to have been good result in law from the fact or facts so found. Further, if there were two findings of fact, either of which would justify in law the making of the decree which was made, that one of such two findings of fact which should in the logical sequence of necessary issues have been first found, and the finding of which would have rendered the other of such two findings unnecessary for the making of the decree which was made, is the finding which can operate as *res judicata*.

A matter cannot be said to be "directly and substantially in issue" within the meaning of the first paragraph of s. 13 of Act No. XIV of 1892 unless and until it is, or becomes, material for the decision of the suit to find as to it. The framing of issues under s. 146 of Act No. XIV of 1882, on which at that stage of the suit the right decision of the case appears to depend, does not of itself make the matter to which such issues relate "directly and substantially in issue" within the meaning of s. 13, although, when the finding upon any one or more of the issues is sufficient for the decision of the suit, it may be desirable that the Court should state in its judgment its finding or decision upon each separate issue which it had framed. SHIB CHARAN LAL v. RAGHU NATH, 17 A. 174=15 A.W.N. (1895) 47

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- (7) S. 13—*Res judicata*—*Parties to subsequent suit arrayed on the same side as co-defendants in previous suit*.—Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, there must be such an adjudication, and in such a case the adjudication will be *res judicata* between the defendants as well as between the plaintiff and the defendants. But for this effect to arise there must be a conflict of interests amongst the defendants and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity the judgment will not be *res judicata* amongst the defendants. AHMAD ALI v. NAJABAT KHAN, 18 A. 65=15 A.W.N. (1895) 156

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- (8) Civil Procedure Code, ss. 13, 562—*Res judicata*—*Remand*—*Appeal*—*Decree in appeal from order of remand dismissing appeal from decree in the suit*.—It is competent to a High Court in an appeal from an order of remand under s. 562 of the Code of Civil Procedure to pass a decree dismissing the appeal preferred to the lower Court from the decree in the suit. HASAN ALI v. SIRAJ HUSAIN, 16 A. 252=14 A.W.N. (1894) 64

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- (9) Ss. 16, 19, 45—*Jurisdiction*—*Joinder of cause of action*—*Suit for recovery of possession of immovable property within the territorial jurisdiction of different Courts*.—Where certain plaintiffs claimed possession of separate portions of land situated in two different districts on the same title against the same defendants alleging a dispossession on one day from part of the property claimed in district A and from the whole in district B, and on another day from the rest of the property in district A: *Held* that the plaintiffs could bring one suit for recovery of the whole property in both districts and that such suit was properly brought in a Court in district A. HARCHANDAR SINGH v. LAL BAHADUR SINGH, 16 A. 359=14 A.W.N. (1894) 119

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- (10) S. 17—*Jurisdiction*—*Muhammadan law*—*Dower*—*Suit for recovery of dower debt from the assets of a deceased Muhammadan*.—A suit for the recovery of a dower debt from the assets of a deceased Muhammadan being a suit on a contract is subject to the provisions as to jurisdiction contained in s. 17 of the Code of Civil Procedure, 1882. SHANKAR DIAL v. MUHAMMAD MUJTABA KHAN, 18 A. 400=10 A.W.N. (1896) 115

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- (11) Ss. 28, 31, 52, 373, 578—*Misjoinder of parties and of causes of action*—*Meaning of "cause of action"*—*Civ. Pro. Code*.—Where a plaintiff alleging himself to be entitled on the death of a Hindu widow to the possession of certain immovable property, upon the death of such widow brought a joint suit against three sets of defendants, being persons to whom the

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- widow in her lifetime had by separate alienations transferred separate portions of the property claimed. *Held*, that such suit was bad for misjoinder of both parties and causes of action, and that s. 578 of the Code of Civil Procedure could not be applied to cure the defect: but the plaintiff was allowed on terms to withdraw his suit as against two out of three sets of defendants with liberty to bring a fresh suit on the same cause of action. *GANESHI LAL v. KHAIRATI SINGH*, 16 A. 279 = 14 A.W.N. (1894) 82 ... 181
- (12) S. 32—*Array of parties in a suit—Improper addition of a defendant.*—An order for sale was made in execution of a decree. A party claiming the property objected. His objection was overruled by the Court of first instance. He appealed to the High Court. The High Court held that the property ordered to be sold was not the property included in the mortgage on which the decree for sale was made and was not property which could be sold under that decree. In the meantime the sale had taken place. Thereupon the owner of the property, which the High Court had held on appeal was not saleable, brought a suit and made the decree holders and auction-purchaser parties to it, and claimed as against them his property. *Held* that it was not competent to the Court acting under s. 32 of the Code of Civil Procedure to introduce into this suit as a defendant a person who claimed the property in suit by a title quite distinct from that under which any of the parties to the suit claimed. *KALIAN RAI v. RAM RATAN*, 18 A. 306 = 16 A.W.N. (1896) 72 ... 910
- (13) S. 32—*Removal of name of defendant from record—Such order not to be made after the first hearing.*—An order striking the name of a defendant off the record of a suit cannot be made under s. 32 of the Code of Civil Procedure at a period subsequent to the first hearing of the suit. *ABBASI BEGAM v. IMDADI JAN*, 18 A. 53 = 15 A.W.N. (1895) 156 ... 741
- (14) S. 32—See PROCEDURE, 18 A. 332.
- (15) Ss. 36, 37—*Bengal Regulation No. XXVII of 1814, ss. 13, 21—Act No. VIII of 1859, ss. 16, 17 and 18—Act No. XX of 1865—Act No. X of 1877, s. 39—Vakalatnamah—Vakalatnamah authorizing pleader to present an appeal signed by person having only a verbal authority from the appellant to do so.*—Under the provisions of Act XIV of 1882 the appointment of a pleader to make or do any appearance, application or act in or to a Civil Court must be in writing, and that writing must be executed by the party or by a person acting on his behalf and acting under the authority of a general power of attorney or *mukhtarnamah*, unless the person making the appointment is the "recognized agent" of the party within the definition of s. 37 of Act No. XIV of 1882. *BADRI PRASAD v. BHAGWATI DHAR*, 16 A. 240 (F.B.) = 14 A.W.N. (1894) 62 ... 156
- (16) S. 43—*"Cause of action"—Execution of decree—Civ. Pro. Code, ss. 278, 280, 283—Intervenor claiming attached property by two separate titles—Single order raising attachment—Two suits by judgment-creditors for declaration of their right to attach—Civ. Pro. Code, s. 58—Order of filing of suits.*—A plaintiff's cause of action consists of every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove such fact, but every fact which is necessary to be proved. The plaintiffs, holding a simple money decree against two persons, Balgobind Ram and Mahadeva Ram, attached in execution thereof (a) their judgment-debtors' mortgagee interest in a certain mortgage and (b) a house said to belong to their judgment-debtors. Against this attachment one Musammat Murti filed objections under s. 278 of the Code of Civil Procedure, in consequence of which the property was released from attachment. The plaintiffs thereupon brought two suits under s. 283 of the Code of Civil Procedure, one in respect of the mortgagee interest and the other in respect of the house. *Held* by the Full Bench (AIKMAN, J., *dissentiente*) that the first essential of the plaintiff's cause of action was the order made under s. 280 of the Code of Civil Procedure and that until that order was made they had no cause of action. The cause of action was the order under s. 280, which had been obtained by Musammat Murti and the right and title of the plaintiffs to bring the subjects of attachment to sale in execution of their decree. The title or titles which the defendant might prove formed no part of the plaintiffs' cause of action, nor would the defendant's

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allegation of different titles in herself to different portions of the property split up the plaintiffs' cause of action into different and distinct causes of action. Similarly the fact that the plaintiffs' judgment-debtors held or were alleged to hold portions of the property under different titles, would not split up the plaintiffs' cause of action into different causes of action. Section 43 of the Code of Civil Procedure has nothing to do with the evidence which may be necessary or may be produced to support or defend a cause of action, or with the desire of a plaintiff to bring more suits than one, or with the devolution of title where the cause of action relates to land or other kind of property. In the above case consequently s. 43 of the Code barred the later of the plaintiffs' two suits. <i>Held</i> also that where two suits are filed on the same day it must be presumed until the contrary is proved that they were presented and admitted in the order in which their numbers appear in the Register of civil suits prescribed by s. 58 of the Code Civil Procedure. <i>Per Aikman, J.</i> —Although it was the single order in the execution department which necessitated the plaintiffs bringing their suits, the plaintiffs' real causes of action were the separate transactions entered into by the judgment-debtors with the objector under s. 278 of the Code, and they were therefore entitled to bring separate suits. <i>MURTI v. BHOLA RAM</i> , 16 A. 165 (F.B.)=14 A.W.N. (1894) 65 ...	106
(17) Ss. 43, 44— <i>Claim for possession and for mesne profits arising out of one cause of action—Suit for possession—Subsequent suit for mesne profits barred.</i> —Where a plaintiff sued for possession of immoveable property upon a forfeiture and for rent in respect of the said property up to the date of the alleged forfeiture, and having obtained a decree, subsequently brought a separate suit for mesne profits including the period from the date of the forfeiture to the date of the institution of the former suit. <i>Held</i> that the claim for mesne profits for the period above mentioned was barred by s. 43 of the Code of Civil Procedure. <i>MEWA KUAR v. BANARSI PRASAD</i> , 17 A. 533=15 A.W.N. (1895) 121 ...	667
(18) S. 44— <i>Misjoinder of causes of action—Objection not taken in the Court of first instance—Practice.</i> —An objection under s. 44 of the Code of Civil Procedure as to misjoinder of causes of action should be taken in the Court of first instance. Where such an objection had been raised for the first time in appeal, the High Court, in second appeal, declined to entertain it. <i>MAULA v. GULZAR SINGH</i> , 16 A. 130=14 A.W.N. (1894) 11 ...	84
(19) S. 44—See PRE-EMPTION, 17 A. 274.	
(20) S. 44, r. (b)— <i>Misjoinder of causes of action—Suit by assignee of Muhammadan widow for part of her dower and for part of the estate of the widow's deceased husband.</i> — <i>Held</i> that a suit by the assignee of a Muhammadan widow for the recovery of part of the assignor's dower and of part of the estate of the assignor's late husband did not contravene the provisions of s. 44, r. b, of the Code of Civil Procedure. <i>AHMAD-UD-DIN KHAN v. SIKANDAR BEGAM</i> , 18 A. 256=16 A.W.N. (1896) 52 ...	877
(21) Ss. 52, 53, 578 - <i>Plaint - Verification of plaint—Result of defective verification—Amendment—Procedure.</i> —If the verification of a plaint is discovered to be defective at any time whilst the suit is before the Court of first instance the plaint may be amended by the Court. If such defect be not discovered until the suit comes on appeal before an appellate Court, such Court may, if it thinks fit, return the plaint to the Court of first instance to be amended by it. But where the defect is such that it is covered by the provisions of s. 578 of the Code of Civil Procedure there is no necessity for the appellate Court to take any steps to procure the amendment of the plaint. In any event a defect in the verification of a plaint will not of necessity result in the dismissal of the suit. A plaint filed by three joint plaintiffs was verified by each in the form :— "The contents of the petition of plaint are true to the best of my knowledge and belief." <i>Held</i> that this form of verification, though not free from ambiguity, was in substantial compliance with the provisions of s. 52 of the Code of Civil Procedure. <i>RAJIT RAM v. KATESAR NATH</i> , 18 A. 396=16 A.W.N (1896) 102	
(22) S. 53, <i>Plaint—Form of plaint in suit by Company in liquidation—Act No. VI of 1882, s. 144.</i> — <i>Held</i> that a plaint in a suit by a bank in liquidation	971

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| in which the plaintiff was described as "the Official Liquidator, Himalaya Bank, Limited, in Liquidation," and which was also subscribed and verified in the same terms, was not a valid plaint, having regard to the terms of s. 144 of the Indian Companies' Act, 1882, and that the defect could not be cured by amendment. GHULAM MUHAMMAD v. THE HIMALAYA BANK, LIMITED, 17 A. 292=15 A.W.N. (1895) 81 ... | 513 |
| (23) S. 53—See CAUSE OF ACTION, 18 A. 432. | |
| (24) S. 53—See COMPANIES ACT (VI OF 1882), 18 A. 198. | |
| (25) S. 53—See EVIDENCE ACT (I OF 1872), 18 A. 98. | |
| (26) S. 53—See PRE-EMPTION, 17 A. 288. | |
| (27) Ss. 100, 108— <i>Ex parte decree</i> —"Appearance," what constitutes.—A summon was issued to a defendant in a civil suit. The surviving officer, being unable to find either the defendant or any person empowered to accept service for him at the address given, affixed a copy of the summons to the outer door of the defendant's house and returned the original to Court. On the day notified in the summons the case was called on, and upon its being called on a pleader presented himself in Court with a power-of-attorney, executed not by the defendant himself but by a third person on his behalf, and stated that the defendant had no notice of the time fixed for the hearing of the case, and prayed for an adjournment to a date upon which a proper answer to the claim could be filed. The application was refused, but the case was adjourned to the day following. On that date no one appeared for the defendant and a decree was passed against him. | |
| <i>Held</i> that there was no appearance on behalf of the defendant within the meaning of s. 100 of the Code of Civil Procedure, and that the decree passed on the adjourned date was therefore an <i>ex parte</i> decree. CHAUDHRI RAJ KUMAR v. JUGAL KISHORE, 18 A. 241=16 A.W.N. (1896) 47 ... | 868 |
| (28) Ss. 159, 578— <i>Application to summon witnesses—Duty of Court in respect of such application—Effect of refusal of Court to summon witnesses—Appeal.</i> —Where a person making an application to a Civil Court for witnesses to be summoned has negligently or with intention to delay the hearing postponed the making of his application for a summons until a time when it would be impossible to obtain the attendance of the witnesses at the hearing, the Court might properly refuse to adjourn the hearing, but nevertheless it would be the duty of the Court to order the summons asked for to issue, as the Court is not given a discretion under s. 159 of the Code of Civil Procedure enabling it to refuse such an application. Where under circumstances similar to those indicated above an application to summon witnesses was refused and that refusal was made one of the grounds of appeal against the decree in the suit. <i>Held</i> that s. 578 of the Code of Civil Procedure would apply if the irregularity in refusing the application did not affect the merits of the case. If it did affect the merits of the case, the ground of appeal would be a good one. BHAGWAT DAS v. DEBI DIN, 16 A. 218=14 A.W.N. (1894) 45 ... | 141 |
| (29) S. 174— <i>Non-attendance of witness in obedience to a summons—Lawful excuse.</i> —There is no obligation on a Civil Court to issue a warrant for the arrest of a witness who, having been summoned, has failed to attend when it is shown to the Court that the absence of such witness is due to the non-payment or non-tender by the person at whose instance the summons had been issued of the necessary expenses of such witness as specified in s. 160 of the Code of Civil Procedure. TODAR MAL v. SAID MUHAMMAD, 17 A. 277=15 A.W.N. (1895) 74 ... | 508 |
| (30) S. 209—See MORTGAGE (FORECLOSURE), 16 A. 269. | |
| (31) S. 214— <i>Pre-emption—Effect of an appeal from a decree for pre-emption on the time limited for paying in the pre-emptive price.</i> —A decree was given in favour of the plaintiff in a suit for pre-emption. The plaintiff paid in a portion only of the pre-emptive price within the time limited by the decree. The defendant appealed. Long after the time prescribed for payment by the original decree had expired, the defendant's appeal was dismissed, but the time for payment was not extended by the Appellate Court's decree. The plaintiff then, after the lapse of a period from the date of the appellate decree in excess of that which had been given him for payment by the decree of the first Court, paid in the balance of the pre- | |

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| emptive price, which was accepted by the Court. On appeal by the defendant from the Court's order directing the balance of the pre-emptive price to be received it was held that the order of the Court allowing the payment was without jurisdiction, the decree having, on the expiration of the time limited without payment by the plaintiff, become a decree in favour of the defendant. JAGGAR NATH PANDE v. JOKHU TEWARI, 18 A. 223 = 16 A.W.N. (1896) 43 | |
| (32) S. 230— <i>Decree for payment of money—Decree for sale of hypothecated property in a suit on a mortgage.</i> —A decree for sale of hypothecated property made in a suit for sale upon a mortgage-bond is not a "decree for the payment of money" within the meaning of s. 230 of Act No. XIV of 1882. RAM CHARAN BHAGAT v. SHEOBARATRI AND ANOTHER, 16 A. 418 = 14 A.W.N. (1894) 142 | 856 |
| (33) S. 230— <i>Execution of decree—Limitation.</i> —R.N. and others obtained a simple money decree against R.S. and another on the 24th of February 1881. On the 2nd of May 1892, previous applications for execution having been unsuccessful, the decree-holders made an application for execution in consequence of which certain property of the judgment-debtors was attached. That application was subsequently struck off by the Court, the attachment being maintained. On the 7th of March 1893 a further application for execution was made. Held that, whether the application of the 7th of March 1893 was or was not merely a continuation of the former application of the 2nd of May 1892, execution of the decree was barred by the rule prescribed by s. 230 of the Code of Civil Procedure. Held also that an order on an application for execution striking off the application, but maintaining attachment effected in pursuance thereof, was an order not warranted by law. RAM NEWAQ v. RAM CHARAN, 18 A. 49 = 15 A.W.N. (1895) 155 | 272 |
| (34) Ss. 230, 235— <i>Execution of decree—Limitation—"Subsequent application to execute the same decree"—"Granted"—Meaning of.</i> —The "subsequent application to execute the same decree" mentioned in s. 230 of the Code of Civil Procedure means a substantive application for execution in the form prescribed by s. 235 of the Code. Hence where an application for the execution in accordance with s. 235 of Code has been made within the period of limitation prescribed by s. 230 and has been granted, that is, execution has been ordered in accordance with the prayer of the decree-holder's application, the right of the decree-holder to obtain execution will not necessarily be defeated if, by reason of objections on the part of the judgment-debtor or action taken by the Court or other Cause for which the decree-holder is not responsible, final completion of the proceedings in execution initiated by the application under s. 235 above referred to, cannot be obtained within the period limited by s. 230. Further applications of the decree-holder to the Court executing the decree to go on from the point where the execution proceedings had been arrested and complete execution of his decree would be applications merely ancillary to be substantive application under s. 235 and would not be obnoxious to the bar of s. 230. RAHIM ALI KHAN v. PHUL CHAND, 18 A. 482 (F.B.) = 16 A.W.N. (1896) 142 | 738 |
| (35) Ss. 232, 244, 540— <i>Execution of decree—Transferee of decree—Representative of party to suit—Appeal.</i> —A person who, within the meaning of s. 232 of the Code of Civil Procedure, is a transferee of a decree is a representative within the meaning of s. 244, qua the decree, of the party to the suit under whom he immediately, or by mesne assignment in writing, or by operation of law, has derived title to the decree in the suit. It is the assignment in writing from the decree-holder, and not the recognition by a Court of him as a representative, which makes such transferee a representative of a party to the suit. A Court upon the application of such a transferee for execution of a decree may wrongly decide that he is not a transferee within the meaning of s. 232, or that, although he is a transferee within the meaning of that section, he is not a representative of a party to the suit, or that by reason of limitation he is not entitled to obtain execution of the decree, and if the Court has so decided, it has determined a question or questions mentioned or referred to in s. 244 of Act No. XIV of 1882, but not specified in s. 588 and an appeal lies under s. 540 of that Act. BADRI NARAIN v. JAI KISHEN DAS AND OTHERS, 16 A. 483 = 14 A.W.N. (1894) 184 | 1028 |

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| (36) S. 234— <i>Execution of decree—Attachment during lifetime of judgment-debtor—Application after death of judgment-debtor to bring his representatives on the record of the execution proceedings—Procedure.</i> —In execution proceedings if the decree-holder desires to proceed after the death of the judgment-debtor against property which has not been attached during the lifetime of the judgment-debtor, his proper course is that marked out by s. 234 of Act No. XIV of 1882: but if the property has been attached during the lifetime of the judgment-debtor, it then comes into the lands of the law and attachment does not abate on the death of the judgment-debtor, and for the purpose of proceeding against, and if necessary selling, that property it is not necessary to implead any one as a legal representative. <i>ABDUR RAHMAN v. SHANKAR DAT DUBE</i> , 17 A. 162=15 A.W.N. (1895) 36 | 429 |
| (37) S. 234—See EXECUTION OF DECREE, 17 A. 431. | |
| (38) Ss. 234, 244—See HINDU LAW (JOINT FAMILY), 16 A. 231. | |
| (39) Ss. 234, 244, 278, 283—See EXECUTION OF DECREE, 17 A. 245. | |
| (40) S. 244— <i>Execution of decree—Representative of judgment-debtor—Purchaser of property attached under a simple money-decree.</i> —A purchaser by private sale of immoveable property from a judgment-debtor is not a representative of the judgment-debtor within the meaning of s. 244 of the Code of Civil Procedure, where the decree against the judgment-debtor is a simple money-decree and creates no charge upon specific property. <i>MADHO DAS v. RAMJI PATAK</i> , 16 A. 286=14 A.W.N. (1894) 84 | 186 |
| (41) S. 244— <i>Execution of decree—Suit for contribution against joint judgment-debtor.</i> —S. 244 of the Code of Civil Procedure does not apply to a suit brought by one of two joint judgment-debtors who has been compelled to satisfy the decree in full against the other joint judgment-debtor for contribution. <i>RAM SARARN PANDE v. JANKI PANDE</i> , 18 A. 106=15 A.W.N. (1895) 240 | 776 |
| (42) S. 244— <i>Representative—Mortgagee under a conditional sale deed who has become owner in pursuance thereof.</i> —A person who becomes owner by process of law of property mortgaged to him by a deed of conditional sale must be considered as the representative of his mortgagor within the meaning of s. 244 of the Code of Civil Procedure. <i>JANKI PRASAD v. ULFAT ALI</i> , 16 A. 284=14 A.W.N. (1894) 38 | 184 |
| (43) S. 244—See EXECUTION OF DECREE, 17 A. 478. | |
| (44) Ss. 244, 278— <i>Execution of decree—Party to the suit in which the decree was passed.</i> —Held that persons who had originally been made parties to a suit, but had been expressly exempted from the operation of the decree, were not "parties to the suit" within the meaning of s. 244 of the Code of Civil Procedure with regard to objections taken by them in respect of the attachment of their property by the decree-holder; but that such objection must be considered to be an objection under s. 278 of the Code. <i>MUKARRAB HUSAIN v. HURMAT-UN-NISSA</i> , 18 A. 52=15 A.W.N. (1895) 153 | 740 |
| (45) Ss. 244, 319— <i>Execution of decree—Purchase by decree-holder at auction sale—Order for delivery of possession—Appeal.</i> —Certain holders of a decree for sale upon a mortgage, having brought the property ordered to be sold to sale, purchased it themselves, Having taken out certificates of sale, they applied to be put in possession of the property purchased by them, and obtained an order for possession. On appeal by the judgment-debtors against this order it was held that no appeal lay, the order objected to being one under s. 319 and not under s. 244 of the Code of Civil Procedure. <i>GHULAM SHABBIR v. DWARKA PRASAD</i> , 18 A. 36=15 A.W.N. (1895) 149 | 729 |
| (46) S. 247— <i>Costs—Cross claims under same decree—Costs under same decree recoverable in different ways.</i> —S. 247 of the Code of Civil Procedure is not limited in its application to cases in which the remedy of each party against the other is of precisely the same nature. Thus where one party to a suit was entitled to recover certain costs by means of the sale of hypothecated property, and the other party under the same decree was entitled to recover a smaller sum as costs from his opponent personally, it was held that s. 247 of the Code applied, and that the costs recoverable personally could be set-off against the costs recoverable by sale of the hypothecated property. <i>BHAGWAN SINGH v. RATAN</i> , 16 A. 395=14 A.W.N. (1894) 133 | 257 |

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- (47) Ss. 253, 582, 583—*Execution of decree—Security for performance of decree of appellate Court—Method of enforcing such security.*—Where in an appeal security has been given to the appellate Court for the due performance of such decree as it may pass, the decree-holder may enforce such security in the manner provided for by s. 253 of the Code of Civil Procedure. *JANKI KUAR v. SARUP RANI*, 17 A. 99=15 A.W.N. (1895) 19 ... 389
- (48) S. 257A—*Execution of decree—Agreement as to payment of decretal money—Void agreement.*—An agreement between the decree-holder and the judgment-debtor for the satisfaction of a decree by which any sum in excess of the decretal amount is payable and which has not been sanctioned by the Court which passed the decree cannot be made the basis of a subsequent suit. *DALU MALWAHI v. PALAKDHARI SINGH*, 18 A. 479=16 A.W.N. (1896) 160 ... 1026
- (49) S. 257A—*Execution of decree—Agreement to give time to the judgment-debtor—Agreement not sanctioned by the Court.*—A judgment-debtor asked for time to pay the decretal amount. The decree-holders agreed to give time on condition that the judgment-debtor gave them a hundi for Rs.1,500, that sum representing a portion of the decree-holder's claim which had been dismissed as barred by limitation. The judgment-debtor gave the hundi, but the sanction of the Court was not obtained to the transaction. On suit by the decree-holders to recover the money secured by the hundi given under the circumstances mentioned above, it was held that the transaction was one contemplated by s. 257-A of Code of Civil Procedure, and that, as it had not been made with the sanction of the Court, it could not be enforced and the suit should be dismissed. *DAN BAHADUR SINGH v. ANANDI PRASAD*, 18 A. 435=16 A.W.N. (1896) 30 ... 996
- (50) S. 258—*Execution of decree—Limitation—Uncertified payment of part of decretal amount—Decree-holder entitled to give evidence of such uncertified payment in answer to a plea of limitation against execution of the decree.*—S. 258 of the Code of Civil Procedure will not debar a decree-holder from giving evidence of uncertified payments made to him out of Court in partial satisfaction of the decree by the judgment-debtor where the judgment-debtor has, in answer to an application for execution of the decree against him, put forward a plea of limitation. *KISHAN SINGH v. AMAN SINGH*, 17 A. 42=14 A.W.N. (1894) 198 ... 351
- (51) S. 258; ss. 2, 244—"Order"—"Decree"—*Appeal.*—An appeal will lie from an order under s. 258 of the Code of Civil Procedure, refusing an application to record an adjustment of a decree made out of Court. *JAMNA PRASAD v. MATHURA PRASAD*, 16 A. 129=14 A.W.N. (1894) 6 ... 83
- (52) Ss. 258, 320—See EXECUTION OF DECREE, 16 A. 228.
- (53) Ss. 263, 264—See LANDLORD AND TENANT, 18 A. 440.
- (54) S. 266—*Attachment—Debt of which the amount is unascertained.*—Where money is due by an agent or vendee to his principal or vendor, the principal's or vendor's claim against his agent or vendee may be attached and sold in execution of a decree against the principal or vendor as a debt under s. 266 of the Code of Civil Procedure, and it is not necessary that the exact amount due to the principal or vendor should be ascertained prior to attachment and sale. *MADHO DAS v. RAMJI PATAK*, 16 A. 286=14 A.W.N. (1894) 84 ... 186
- (55) Ss. 266 (l), 311, 312, 588—*Letters Patent, s. 10—Assignment of villages to Hindu widow in lieu of maintenance—Attachment and sale of such villages in execution of money decree—Objection by widow after sale—Objection allowed—Appeal from order allowing objection.*—Certain villages were assigned for her maintenance to a Hindu widow by members of her husband's family. Those villages were subsequently attached and sold in execution of a simple money decree against the widow. After the sale had become final the widow came forward with an objection to the attachment and sale of the assigned villages on the ground that such attachment and sale were in contravention of s. 266 (l) of the Code of Civil Procedure. The first Court disallowed this objection; but on appeal to the High Court the widow got a decree allowing her objection. On appeal by the decree-holder under s. 10 of the Letters Patent, it was held that, whether or not the widow's interest in the particular villages was capable of being attached, inasmuch as the order asked for by the widow's application was

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| practically an order under s. 312 of the Code of Civil Procedure, an appeal under s. 10 of the Letters Patent would not lie. BANSIDHAR v. GULAB KUAR , 16 A. 413 = 14 A.W.N. (1894) 146 | 288 |
| (56) Ss. 268, 274—See EXECUTION OF DECREE, 18 A. 169. | |
| (57) Ss. 268, 485, 486— <i>Attachment of debt by third party—Attachment not prohibitory of suit by creditor against debtor—Limitation—Act No. XV of 1877, ss. 15, 19—Acknowledgment of debt—Powers of Sarbarakar.</i> —An attachment before judgment under s. 485, Civil Procedure, issued by a Court at the instance of a third party, prohibited the creditor from recovering, and the debtor from paying, the debt:— <i>Held</i> , that an order in those terms was not an order staying the institution of a suit within the meaning of s. 15 of the Limitation Act No. XV of 1877. | |
| <i>Shib Singh v. Sita Ram</i> referred to and approved,—the same rule relating to all attachments whether before or after judgment, couched in similar terms. The person restrained from receiving payment may, nevertheless, assert his right in a suit for the money due. | |
| A debtor, since deceased, had executed a bond to his creditor. The heir of the debtor having been disqualified, and a sarbarakar of the estate having been appointed, the latter had executed a <i>mukhtarnamah</i> or power-of-attorney empowering an agent to act in reference to the land, and the charges thereon. The agent admitted the debt:— | |
| <i>Held</i> that, on the construction of the power given to him, authority to the agent to acknowledge a personal liability of the debtor and his heir, within the meaning of s. 19 of Act No. XV of 1877, could not be implied. | |
| It was doubted whether the sarbarakar, not having been appointed guardian of the heir, could have made such an acknowledgment herself. | |
| Another acknowledgment, a notice from the Collector, as agent for the Court of Wards, admitting the estate's indebtedness to the original holder of the bond, was relied upon. In addition to the bond-debt now in suit, another sum, due on a mortgage, was claimed by the same creditor, and the terms of the notice, would apply to either:— | |
| <i>Held</i> that, the debt referred to in the notice not having been identified with the bond-debt in suit, acknowledgment of the latter by the Collector was not established within s. 19. | |
| The oral evidence of the Collector as to his intention was not admissible to construe the notice, but accompanying circumstances might be shown and considered. BETI MAHARANI v. THE COLLECTOR OF ETAWAH , 17 A. 198 (P.C.) = 22 I.A. 31 = 6 Sar. P.C.J. 551 | 452 |
| (58) S. 276— <i>Execution of decree—Attachment—Alienation—Lease of property under attachment.</i> — <i>Held</i> that a <i>zar-i-peshgi</i> lease and an ordinary agricultural lease made by a judgment-debtor of property under attachment were alienations which were void by reason of the prohibition contained in s. 276 of the Code of Civil Procedure. DEBI PRASAD v. BALDEO , 18 A. 123 = 16 A.W.N. (1896) 13 | 738 |
| (59) S. 278 <i>et seqq.</i> — <i>Execution of decree—Effect of order under s. 278.</i> —An order in favour of one of several decree-holders on an objection under s. 278 of the Code of Civil Procedure does not enure for the benefit of other decree-holders who are not parties to the proceedings under s. 278. JAGAN NATH v. GANESE , 18 A. 413 = 16 A.W.N. (1896) 129 | 981 |
| (60) Ss. 278, 279—See BURDEN OF PROOF, 18 A. 369. | |
| (61) Ss. 278, 283— <i>Execution of decree—Application in execution department—Separate suit—Remedy under s. 283 not excluded by previous application under s. 278.</i> —The provisions of s. 278 of the Code of Civil Procedure and the sections immediately succeeding are not exclusive of the remedy provided by s. 283 of the Code. SUNDAR SINGH v. GHASI , 18 A. 410 = 16 A.W.N. (1896) 126 | 979 |
| (62) Ss. 278, 283— <i>Suit by claimant to attached property—Declaratory relief—Two declarations or one—Court fee.</i> —Where a claimant whose objection under s. 278 of the Code of Civil Procedure has been disallowed brings a suit and makes the judgment-creditor who was trying to execute the decree the sole defendant to the suit, a claim for a declaration that the property under attachment was the plaintiff's property and not liable to attachment in execution of the decree of the defendant is a claim for only | |

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one declaration, and for such purposes and in such a suit it is immaterial whether the claim is that the property is the plaintiff's and not liable to attachment, or that the property is the plaintiff's as against the defendant's right to attach and that the order of attachment should be cancelled. But where the person objecting under s. 278 of the Code brings his suit and makes not only the execution creditor in the attachment proceedings but also the judgment-debtor in those proceedings parties to the suit, and asks for a declaration of the plaintiff's title to the property under attachment as against the judgment-debtor, and also asks for a declaration in denial of the judgment-creditor's right to bring that property to sale in execution of the judgment-creditor's decree, there, there are two substantial declarations asked for. MOTI SINGH v. KAUNSILLA, 16 A. 308 (F.B.) 14 = A.W.N. (1894) 109

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- (63) S. 283—*Jurisdiction—Valuation of suits—Act No. XII of 1887 (Bengal, etc., Civil Courts Act), ss. 19, 21—Act No. I of 1887 (General Clauses Act), s. 3, cl. (13).*—When the only parties to a suit under s. 283 of Act No. XIV of 1882 are the execution-creditor or his representative on one side, as plaintiff or as defendant, and the claimant-objector or his representative on the other, and the sole question in the suit between such parties is the question whether the property attached in execution of the decree of the execution-creditor is or is not liable to be attached and sold in execution of the decree of the execution-creditor, the value of the suit within the meaning of ss. 19 and 21 of Act No. XII of 1887, which, by cl. (13) of s. 3 of Act No. I of 1887, means "the amount or value of the subject matter of the suit," is the value of the property sought to be sold in execution of the decree, when the amount of the decree exceeds the value of the property, and the value of so much of the property sought to be sold as will on a sale satisfy the amount sought to be realized by the sale, when the value of the property attached exceeds the amount sought to be realized, and that in such latter case the amount which it is sought to realise by a sale under the decree may be taken as the value of that portion of the property the sale of which will theoretically, although possibly not in practice, be sufficient to satisfy the amount sought to be realised by a sale.

But when in a suit under s. 283 of Act No. XIV of 1882 the claimant-objector makes the judgment-debtor or his representative a party as defendant to the suit, the property attached must be regarded as the subject-matter of the suit, and the value of the suit, within the meaning of ss. 19 and 21 of Act No. XII of 1887 must be the value of the property attached, whether such value exceeds or is less than the amount which is sought to be realised by the sale of property in execution of the decree. DWARKA DAS v. KAMESHAR PRASAD, 17 A. 69 = 15 A.W.N. (1895) 3

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- (64) S. 285—*Execution of decree—Attachment of the same property by two courts of different grades.*—The operation of s. 285 of the Code of Civil Procedure is not effected by the fact that prior to the attachment made by the Court of higher grade proceedings subsequent to attachment may have taken place in the Court of lower grade in execution of the decree of that Court. BALKISHEN v. NARAIN DAS, 18 A. 348 = 16 A.W.N. (1896) 93

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- (65) S. 285—*Execution of decree—Money attached in execution in two Courts—"Court of highest grade"—Munsif's Court—Small Cause Court.*—In the North-Western Provinces the Court of a Munsif must, for the purposes of s. 285 of the Code of Civil Procedure, be regarded as of a higher grade than a Court of Small Causes. So held by Edge, C.J., Tyrrell, Burkitt and Aikman, Knox, J., dissentiente. Per Knox, J. The respective functions of a Munsif's Court and of a Court of Small Causes in the North-Western Provinces are such that the Courts do not admit of the comparison implied by the term "grade" being instituted between them for the purposes of s. 285 of the Code of Civil Procedure. BALLU RAM v. RAGHUBAR DIAL, 16 A. 11 (F.B.) = 13 A.W.N. (1893) 211

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- (66) Ss. 287, 318, 319 — *Execution of decree—Executing Court delivering possession of property not specified in sale certificate—Revision—Practice.*—In execution of a decree against several joint judgment-debtors certain immoveable property was proclaimed for sale. The sale proclamation described the property as so many biswas and biswansis in certain villages amounting to a certain area. The judgment-debtors possessed property in

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those villages over and above that sought to be sold. The property as above described was sold and certificates of sale were granted which in terms followed the description contained in the proclamation of sale. The decree-holders purchased the property so sold and applied for possession thereof, but in their application they inserted a detail of the specific shares of property held by the several judgment-debtors, over which they prayed for possession. The Court executing the decree went into the question of the specification of shares and ordered possession to be delivered over certain specific shares of the several judgment-debtors.

Held that, under the circumstances described above, the High Court would interfere in revision under s. 622 of the Code of Civil Procedure, although it was possible that the matters complained of might be grounds for a separate suit. GHULAM SHABBIR v. DWARKA PRASAD, 18 A. 163=16 A.W.N. (1896) 18 ...

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- (67) S. 311—*Execution of decree—Application to set aside sale in execution—Plea to jurisdiction of executing Court not admissible in an application under s. 311.—Held* that in an application under s. 311 of the Code of Civil Procedure to set aside a sale in execution of a decree it is necessary for the applicant to show not only that there has been a material irregularity in publishing or conducting the sale, but also that substantial injury had been sustained in consequence of such material irregularity.

Held also that in such an application it is not competent to the applicant to raise, nor to the Court to entertain, any plea to the jurisdiction of the Court executing the decree, as, for example, a plea that the property sold, or part of it, was ancestral and ought to have been sold in accordance with the provisions of s. 320 of the Code. SHIRIN BEGAM v. AGHA ALI KHAN, 18 A. 141=16 A.W.N. (1896) 9 ...

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- (68) S. 311—*Execution of decree—Application to set aside sale in execution—What application must prove.—It* is not sufficient for an applicant under s. 311 of the Code of Civil Procedure to show that there has been material irregularity in publishing or conducting a sale, and that a price below the market value has been realised; but he must go on to connect the one with the other, that is, the loss with the irregularity, as effect and cause by means of direct evidence. JAGAN NATH v. MAKUND PRASAD AND BALDEO PRASAD, 18 A. 37=15 A.W.N. (1895) 154 ...

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- (69) Ss. 312, 320, 588, cl. (16)—*Act No. VII of 1888, ss. 30, 55—Execution of decree—Decree transferred to Collector for execution—Suit by auction-purchaser to confirm sale set aside by the Collector.—A* decree was transferred to the Collector for execution. A sale was held by the Collector under that decree. Subsequently that sale was set aside by the Collector by an order under section 312 of the Code of Civil Procedure. A person who had been an auction-purchaser at the sale so set aside brought a suit in a civil Court to have the sale restored and confirmed. *Held* that such a suit would not lie.

Azimuddin v. Baldeo and Bandi Bibi v. Kalka referred to and held to be no longer applicable by reason of the changes effected in the law by Act No. VII of 1888, but the judgment of Oldfield, J., in the former case approved. SHIB SINGH v. MUKAT SINGH, 18 A. 437=16 A.W.N. (1896) 135 ...

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- (70) S. 317—*Execution of decree—Application for execution against a person alleged to be the beneficial owner, though not the certified purchaser.—The* provisions of s. 317 of the Code of Civil Procedure contemplate suits between the certified purchaser and the beneficial owner, and will not operate so as to bar a third party from asserting that the certified purchaser is not the beneficial owner. THE UNCOVENANTED SERVICE BANK, LIMITED v. ABDUL BARI, 18 A. 461=16 A.W.N. (1896) 151 ...

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- (71) S. 320—*Execution of decree—Power of Collector to deal with money realized through his Court in execution of a Civil Court's decree.—Where* a decree has been sent to the Collector for execution under s. 320 of the Code of Civil Procedure he holds any money which may be realized in execution of such decree at the disposal of the Civil Court by which the decree has been sent to him for execution, and he is not competent to distribute such money in contravention of an order from the Civil Court. TAPESRI LAL v. DEOKINANDAN RAI, 16 A. 1=13 A.W.N. (1893) 180 ...

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| (72) Ss. 322, 325, 326—Act No. X of 1877— <i>Execution of decree—Right of creditor under a simple money decree obtained after property has been taken over by the Collector to be entered in list of creditors prepared under s. 322 B.</i> —Held that the assignees of a decree for money obtained against a person whose property had been taken over by the Collector under s. 326 of Act No. X of 1877, whilst such property was under the management of the Collector, were not entitled to be placed on the list of creditors prepared by the Collector under s. 322 of Act No. XIV of 1882; and that in any case application to be placed on the said list of creditors should have been made to the Collector and not to the District Judge. <i>MURARI DAS v. THE COLLECTOR OF GHAZIPUR</i> , 18 A. 313 = 16 A.W.N. (1896) 77 ... | 914 |
| (73) Ss. 328, 331— <i>Execution of decree—Resistance or obstruction to execution—Complaint—Limitation—Renewal of resistance or obstruction—Fresh cause of action—Estoppel.</i> —The period of limitation provided for in s. 328 of the Code of Civil Procedure is a limitation which governs a cause of action arising out of a particular resistance or obstruction. So far as that resistance or obstruction is concerned, the decree-holder, if he wishes to take proceedings under s. 328, must do so within one month from the time of such resistance or obstruction. But the bar created by the limitation imposed by this section does not extend to and hold good so as to bar complaints against acts of resistance or obstruction made upon fresh proceedings taken by the decree-holder. <i>NARAIN DAS v. HAZARI LAL</i> , 18 A. 233 = 16 A.W.N. (1896) 84 ... | 862 |
| (74) Ss. 335, 334; 2, 244.— <i>Execution of decree—Application by usufructuary mortgagee ejected by auction purchaser to be restored to possession—Representative of party to suit—Auction purchaser who was also assignee of decree.</i> —In a suit for sale upon a mortgage the plaintiff having obtained a decree assigned the same, and the assignee brought the property decreed to be sold to sale and purchased it himself and obtained possession. A usufructuary mortgagee of the property who had been a party to the suit and in whose favour the decree was, in so far that it declared his right to continue in possession, applied to be restored to possession and obtained an order in his favour. Thereupon the assignee, auction-purchaser, applied in revision to have the order restoring the usufructuary mortgagee to possession set aside.
<i>Held</i> , that the order in question was an order which could properly be made under s. 335 of the Code of Civil Procedure, and, being unappealable, an application for revision thereof might lie.
The auction-purchaser, though he happened also to be the assignee of the decree, was not a representative of a party to the suit within the meaning of s. 244, nor was the usufructuary mortgagee a judgment-debtor within the meaning of s. 334 or 335, but he was a person other than a judgment-debtor, within the meaning of s. 335. <i>SABHAJIT v. SRI GOPAL</i> , 17 A. 222 (F.B.) = 15 A.W.N. (1895) 64 ... | 467 |
| (75) S. 336— <i>Bond for production of judgment-debtor—Conditions in bond unprovided for by s. 336.</i> —Where in a bond under s. 336 of the Code of Civil Procedure, besides the usual covenants to produce the judgment-debtor before the Court, and that the judgment-debtor would apply to be declared an insolvent, further stipulations were contained as to what should happen if the judgment-debtor's application to be declared insolvent were refused, it was held that the latter stipulations were not such as were contemplated by s. 336 and could not be enforced under that section. <i>JANKI DAS v. RAM PARTAB</i> , 16 A. 37 = 13 A.W.N. (1893) 203 ... | 25 |
| (76) Ss. 350, 359— <i>Insolvency—Powers exercisable by Court under s. 359—Withdrawal of application by applicants without permission to renew—Court not competent to make payment of costs a condition precedent to the granting of permission to withdraw.</i> —A court acting under s. 359 of the Code of Civil Procedure may, on the motion of a creditor under certain circumstances, order the imprisonment of an applicant for a declaration of insolvency, or it may, under certain circumstances of its own motion, send the applicant to be dealt with by a Magistrate; but it cannot, unless moved by a creditor, pass an order of imprisonment under that section; and if on the motion of a creditor it has ordered the imprisonment of the applicant it cannot subsequently act under the last clause of s. 359. | |

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| Where, an application for a declaration of insolvency having been filed, the applicant asked and obtained permission to withdraw the application absolutely, i.e., without permission to renew the application, it was held that the Court could not make the payment by the applicant of the opposing creditor's costs a condition precedent to the granting of such permission so as to enable the Court subsequently to revive the proceedings commenced by the application, but that such proceedings were finally determined by the applicant's withdrawal. <i>HAIDAR SHAH v. JAMNA DAS</i> , 17 A. 156=15 A.W.N. (1895) 43 ... | 425 |
| (77) S. 351 (d)— <i>Insolvency</i> —"Other act of bad faith"— <i>Act of bad faith committed by applicant for declaration of insolvency antecedently to his application.</i> —The expression "any other act of bad faith" as used in s. 351, cl. (d) of the Code of Civil Procedure means any act of bad faith not before mentioned in s. 351 which bears directly upon the conduct of the debtor in the matters leading up to his application for insolvency, and will not exclude any act of bad faith by which he has incurred a then still subsisting liability to any of his creditors, whether the particular creditor is or is not the creditor whose decree is in execution, and whether or not the bad faith is connected with the liability which has resulted in that decree. <i>GOPAL DAS v. BIHARI LAL</i> , 17 A. 218 (F.B.)=15 A.W.N. (1895) 63 ... | 464 |
| (78) Ss. 351, 355, 356, 357— <i>Insolvent but undischarged judgment-debtor—Application by scheduled creditors to sell subsequently-acquired property of the insolvent, Civil Procedure Code, s. 588, cl. (17)—Appeal.</i> —The provisions of s. 357 of the Code of Civil Procedure are not applicable until the insolvent has been discharged under s. 351 or s. 355 of the Code. Hence where some of the scheduled creditors of a judgment-debtor, who had been declared an insolvent and in respect of whose property a receiver has been appointed, but who had not been discharged, presented an application to the Court, purporting to be made under s. 357 of the Code of Civil Procedure, praying for the sale of certain property which had come by inheritance to the judgment-debtor, and the Court, also purporting to act under s. 357 of the Code, made an order on such application allowing the property in question to be released from attachment on deposit by the insolvent of one-third of the schedule debts; it was held that although the Court might have acted under s. 356 of the Code, yet as its order purported to be under s. 357, it was <i>ultra vires</i> and must be set aside. Held, also that the above-mentioned order was appealable as an order under s. 357 by virtue of s. 588, cl. (17) of the Code of Civil Procedure. <i>GANESHI LAL v. MUSARRAT ALI AND GIRWAR LAL v. MUSARRAT ALI</i> , 16 A. 234=14 A.W.N. (1894) 71 ... | 152 |
| (79) S. 365— <i>Non-joinder—Death of appellant during pendency of appeal—One only of three representatives brought upon the record—Abatement of appeal.</i> —The words "the legal representative" in s. 365 of the Code of Civil Procedure must, where there are more than one legal representative, be read in the plural. Hence, where a sole appellant died during the pendency of his appeal, leaving three legal representatives, and only one of such legal representatives, was brought upon the record in the place of the deceased appellant within the prescribed period of limitation: Held, that the appeal must abate. Either all the legal representatives of the deceased appellant should have been brought upon the record as appellants, or, if any had refused to be joined as appellants, they should have been brought on as respondents. <i>GHAMANDI LAL v. AMIR BEGAM</i> , 16 A. 211=14 A.W.N. (1894) 22 ... | 136 |
| (80) S. 366— <i>Order rejecting application for suit to abate—Appeal.</i> —Held, that an order rejecting an application that a suit might be declared to have abated by reason of the death of the plaintiff and the invalidity of an application to the Court to bring his legal representative on to the record was not one of the orders contemplated by s. 366 of the Code of Civil Procedure and that no appeal would lie therefrom. <i>BHAGWAN DAS v. THE MAHARAJA OF BHARTPUR</i> , 17 A. 286=15 A.W.N. (1895) 78 ... | 509 |
| (81) Ss. 366, 588— <i>Abatement of suit—Appeal.</i> —No appeal will lie from an order under the first paragraph of s. 366 of the Code of Civil Procedure, such order neither amounting to a decree nor being specifically appealable under s. 588. <i>HAMIDA BIBI v. ALI HUSEN KHAN</i> , 17 A. 172=15 A.W.N. (1895) 42 ... | 436 |

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(82) S. 368—See COMPANIES ACT (VI OF 1882), 18 A. 156.

(83) Ss. 372, 582—*Devolution of interest during pendency of suit—Assignment of decree prior to appeal—Application to substitute name of assignee as respondent to appeal—"Suit."*—An application was made by an appellant to substitute for the name of the person originally named as respondent to the appeal the name of a person to whom the decree had been assigned before the filing of the appeal, such application being made more than two years after notice of the assignment had reached the appellant. The person whose name was so sought to be substituted as respondent objected to being placed upon the record of the appeal. *Held*, that the name of the proposed respondent should not be placed on the record.

Semble, that section 372 of the Code of Civil Procedure does not apply to a case where the devolution of interest occurs between the time of the passing of a decree and the time of the filing of an appeal from that decree. THE COLLECTOR OF MUZAFFARNAGAR v. HUSAINI BEGAM, 18 A. 86 = 15 A.W.N. (1895) 232

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(84) S. 372, 582—*Appeal—Devolution of interest pending appeal—Array of parties in appeal—Review.*—*Held* that s. 372 of the Code of Civil Procedure applies as well to the case of a devolution of interest pending an appeal as to the case of a devolution of interest pending a suit.

Held, also that a person may, under s. 372, be added or substituted as a party either on his own application or on the application of one of the parties already on the record.

Held, also that an application by a respondent to an appeal, whose interest had at one time been represented by an official receiver, to replace upon the record of the appeal as a party respondent the name of such official receiver, which had been struck off owing to a misrepresentation of fact, might be treated as an application for review of the order striking off the name of the official receiver. *In the matter of the petition of SARAT CHANDRA SINGH*, 18, A. 285 = 16 A.W.N. (1896) 45

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(85) S. 373—"Order"—"Decree"—*Appeal*—An order under s. 373 of the Code of Civil Procedure allowing a plaintiff to withdraw his suit with leave to bring another suit on the same cause of action is not appealable, being neither one of the orders specified in s. 588 nor a decree within the meaning of s. 2 of the said Code. JAGDESH CHAUDHRI v. TULSHI CHAUDHRI, 16 A. 19 = 13 A.W.N. (1893) 159

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(86) S. 373—"Order"—"Decree"—*Appeal*.—An order under s. 373 of the Code of Civil Procedure allowing a plaintiff to withdraw his suit with liberty to bring a fresh suit on the same cause of action is not appealable, not being a decree within the meaning of s. 2 of the Code, nor one of the orders from which an appeal is allowed by s. 588. GENDA MAL v. PIRBHU LAL, 17 A. 97 = 15 A.W.N. (1895) 17

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(87) Ss. 373, 43—*Withdrawal of suit with permission to bring a fresh suit on the same cause of action—Effect of such withdrawal.*—Where a suit is withdrawn with permission under the first paragraph of s. 373 of the Code of Civil Procedure, the effect is to leave the parties in the same position as that in which they would have been if the suit had never been brought.

A plaintiff, therefore, who has obtained an order under s. 373 of the Code, will not be debarred by s. 43 from claiming in a subsequent suit a relief which he might have included, but did not, in the suit which he was permitted to withdraw. BEHARI LAL PAL v. SRIMATI BARAN MAI DAS, 17 A. 53 = 14 A.W.N. (1894) 201

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(88) Ss. 373, 649—See EXECUTION OF DECREE, 17 A. 106.

(89) S. 403, *et seqq*—*Application for leave to sue in forma pauperis—Subsequent payment of Court fees as for a regular suit—Limitation—Act No. XV of 1877, s. 4, sch. ii, art. 104.*—A. B. applied for leave to sue as a pauper for the recovery of certain dower alleged to be due to her. Upon her right to sue as a pauper being disputed by the persons proposed by her in her application for leave to sue as a pauper as defendants to the suit, A. B. paid into Court, the Court-fee necessary for a regular suit to recover the amount claimed, and prayed that her original application might be treated as the plaint in the suit and the suit proceeded with in the ordinary manner. In the meantime, however, the period of limitation prescribed by art. 104 of

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- sch. ii of Act No. XV of 1877 for a suit to recover deferred dower had expired. *Held*, that the suit was barred by limitation, and that section 5 of Act No. XV of 1877 could not be applied. *ABBASI BEGAM v. NANHI BEGAM*, 18 A. 206=16 A.W.N. (1896) 33 ... 843
- (90) Ss. 403, 409—*Application for leave to sue in forma pauperis—Application refused—Institution of regular suit—Limitation.*—When an application for leave to sue as a pauper is refused and the applicant subsequently brings a suit in the same matter on a full Court-fee, such suit dates, for the purposes of limitation, from the time of filing the plaint and not from the date of the application for leave to sue as a pauper. *Aliter* when, leave to sue as a pauper having been granted, the applicant is dispaupered. *NARAINI KUAR v. MAKHAN LAL*, 17 A. 526=15 A.W.N. (1895) 106 ... 663
- (91) S. 411—*Suit in forma pauperis—Court fee payable out of the subject-matter of the suit—Mode of realization of Court-fee by Government.*—In a suit brought in *forma pauperis* the plaintiff was successful, and the decree directed that the Court-fee which would have been payable had the suit not been in *forma pauperis* should be the first charge on the property the subject-matter of the suit and should be recoverable from the defendant in the same manner as the costs of the suit. *Held*, that it was not necessary for Government to bring a separate suit to recover the Court-fee, but that the same might be realized from the property the subject of the suit by proceedings in execution. *RAM DAS v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL*, 18 A. 419=16 A.W.N. (1896) 121 ... 985
- (92) S. 435—*Corporation—Suit by agent of an unincorporated society—Ejectment—Possessory title.*—A suit in ejectment as against a trespasser was brought by a person signing the plaint as "for and as Superintendent and Principal Officer of the Estate of the Board of Foreign Missions of the Presbyterian Church of New York." The plaintiff was not shown to be a member of the Board nor did he set up any possessory title of his own. *Held* that inasmuch as the Board of Foreign Missions of the Presbyterian Church of New York was not a corporation or company authorised to sue and be sued in the name of an officer or trustee within the meaning of s. 435 of the Code of Civil Procedure, and also as the person signing the plaint in the manner above described, did not profess to be suing on his own possessory title to the land in respect of which ejectment was claimed the suit must be dismissed. *YUSUF BEG v. THE BOARD OF FOREIGN MISSIONS OF THE PRESBYTERIAN CHURCH OF NEW YORK IN AMERICA THROUGH THE REVD. W.F. JOHNSON, PRINCIPAL OFFICER*, 16 A. 420=14 A.W.N. (1894) 154 ... 274
- (93) S. 462—*Minor—Circumstances necessary to make a compromise by a guardian or next friend on behalf of a minor binding on the minor.*—In order to make an agreement or compromise, to which s. 462 of the Code of Civil Procedure applies, a lawful agreement or compromise, it is necessary that the next friend or guardian should ask the Court to consider the proposed terms of the agreement or compromise, and, before making the agreement or entering into the compromise, should obtain permission from the Court to enter into the agreement or compromise proposed. The Court should record the fact that such application was made to it; that the terms of the proposed agreement or compromise were considered by the Court; and that, having regard to the interests of the minor, the Court granted leave to the making of the agreement or compromise.
- From the mere fact that the Court passed the decree in accordance with the compromise, it cannot be inferred that any of those steps preliminary and necessary to the making of the decree have been taken by the Court. *KALAVATI v. CHEDI LAL*, 17 A. 531=15 A.W.N. (1895) 126 ... 666
- (94) S. 483—*Attachment before judgment—Suit on hypothecation-bond—Attachment of non-hypothecated immoveable property—Sale of hypothecated property not necessary to satisfy Court that such property may prove insufficient.*—S. 483 of the Code of Civil Procedure does not refer exclusively to movable property. Where in a suit on an hypothecation-bond the plaintiff sought to attach before judgment immoveable property of the defendant other than that hypothecated: *Held*, that it was not necessary, in order that the Court might be satisfied that the proceeds of the sale of the hypothecated property were likely to prove insufficient to meet the decree which

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| the plaintiff might obtain in his suit, that such property should be actually brought to sale. <i>BISHAMBAR SAHAI v. SUKHDEVI</i> , 16 A. 186 = 14 A.W.N. (1894) 20 | 120 |
| (95) Ss. 483, 484, 486, <i>Execution of decree—Attachment of money deposited in Court.</i> —The term "property" as used in ss. 483 and 484 of the Code of Civil Procedure is wide enough to include property of every description, moveable and immoveable, whether in the actual possession of the defendant or of some other person on his behalf; and the words "the Court may require him . . . to produce and place at the disposal of the Court" only refer to such property as is capable of being produced in Court. | 377 |
| Where property ordered to be attached is deposited in the Court which made the order for attachment, that order is sufficient notice to itself that the property ordered to be attached is to be held subject to the further orders of the Court, and it is not necessary that a separate formal notice should be drawn up. <i>CHEDI LAL v. KUARJI DICHIT</i> , 17 A. 82 = 15 A.W.N. (1895) 14 | 777 |
| (96) S. 488— <i>Order for maintenance—Person against whom order is sought a competent witness on his own behalf.</i> —A person against whom an order for maintenance under section 488 of the Code of Criminal Procedure is sought is a competent witness on his own behalf in such proceedings. <i>HIRA LAL v. SAHEB JAN</i> , 18 A. 107 = 15 A.W.N. (1895) 242 | 322 |
| (97) S. 492— <i>Execution of decree—Application to Civil Court for stay of sale in execution of a decree of a Court of Revenue.</i> —The term "decree" as used in the Code of Civil Procedure does not include the decree of a Court of Revenue. | 1008 |
| <i>Held</i> , therefore that an application under s. 492 of the Code of Civil Procedure for stay of sale in execution of a decree of a Court of Revenue in a suit under s. 93 of Act XII of 1881, cannot be entertained by a Civil Court. <i>ONKAR SINGH AND ANOTHER v. BHUP SINGH</i> , 16 A. 496 = 14 A.W.N. (1894) 180 | 150 |
| (98) S. 505— <i>Receiver—Power of District Court under s. 505 as to appointment of receiver.</i> —The concluding words of s. 505 of the Code of Civil Procedure—"or pass such order as it thinks fit"—must be read as controlled by the words preceding them, and do not confer upon the District Court the power itself to appoint a receiver not nominated by the Subordinate Court. <i>AMAR NATH v. RAJ NATH</i> , 18 A. 453 = 16 A.W.N. (1896) 141 | 987 |
| (99) Ss. 520, 521, 526— <i>Arbitration—Award—Refusal by Court to file award</i> —"Grounds shown"—In s. 526 of the Code of Civil Procedure the word "shown" is not equivalent to "alleged" but it is necessary that one of the grounds mentioned in s. 520 or s. 521 should be proved to the satisfaction of the Court before the Court is justified in refusing to file the award. <i>JAGAN NATH v. MANNU LAL</i> , 16 A. 231 = 14 A.W.N. (1894) 60. | |
| (100) Ss. 521, 522— <i>Award—Decree on judgment in accordance with an award—Appeal.</i> —Where a decree has been made upon a judgment given upon an award and is not in excess of and is in accordance with the award, an appeal from such decree will lie on the ground that the so-called award upon which the judgment and decree are based is from one cause or another no award in law. | |
| Where an application to set aside an award on the ground of the misconduct of an arbitrator has been made under s. 521 of the Code of Civil Procedure, and such application has been refused after judicial determination and a decree made under s. 522 of the Code, which is in accordance with and not in excess of the award, no appeal based upon any similar ground will lie from the decree so made. But an appeal will lie in the case last mentioned where, an application to set aside the award on the ground of misconduct of the arbitrator having been made, the Court has passed its decree without considering such application, or where the Court has not allowed sufficient time to the parties to file objections to the award. <i>IBRAHIM ALI v. MOHSIN ALI</i> , 18 A. 422 (F.B.) = 16 A.W.N. (1896) 187 | |
| (101) S. 522— <i>Award—Appeal—Grounds of appeal from a decree passed upon a judgment in accordance with an award.</i> — <i>Held</i> that an appeal would not lie from a decree passed upon a judgment given according to an award merely because there might have been some irregularities in the procedure of the | |

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| arbitrator, such alleged irregularities having been considered by the Court which passed the decree and having been found by that Court not to be of such a nature as to render the award no award in law. <i>RAM DHAN SINGH v. KARAN SINGH</i> , 18 A. 414=16 A.W.N. (1896) 116 ... | 982 |
| (102) Ss. 525, 526— <i>Arbitration—Objection to application to file an award in Court that one party had not agreed to refer any matter to arbitration—Jurisdiction of Court to determine whether the parties had or had not referred the matter in question to arbitration.</i> —An objection to an application made under s. 525 of the Code of Civil Procedure that the parties had not agreed to refer to arbitration any matter, or had agreed to refer some only of the matters determined by the award, or that the document alleged to be an award was not an award of the arbitrators, is an objection which must be considered and determined under s. 526 upon evidence by the Court to which the application is made. <i>AMRIT RAM v. DASRAT RAM</i> , 17 A. 21 (F.B.)=14 A.W.N. (1894) 187 ... | 337 |
| (103) S. 539—See ACT XX OF 1863 (RELIGIOUS ENDOWMENTS). 18 A. 227. | |
| (104) S. 541— <i>Appeal—Necessity for copy of decree appealed against accompanying a memorandum of appeal.</i> —A memorandum of appeal is not a good memorandum of appeal in law unless it is accompanied by a copy of the decree appealed against. <i>CHAMELA KUAR v. AMIR KHAN</i> , 16 A. 77=13 A.W.N. (1893) 223 ... | 51 |
| (105) S. 549— <i>Security for costs—Failure of appellant to file security—Rejection of appeal—Appeal from order of rejection—Order for security not to state specific amount for which security is required.</i> —An order rejecting an appeal under s. 549 of the Code of Civil Procedure is not appealable either as an order or as a decree.

Where a Court, acting under s. 549 of the Code, orders an appellant to give security for costs, it is not necessary that any specific sum for which security is to be given should be named in the order for security. It is sufficient for the order to direct the appellant to furnish security within a time to be stated "for the costs of the appeal" or "for the costs of the original suit," or "for the costs of the appeal and of the original suit." <i>LEKHA v. BHANNA</i> , 18 A. 101 (F.B.)=15 A.W.N. (1895) 288 ... | 773 |
| (106) Ss. 556, 558, 588, 622— <i>Dismissal of appeal "for default of prosecution," appellant and his pleaders being present—Refusal to reinstate appeal—Remedy of appellant—Revision.</i> —A Civil appeal was being heard before a Subordinate Judge, the appellant and two pleaders on his behalf being present. During the argument one of the pleaders was called away to another Court and remained absent, and as neither the other pleader nor the appellant was in a position to continue the argument, the Subordinate Judge passed an order, purporting to be under section 556 of the Code of Civil Procedure, dismissing the appeal "for default of prosecution." An application under section 558 to reinstate the appeal was rejected. The appellant appealed under section 588 to the High Court against the order under section 558. <i>Held</i> that no such appeal lay, as the order in question could not have been made under section 556. But the appellant was allowed to apply in revision under section 622 against the order under section 556, and upon that application it was <i>held</i> that the Court below had acted illegally and with material irregularity in dismissing the appeal for default under section 556. <i>JAWAHIR SINGH v. DEBI SINGH</i> , 18 A. 119=16 A.W.N. (1896) 9 ... | 785 |
| (107) S. 559— <i>Addition of a party in second appeal.</i> —A Court cannot in a second appeal act under s. 559 of the Code of Civil Procedure, and add a party as a respondent unless such party was a party to the appeal below, and this notwithstanding that he was a party to the suit in the Court of first instance. <i>CHUNNI v. LAJA RAM</i> , 16 A. 5=13 A.W.N. (1893) 141 ... | 4 |
| (108) S. 561— <i>Appeal—Objections—Withdrawal of appeal—Failure of objections.</i> —If an appeal in which objections have been filed under s. 561 of the Code of Civil Procedure is withdrawn, the objections cannot be heard. <i>JAFAR HUSAIN v. RANJIT SINGH</i> , 17 A. 518=15 A.W.N. (1895) 115 ... | 657 |
| (109) Ss. 562, 564, 566, 622— <i>Remand—Refusal of Court of first instance to record evidence tendered—Refusal of Appellate Court to record additional evidence.</i> —The plaintiffs in the Court of first instance produced both documentary and oral evidence in support of their claim. The Court being | |

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- satisfied with the documentary evidence produced by the plaintiffs declined to record the evidence of the witnesses tendered by them. The defendants appealed, and the lower appellate Court reversed the decree of the Court of first instance, but in its turn declined to allow the plaintiffs respondents to produce fresh evidence before it. On appeal by the plaintiffs to the High Court, it was *held* that, though there was no section of the Code of Civil Procedure strictly applicable to the circumstances of the case, the Court was warranted *ex debito justitiæ* in setting aside all proceedings of both Courts below and in directing the Court of first instance to re-try the case, admitting all admissible evidence which had previously been tendered to the Court of first instance and which that Court had refused to record. *DURGA DIHAL DAS v. ANORAJI*, 17 A. 29=14 A.W.N. (1894) 190. 342
- (110) Ss. 562, 588, cl. (28)—*Act No. XII of 1881 (N.W.P. Rent Act)*, ss. 190, 191—*Appeal from Court of Revenue to District Judge—Remand by District Judge under s. 562 of the Civil Procedure Code—Appeal to High Court from order of remand.*—S. 190 of Act No. XII of 1881 makes s. 562 of Act No. XIV of 1882, applicable to appeals from a Court of Revenue to a District Judge, and where in such a case a District Judge has made an order of remand under s. 562, an appeal will lie from such order to the High Court under s. 588, cl. (28) of Act No. XIV of 1882. *PARTAP SINGH v. NARAIN DAS*, 16 A. 375=14 A.W.N. (1894) 120 ... 244
- (111) Ss. 562, 588, 591—*Order—Appeal—Conditions under which an order passed in the course of a suit may be questioned in an appeal from the decree in such suit.*—An order made under the Code of Civil Procedure from which an appeal is given under s. 588 of that Code may be questioned under s. 591 in an appeal from the decree in the suit if the ground of objection is stated in the memorandum of appeal. ...
Held by Edge, C.J. and Aikman, J. that section 591 of the Code of Civil Procedure does not enable an appellant to avoid limitation by coming up under s. 591 when the only ground of appeal is an order made under s. 562. S. 591 contemplates two things—there being a regular appeal about something else, and in that appeal the insertion of a ground of objection under s. 591. *SHEO NATH SINGH v. RAM DIN SINGH*, 18 A. 19 (F.B.)=15 A.W.N. (1895) 134 ... 717
- (112) S. 566—*Unnecessary reference—Power of Court to disregard the findings returned.*—A single Judge of the High Court hearing a second appeal made an order of reference under s. 566 of the Code of Civil Procedure. On the return to the reference the appeal came before another Judge, who, holding that the reference was unnecessary, and that the original findings of fact in the Court below were sufficient to dispose of the appeal, disregarded the findings on the reference and dismissed the appeal. In appeal under s. 10 of the Letters Patent it was *held* that it was competent to the Judge before whom the appeal had subsequently come to disregard the findings on the order of reference. *MUBARAK HUSAIN v. BIHARI*, 16 A. 306=14 A.W.N. (1894) 97 ... 199
- (113) Ss. 566, 574—*Issue not disposed of by the lower appellate Court—Procedure.*—In a suit for money due under a bond the plaintiff tendered three witnesses in the Court of first instance to prove execution of the bond. That Court having examined one of such witnesses declined to examine the others, being satisfied on his evidence of the genuineness of the bond, and passed a decree in favour of the plaintiff. On appeal by the defendant the lower appellate Court disposed of the sole issue in the appeal, *viz.*, execution or non-execution, in the following words:—"I do not think the claim made out by the plaintiff on his own evidence."
Held, that under the circumstances above described it was competent to the High Court in second appeal to act under s. 566 of the Code of Civil Procedure and refer an issue as to the execution or non-execution of the bond in suit to the lower appellate Court, that issue having practically not been tried at all by the said Court. *GANGA PRASAD v. LAL BAHADUR SINGH*, 17 A. 117=A.W.N. (1895) 21 ... 400
- (114) S. 583—*Application for refund of money paid into Court by a successful plaintiff in a suit for pre-emption, the decree having been set aside on appeal—Interest.*—A plaintiff in a pre-emption suit obtained a decree and paid into Court the pre-emptive price as stated in that decree, and the money

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| was drawn out of Court by the vendor. Subsequently the decree was reversed on appeal, and the plaintiff then applied under section 583 of the Code of Civil Procedure for a refund of the money paid into Court as above described with interest. <i>Held</i> , that the pre-emptor was entitled to a refund of the money together with interest up to date of re-payment. BHAGWAN SINGH v. UMMAT UL-HASNAIN, 18 A. 262 = 16 A.W.N. (1896) 42 | 881 |
| (115) S. 584 (c)— <i>Substantial error or defect in procedure—Court proceeding to hear an appeal without waiting for return of commission issued at the request of a party.</i> —The intention of the Code of Civil Procedure is that when a Court deems it necessary on the application of a party or otherwise that a commission for local investigation should be issued, the return to that commission should be before the Court before it should proceed to hear and determine the case. MADHO SINGH v. KASHI SINGH, 16 A. 342 = 14 A.W.N. (1894) 112 | 223 |
| (116) S. 586— <i>Execution of decree—Suit of the nature cognizable in Courts of Small Causes—Appeal.</i> —Where the original suit is a suit of the nature cognizable in Courts of Small Causes, and the subject-matter of the suit does not exceed Rs. 500 in value, no second appeal will lie in respect of an order made in execution proceedings relating thereto. DIN DAYAL v. PATRAKHAN, 18 A. 481 (F.B.) = 16 A.W.N. (1896) 160 | 1027 |
| (117) S. 596— <i>Application for leave to appeal to Her Majesty in Council—Value of property affected by decree.</i> —In an application for leave to appeal to Her Majesty in Council the value of the property ostensibly affected by the decree sought to be appealed was below Rs. 10,000; but it appeared that the suit in appeal in which the said decree had been passed was connected with another suit relating to the same property in which a decree had been passed, which was the subject of another similar application and that the aggregate value of the two decrees was much above Rs. 10,000, and that it could not be known which of such decrees would affect which specific portion of the property in question. <i>Held</i> that under the above circumstances the application under consideration should be granted under the last paragraph of s. 596 of the Code of Civil Procedure. <i>In the matter of the petition of</i> KHWAJA MUHAMMAD YUSUF, 18 A. 196 = 16 A.W.N. (1896) 39 | 836 |
| (118) S. 596— <i>Restriction of power in India to grant leave to appeal to Her Majesty in Council—Concurrence of two Courts in deciding fact.</i> —Where the decree of an appellate Court has affirmed the decision of the Court immediately below it, upon an issue of fact, and no substantial question of law is involved, no appeal is open, under s. 596 of the Code of Civil Procedure, and leave to appeal should not be granted by the High Court in such a case. KUAR NIRBHAI DAS v. RANI KUAR, 16 A. 274 (P.C.) 177 = 6 Sar. P.C.J. 433 | 177 |
| (119) Ss. 600, 601— <i>Refusal of certificate of leave to appeal to Her Majesty in Council—Finality of an order with reference to the admission of an appeal to Her Majesty in Council—Remand—Civ. Pro. Code, ss. 562, 565.</i> —An order comprising the decision of the appellate High Court upon a cardinal issue in a suit, that issue being one that goes to the foundation of the suit, and one that can never while this decision stands, be disputed again, is a final decree for the purposes of appeal to the Queen in Council, notwithstanding that there may be subordinate inquiries yet to be made in disposing of the suit. | |
| The certificate, of which the grant was part of the procedure in the admission of such an appeal, was refused by the High Court on the ground that the proposed appeal was from an order remanding a suit under s. 562, Civil Procedure; and that orders of remand under that section were, by the practice of the Court, treated as not final within s. 595, cl. (a). That practice is probably correct; but here the order only purported to be under s. 562, which was not applicable. The first Court had not disposed of the suit upon a preliminary point, so as to have excluded evidence of fact appearing to the appellate Court essential; and s. 565 appeared to be applicable rather than s. 562. The appellate Court had reversed, once for all, the decision of the first Court upon an issue as to the making and validity of a will, which issue governed the whole case. SAIYID MUZHAR HOSSEIN v. MUSSAMAT BODHA BIBI, 17 A. 112 (P.C.) = 5 M.L.J. 20 = 22 I.A. 1 = 6 Sar. P.C.J. 580 | |

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- (120) S. 622—*Revision—Construction of document.*—The fact that a Court has misunderstood the effect of a document in evidence does not constitute a ground upon which the High Court can interfere in revision under s. 622 of the Code of Civil Procedure. *DASRATH RAI v. SHEODIN RAI*, 16 A. 39 = 13 A.W.N. (1893) 199 ... 26
- (121) S. 622—See *PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887)*, 16 A. 476.
- (122) S. 622—See *STATUTE*, 24 and 25, Vic. Cap. 104, 18 A. 4.
- (123) S. 623.—See *EXECUTION OF DECREE*, 16 A. 390.
- (124) Ss. 623, 625, 541.—*Review of judgment—Application for review not to be accompanied by copy of judgment, decree or order sought to be reviewed—Act No. XV of 1877, s. 12.*—It is not necessary that an application for review of judgment should be accompanied by a copy of the decree, order or judgment sought to be reviewed. *WAJID ALI SHAH v. NAWAL KISHORE*, 17 A. 213 (F.B.) = 15 A.W.N. (1895) 61 ... 461
- (125) Ss. 626, 629—*Review of judgment—Appeal.*—No appeal will lie from an order granting a review of judgment except under the conditions specified in section 629 of the Code of Civil Procedure. *DARYAI BIBI v. BADRI PRASAD*, 18 A. 44 = 15 A.W.N. (1895) 151 ... 734

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See *CIVIL PROCEDURE CODE*, (ACT XIV OF 1882), 16 A. 342.

Companies Act (VI of 1882).

- (1) Ss. 130, 132.—*Company—Winding up—"Court"—Jurisdiction.*—Held that with regard to a Company the registered office of which was at Mussooree "the Court," as that term is used in Part IV of Act No. VI of 1882 (*Indian Companies Act*), means the Court of the District Judge of Saharanpur, and not that of the Subordinate and Small Cause Court Judge sitting at Mussooree or Dehra. *THE HIMALAYA BANK v. QUARRY*, 17 A. 252 = 15 A.W.N. (1895) 97 ... 487
- (2) S. 144—*Suit by Official Liquidator—Description of plaintiff—Civ. Pro. Code, s. 53—Amendment of plaint—Limitation—Act No. XV of 1877, s. 22.*—In a suit to recover a debt to a Company which had gone into liquidation the plaintiff was described in the plaint as "the Official Liquidator, Himalaya Bank, Limited, in liquidation," and the plaint was signed and verified in the same terms. On objection taken by the defendant, the plaint was allowed to be amended, but after the period of limitation prescribed for the suit had expired, so as to read "The Himalaya Bank, Limited, in liquidation, plaintiff." Held by the Full Bench that the plaint as originally filed was in substantial compliance with the provisions of Act No. VI of 1882; and that even if it might be considered that the amendment made was necessary, such amendment did not introduce a new plaintiff into the suit so as to let in the operation of s. 22 of Act No. XV of 1877. *MUHAMMAD YUSUF v. THE HIMALAYA BANK, LIMITED*, 18 A. 198 = 16 A.W.N. (1896) 28 ... 838
- (3) S. 144.—See *CIVIL PROCEDURE CODE*, (ACT XIV OF 1882), 17 A. 229.
- (4) Ss. 162, 163.—See *PENAL CODE (ACT XLV OF 1860)*, 16 A. 88.
- (5) Ss. 162, 169, 214—*Appeal—Limitation—Act No. XV of 1877, s. 12.*—Held that no appeal lay from an order made under section 162 of Act No. VI of 1882, by a Court under the supervision of which proceedings in liquidation were being conducted declining to continue an investigation commenced by it under that section.
- Held also that, whether or not the service of notice of appeal within three weeks provided for by section 214 of Act No. VI of 1882, implies that all the formalities prescribed for the presentation and admission of an appeal by the Court of Civil Procedure must first be gone through before notice of appeal can be served, a person appealing under the said section cannot avail himself of the provisions of section 12 of Act No. XV of 1877, *R. WALL v. J. E. HOWARD*, 18 A. 215 = 16 A.W.N. (1896) 39 ... 850
- (6) S. 169—*Company—Winding up—Power of Judge to review order made in course of liquidation—Secured and unsecured creditors—English law, application of, where Indian Statutes are silent—"Justice, equity and good conscience."*—Section 169 of Act No. VI of 1882 is not intended to refer to

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| a case in which a Judge upon the discovery of fresh matter considers it expedient to pass a fresh order or to review an order passed by him. There being no provision in the Indian Statute law by which, in the winding up of a Company, secured creditors are entitled to any preference over unsecured creditors; in such proceedings the rule of English law—that secured creditors can only prove for the balance of their debts after deducting the value of their securities—should prevail, as being consonant with justice, equity and good conscience. <i>THE MUSSOORIE BANK, LIMITED v. THE HIMALAYA BANK, LIMITED</i> , 16 A. 53=13 A.W.N. (1893) 205 ... | 35 |
| (7) S. 169.—See <i>LETTERS PATENT</i> , 17 A. 438. | |
| (8) Ss. 169, 214.—See <i>COURT FEES ACT VII OF 1870</i> , 17 A. 238. | |
| (9) S. 214— <i>Company—Civ. Pro. Code, s. 368—Parties—Substitution of representatives of deceased respondent.</i> —R. W. and others, contributories to a Company which had gone into liquidation, filed an application under s. 214 of Act No. VI of 1882 directed against certain officers of the Company. That application, after certain issues had been framed and partially tried, was dismissed, and an order was also made giving costs against the applicants. The applicants appealed to the High Court against the order of dismissal. Pending this appeal one of the opposite parties died, and it was sought to put his legal representatives upon the record of the appeal as a respondent. <i>Held</i> , that in view of explanation II to s. 214 of the Indian Companies Act, 1882, the legal representative of the said deceased respondent could not be brought upon the record, either in respect of the relief prayed for in the original application or in respect of the order making costs payable by the applicants, as that order could not be separated from the dismissal of the application. <i>R. WALL v. J. E. HOWARD</i> , 18 A. 156=16 A.W.N. (1896) 28 ... | 810 |
| (10) S. 214— <i>Company—Winding up—Auditor—Officer of the Company—Mifeasance—Damages—Remoteness of loss—Limitation—Act No. XV of 1877, schedule II, article 36.</i> —An auditor of a Company to which Act No. VI of 1882 applies, who is duly appointed by a general meeting of the Company and not casually called in as occasion may require, is an officer of the Company within the meaning of s. 214 of the abovementioned Act.
The compensation which, under s. 214 of the Indian Companies Act, 1882, may be assessed against a defaulting director or other officer of a Company, is of the nature of damages; it is therefore necessary that the loss to the Company in respect of which compensation is asked for should be the direct, and not a remote and more or less speculative consequence of the mifeasance or neglect of duty on the part of the director or other officer of the Company from whom compensation is sought.
The special proceeding provided for by s. 214 of Act No. VI of 1882 is not subject to the limitation prescribed by article 36 of schedule II of the Indian Limitation Act, 1877. <i>D. CONNELL v. THE HIMALAYA BANK, LD</i> , 18 A. 12=15 A.W.N. (1895) 136 ... | 712 |
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| (1) <i>Director selling his own shares to share-holder of Company—Action for deceit—Director not in a fiduciary position as regards individual shareholders.</i> —A director of a Company, though he may occupy a fiduciary position with regard to the shareholders collectively, holds no such position with regard to individual shareholders. <i>WILSON v. M. MACAULIFFE</i> , 18 A. 56=15 A.W.N. (1895) 158 ... | 743 |
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(1) *Ss. 2, 25, cl. (2), 70, Execution of decree—Contract—Consideration.*—H. D. and S. D., two brothers, constituted a joint Hindu family owning considerable landed property. H. D. having incurred heavy personal debts, the two brothers in 1879 united in applying to have their property taken over by the Court of Wards. This was done; and on the 17th of June 1889, while such property was still under the management of the Court of Wards, the two brothers entered into an agreement whereby H. D. remained as manager of the property with an allowance of Rs. 12,000 per annum for his support, but ceded to his brother absolutely and unconditionally all his proprietary interest in the family property, and all power to make the family property liable in any way for the payment of his debts. On the 6th of October 1889, the Court of Wards released the property freed from the liabilities imposed upon it by H. D. In 1891 one B. D. obtained in the Court of the Subordinate Judge at Agra a money-decree against H. D. H. D. died in the following year, and, subsequently to his death, B. D. sought to execute his decree against S. D. as representative of H. D. by attachment of property in the hands of S. D. S. D. objected to the attachment and his objection was allowed. B. D. appealed, and on this appeal it was *held* that, having regard to the agreement of the 17th June, 1889, above referred to, the property in question could not be attached as the property of H. D. The said agreement was not bad for want of consideration; the consideration being that at the request of his brother, which must be presumed from the circumstances of the case, S. D. had agreed to place his interest in the property under the management of the Court of Wards, and had also foregone, during the ten years that estate was under the management of the Court of Wards, the greater part of his interest in the profits of the estate, and had refrained on cessation of the Court of Wards' management from suing his brother for an account; and even if this were not so, the agreement would be good either under s. 25, cl. (2) or under s. 70 of Act No. IX of 1872. *BITHAL DAS v. SHANKAR DAT DUBE*, 17 A. 264=15 A.W.N. (1895) 57 ...

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| (1) Ss. 5, 7, <i>cls. v. (d), vi</i> — <i>Court-fee—Suit for pre-emption of separate plots of land not being a fractional share of a revenue-paying unit.</i> —Held that in a suit for pre-emption in respect of separate plots of land which did not constitute any definite fraction of distinct revenue-paying area and were not themselves separately assessed to revenue, the Court-fee should be paid on the market value of the land in suit, and not, as is the case where the suit is for a definite fractional share, on five times the Government revenue. REFERENCE UNDER THE COURT FEES ACT, 1870, s. 5, 16 A. 493. ... | 320 |
| (2) Ss. 5, 17— <i>Court-fee—Suit for possession and for mesne profits or damages—Suit not embracing two distinct subjects.</i> —A suit upon one and the same cause of action for possession of immoveable property and for <i>mesne profits</i> or damages for the wrongful retention of such property is not a suit embracing two or more distinct subjects within the meaning of s. 17 of Act No. VII of 1870. REFERENCE UNDER THE COURT FEES ACT, 1870, s. 5, 16 A. 401=14 A.W.N. (1894) 124 ... | 261 |
| (3) <i>Sch. II, art. 11 (b)</i> — <i>Act No. VI of 1882, ss. 169, 214—Appeal, Court fee.</i> —An order under s. 214 of Act No. VI of 1882 (Indian Companies Act) is not a decree or an order having the force of a decree, and consequently an appeal from such an order to a High Court is properly stamped, with reference to Act No. VII of 1870 (Court-fees Act), <i>sch. ii. art. 11 (b)</i> , with a Court-fee stamp of Rs. 2. REFERENCE UNDER ACT NO. VII OF 1870 (COURT-FEES ACT), s. 28, 17 A. 238=15 A.W.N. (1895) 56 ... | 477 |
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- (1) Ss 55, 56, 114—See PENAL CODE (ACT XLV OF 1860), 18 A. 246.
- (2) Ss. 106, 423,—*Security to keep the peace—Appellate Court not competent to require such security—Sentence, powers of Appellate Court in respect of.*—The Magistrate of a district acting as an appellate Court in criminal cases cannot make an order under s. 106 of Code of Criminal Procedure.
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- (3) Ss. 110, 526—*Security for good behaviour—Transfer.*—Proceedings under s. 110 of the Code of Criminal Procedure cannot be transferred to any Court outside the district within which such proceedings have been lawfully instituted. *In the matter of the petition of AMAR SINGH*, 16 A. 9=13 A.W.N. (1893) 183 ...
- (4) Ss. 135, 138, 139—*Order for removal of obstruction—Jury appointed to consider reasonableness of order—Procedure.*—One K. R. having been ordered by a Magistrate under section 133 of the Code of Criminal Procedure to remove an alleged obstruction, applied for a jury. Five jurors were chosen,

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who, having examined the place in dispute, proceeded without consultation to deliver separate and independent opinions. The verdict of the majority was in favour of upholding the Magistrate's order. The Magistrate however discharged his order.	
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(5) S. 144—See <i>MAGISTRATE</i> , 17 A. 485.	
(6) Ss. 161, 162— <i>Statements made to Police officer, in the course of an investigation—Use of notes of such statements at trial before the Court of Session—Practice.</i> —A police officer's notes of statements made to him in the course of an investigation and recorded by him under s. 161 of the Code of Criminal Procedure should, if used at all at the subsequent trial, be used only after proper proof of them and of the circumstances under which they were recorded, and under the direct sanction of the presiding Judge. Copies of such notes should not be given without question and as a matter of course to the accused or his counsel. <i>QUEEN-EMPRESS v. NASIR-UD-DIN</i> , 16 A. 207=14 A.W.N. (1894) 57	133
(7) Ss. 161, 162.— <i>Use at trial in Sessions Court of statements made to police officer investigating case—Evidence.</i> —Though, speaking generally, statements, other than dying declarations, made to a police officer in the course of an investigation under Chapter XIV of the Code of Criminal Procedure may be used at the trial in favor of an accused person, such statements can only be so used when they are legally brought as evidence before the Court, that is to say, a witness having been cross-examined as to a statement, it may be shown by the evidence of the police officer that he did make a statement favourable to the accused, which the witness denies having made; and if the statement was at the time reduced into writing by the police officer he would be allowed to refresh his memory by referring to it, but the written statement itself, when the statement has been reduced into writing (according to the section it must not be signed by the person making it), cannot be used as direct evidence of what was stated by the witness to the police officer. Such statements as above described made as to the presence of an accused person at the commission of an offence and not being statements to which the second paragraph of s. 162 of the Code of Criminal Procedure applies cannot legally be used evidence against the accused. <i>QUEEN-EMPRESS v. TAJ KHAN</i> , 17 A. 57=14 A.W.N. (1894) 208	361
(8) S. 164— <i>Confession—Confession subsequently retracted, effect of.</i> —It is unsafe for a Court to rely on and act upon a confession which has been retracted unless upon a consideration of the whole evidence in the case the Court is in a position to come to the unhesitating conclusion that the confession is true; that is to say, usually, unless the confession is corroborated by credible independent evidence. <i>QUEEN-EMPRESS v. MAHABIR</i> , 18 A. 78=15 A.W.N. (1895) 227	757
(9) S. 180—See <i>PENAL CODE (ACT XLV OF 1860)</i> , 19 A. 350.	
(10) S. 191 (c)— <i>Act No. X of 1872, s. 140 (c)—Complaint—By whom a complaint of an offence may be made.</i> —The complaint upon which under s. 191 (c) of the Code of Criminal Procedure a Magistrate may take cognizance of an offence may be made by any member of the public acquainted with the facts of the case, not necessarily by the person aggrieved by the offence to which the complaint relates. <i>FARNAND ALI v. HANUMAN PRASAD</i> , 18 A. 465=16 A.W.N. (1896) 49	1016
(11) S. 195— <i>Sanction to prosecute—Necessary contents of application for sanction.</i> —An application for sanction to prosecute for forgery or perjury must indicate precisely the document in respect of which forgery is said to have been committed, or must set forth in detail the statements alleged to be false showing the place where and the occasion on which such alleged false statements were made. <i>BALWANT SINGH v. UMED SINGH</i> , 18 A. 203=15 A.W.N. (1896) 31	842
(12) S. 195— <i>Sanction to prosecute—Sanction granted by Court without application being made by the person to whom it is granted.</i> —A sanction to prosecute under s. 195 of the Code of Criminal Procedure presupposes an	

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application for sanction, and where no such application is made a Court ought not to take upon itself to grant sanction, but should take action in the manner provided by s. 476 of the Code. <i>In the matter of the petition of BANARSI DAS</i> , 19 A. 213=16 A.W.N. (1896) 32 ...	848
(13) S. 195— <i>Sanction to prosecute—Sanction in respect of an offence committed in the course of a Civil suit of over Rs. 5,000 in value—Appeal.</i> —Where sanction to prosecute is granted in respect of perjury committed in the course of a civil suit, the valuation of such civil suit is immaterial to the question of the Court to which an application under s. 195 of the Code of Criminal Procedure for revocation of the order granting sanction will lie. <i>GANGA DEVI v. SHER SINGH</i> , 17 A. 51=14 A.W.N. (1894) 201 ...	357
(14) S. 195— <i>Sanction to prosecute—Notice to show cause not a necessary preliminary—Sanction not acted upon within six months—Removal of sanction.</i> —An order under s. 195 of the Code of Criminal Procedure sanctioning a prosecution for perjury is not bad by reason of notice to show cause not having been issued previously to the person against whom such order is made. If an order under s. 195 of the Code of Criminal Procedure lapses, not having been acted upon within six months, that does not bar the granting of fresh sanction on the same grounds if a sufficient reason for the delay be shown. <i>MANGAR RAM v. BEHARI</i> , 18 A. 358=16 A.W.N. (1896) 113 ...	945
(15) Ss. 195, 439, 476— <i>Order directing prosecution—Revision.</i> —Under the general revisional powers conferred by s. 439 of the Code of Criminal Procedure, a High Court has power to consider the propriety of an order which purports to be passed under s. 476 of the Code. Where a defendant in a suit in the Court of a Munsif applied to the District Judge for sanction under s. 195 of the Code of Criminal Procedure to prosecute a witness who had given evidence in the Munsif's Court in support of a deed, produced as evidence before that Court, which had been found by the Munsif to be a forgery, and the District Judge refused the application, but, purporting to act under s. 476 of the Code, himself ordered the prosecution of such witness: <i>Held</i> that the Judge's order was made without jurisdiction, the offence in respect of which the prosecution was directed having been neither committed before him nor brought to his notice in the course of a judicial proceeding. <i>In the matter of the petition of MATHURA DAS</i> , 16 A. 80=14 A.W.N. (1894) 9 ...	53
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(20) Ss. 417, 421— <i>Appeal by Government—Practice.</i> —An appeal on behalf of Government in the exercise of the powers conferred by s. 417 of the Code of Criminal Procedure should not be entertained when the judgment appealed from is based upon facts and the conclusions of the Court are such as may reasonably be arrived at upon the facts found. <i>QUEEN EMPRESS v. ROBINSON</i> , 16 A. 212=14 A.W.N. (1894) 49 ...	137
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<p>under the provisions of s. 421 of the Code of Criminal Procedure, 1882, should record shortly its reasons for such rejection in view of the possibility of such order being challenged by an application for revision. QUEEN EMPRESS v. NANNHU, 17 A. 241 (F.B.) 15 A.W.N. (1895) 68 ...</p>	480
<p>(22) S. 423 (b) (3)—<i>Enhancement of sentence—Powers of Appellate Court.</i>—Held, that the alteration by an Appellate Court of a sentence of a fine of Rs. 50 or in default two months' simple imprisonment to a sentence of six months' rigorous imprisonment was an enhancement of the sentence and as such, prohibited by section 423 of the Code of Criminal Procedure. QUEEN-EMPRESS v. LACHMI KANT, 18 A. 301=16 A.W.N. (1896) 58 ...</p>	906
<p>(23) S. 488—<i>Order for maintenance of wife—Such order not affected by declaratory decree of Civil Court.</i>—An order for the maintenance of a wife duly made under s. 488 of the Code of Criminal Procedure cannot be superseded by a declaratory decree of a Civil Court to the effect that the wife in whose favor such order has been made has no right to maintenance. SUBHUDRA v. BASDEO DUBE, 18 A. 29=15 A.W.N. (1895) 147 ...</p>	724
<p>(24) S. 531—<i>Sessions Court—Jurisdiction—Appeal presented within, but heard outside, the local limits of the jurisdiction of a Sessions Court.</i>—A criminal appeal was presented to the Sessions Judge of the Bijnor-Budaun Division at Bijnor, within the said Sessions division, but was heard by the said Judge at Moradabad at which place he was empowered to exercise civil but not criminal jurisdiction. Held, that the trial of such appeal at Moradabad was an irregularity, but, no failure of justice being shown to have been occasioned thereby, was covered by s. 531 of the Code of Criminal Procedure, and did not render the trial of the appeal a nullity. QUEEN-EMPRESS v. FAZL AZIM, 17 A. 36 (F.B.)=14 A.W.N. (1894) 195 ...</p>	347
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(2) <i>Customary right—Facts necessary to establish the existence of a customary right.</i> —The plaintiff sued for possession of a piece of land which, he alleged, formed part of the court-yard of his <i>kothi</i> , and for demolition of a <i>chabutra</i> thereon. The defendants denied the plaintiff's title and alleged that they always used the <i>Chabutra</i> as a sitting-place, and that during the <i>Moharram</i> the <i>tazias</i> and <i>alums</i> were exhibited upon the <i>chabutra</i> and a <i>takht</i> was placed upon it. The Court of first instance found that the defendants had a right to use the land in the manner claimed during the <i>Moharram</i> . The lower appellate Court on the question of the defendants' right to use the said land in the manner claimed by them found as follows —“That various <i>mirasis</i> , whose connexion with each other is not established, have within a period of twenty years or so placed <i>tazias</i> upon the land and sung there.” <i>Held</i> , that this finding of fact did not necessarily in law lead to the conclusion that there was a local custom by virtue of which the easement now claimed by the defendants was acquired. Where a local custom excluding or limiting the general rules of law is set up, a Court should not decide that it exists unless such Court is satisfied of its reasonableness and its certainty as to extent and application, and is further satisfied by the evidence that the enjoyment of the right was not by leave granted, or by stealth or by force, and that it had been openly enjoyed for such a length of time as suggests that originally, by agreement or otherwise the usage had become a customary law of the place in respect of the persons and things which it concerned. KUAR SEN v. MAMMAN, 17 A. 87=15 A.W.N. (1895) 10 ...	381
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- (1) S. 9—*Admissibility of evidence—Copy of proceeding anterior to suit containing mention of the descent of one of the parties to the suit.*—*Civil Procedure Code*, s. 568.—One of the questions in issue in a suit as to the pedigree of a certain family being whether one Gauri Shankar was son of Balwant Singh, or of one Moajjam Singh, belonging to a totally different family from that of Balwant Singh, an attested copy of a *rubkar* in some proceedings long anterior to the suit was tendered in evidence, in which *rubkar* Gauri Shankar was described as the son of Balwant Singh. *Held*, that the *rubkar* was admissible in evidence under the provisions of s. 9 of Act No. I of 1872. *RADHAN SINGH v. KUARJI DICHHIT*, 18 A. 98=15 A.W.N. (1895) 236 ... 771
- (2) S. 30—*Joint trial—Statements of co-accused who pleaded guilty—Evidence.*—Where two out of several persons on their trial in a Court of Session on a joint charge pleaded guilty and made certain statements to the Court, it was *held* that such statements could not be taken into consideration as evidence against the other accused persons, inasmuch as after pleading guilty the persons making those statements were no longer on their trial. *QUEEN-EMPRESS v. PIRBHU*, 17 A. 524=15 A.W.N. (1895) 111 ... 661
- (3) S. 32—*Evidence proving title by inheritance to raj estates—Proof of pedigree—Estate held as separate under the Hindu Law—Widow's interest therein—Act No. XI of 1857 (Offences against the State)—Confiscation.*—A raj estate was claimed by the appellant as the nearest agnatic kinsman of the last raja in possession, who had died without male issue, but leaving a widow, and a daughter by her, both of whom died before this suit.

The respondent, who had obtained possession under a gift from the widow, denied the claimant's relationship to the raja. He also alleged that no title could have descended to the claimant from father to son, as the father's property had been confiscated on his conviction of an offence against the State, and sentence under Act XI of 1857.

Held, that as the widow had taken the estate as the result of her husband's having owned it as his separate property, the respondent, whose only title was through her, had not established that a right of survivorship had accrued to the plaintiff's father on the death of the raja in 1853; therefore, there was no right of that kind which could have been confiscated by the sentence which was passed in 1862. Nor had the father any right of inheritance that could be enforced during the life of the widow, who outlived him. The separation of the estate, as held by the late raja, negatived both the confiscation and limitation.

The claimant, to prove his title, relied upon a pedigree, not stated in any document produced, that had existed in the family before this suit. The genealogy on which he claimed was, however, identical with one which his father had more than once asserted, alleging title to two mauzas of the raj estate. The raja, called upon to answer in proceedings at settlement, had not given a direct denial to the alleged relationship.

On the contention that there were steps in the pedigree as to which the evidence adduced did not include proof of statements made by a deceased person who had means of knowledge, or proofs of other statements within s. 32 of the Indian Evidence Act, I of 1872, and as to which the evidence was insufficient.

Held, that the evidence taken altogether, oral and documentary, had been sufficient to prove that the appellant was related to the deceased raja, as

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- he had claimed to be, and that the appellant was, as heir to him, entitled to inherit the raj estates on the widow's death; this opinion being founded on the documentary evidence. *BEJAI BAHADUR SINGH v. BHUPINDAR BAHADUR SINGH AND BEJAI BAHADUR SINGH v. KOUNSAL KISHORE PRASAD*, 17 A. 456 (P.C.)=22 I.A. 139=6 Sar P.C.J. 593 ... 616
- (4) S. 34—*Account-books—Corroborative evidence necessary to render defendant liable upon entries in plaintiffs' books*—In a suit to recover money due upon a running account, the plaintiff produced his account-books, which were found to be books regularly kept in the course of business, in support of his claim. One of the plaintiffs gave evidence as to the entries in the account-books, but in such a manner that it was not clear whether he spoke from his personal knowledge of the transactions entered in the books, the entries in which were largely in his own handwriting, or simply as one describing the state of affairs that was shown by the books. He was cross-examined, but no questions were asked him to show that he was not speaking as to his personal knowledge. *Held*, that the evidence given as above should be interpreted in the manner most favourable to the plaintiff, and might be accepted in support of the entries in the plaintiff's account-books, which by themselves would not have been sufficient to charge the defendants with liability. *DWARKA DAS v. SANT BAKHSI*, 18 A. 92=15 A.W.N. (1895) 235 ... 767
- (5) S. 34—*Evidence as to whether hundis were genuine or not—Comparison of handwriting—Entries in account-books regularly kept—Tests of correctness*.—The High Court had reversed the finding of the first Court on an issue which, in effect, was whether certain hundis were genuine or false. Under s. 34 of Act No. I of 1872 (The Indian Evidence Act), the plaintiff's account-books were produced by the plaintiff as relevant evidence, and were relied on as corroborating direct testimony. The books were tested by reference to entries corresponding with other independent evidence. The Judicial Committee, on the whole evidence, affirmed the decision of the High Court that the hundis were genuine. In the decree which gave interest to its date, they extended the period until payment. *JASWANT SINGH v. SHEO NARAIN LAL*, 16 A. 157 (P.C.)=22 I.A. 6=6 Sar. P.C.J. 404 ... 101
- (6) S. 92—*Evidence to vary or add to the terms of a contract in writing—Evidence to show manner in which consideration was agreed to be paid*.—S. 92 of the Indian Evidence Act, 1872, will not debar a party to a contract in writing from showing, notwithstanding the recital in the deed, that the consideration specified in the deed was not in fact paid as therein recited, but was agreed to be paid in a different manner. *INDARJIT v. LAL CHAND*, 18 A. 168=16 A.W.N. (1896) 16 ... 818
- (7) S. 132—See PENAL CODE (ACT XLV OF 1860), 16 A. 88.
- (8) See BURDEN OF PROOF, 17 A. 428.
- (9) See CIVIL PROCEDURE CODE, 17 A. 29.
- (10) See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 17 A. 57.
- (11) See PENAL CODE (ACT XLV OF 1860), 17 A. 576.
- (12) See SUCCESSION CERTIFICATE (VII OF 1889), 17 A. 578.

Execution of Decree.

- (1) Act IV of 1882, ss. 88 and 89—*Suit for sale on a mortgage—Future interest*.—A decree for sale under s. 88 of the Transfer of Property Act, 1882, in a suit for sale on a mortgage declared a certain sum, including principal and interest up to date of decree, to be payable to the plaintiff within a stated time, and also provided that the decree should carry future interest. The judgment-debtor did not pay within the specified time, and subsequently the decree holder applied for an order absolute for sale under s. 89 of the above-mentioned Act. *Held*, that the amount which could be realized by the decree-holder by sale of the mortgaged property would include future interest from the date of the decree under s. 88 to the date of sale, and that it was not necessary that specific mention of future interest should be contained in the order under s. 89 of the Act. *RAJ KUMAR v. BISHESHAR NATH*, 16 A. 270=14 A.W.N. (1891) 80 ... 175
- (2) *Ambiguous decree—Reference to pleadings in the suit to ascertain meaning of the decree*.—Where a decree is in its terms ambiguous it is competent to the Court executing it to refer to the pleadings in the suit in which

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such decree was passed to ascertain its precise meaning. LACHMI NARAIN v. JWALA NATH, 18 A. 341 = 16 A.W.N. (1896) 87 ...

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- (3) *Attachment—Assignment of decree—Second attachment by assignee—Presumption as to cessation of prior attachment.*—If at the date of the assignment of a decree the judgment-debtor's property is already under attachment in execution of such decree, it is not necessary for the assignee of the decree to apply for a fresh attachment. When either the decree-holder or his assignee applies to have attachment under the decree of property which has been previously attached under the decree, it lies upon the decree-holder or the assignee of the decree, as the case may be, if the question is raised, to show that the second application was unnecessary by reason of the first attachment being still subsisting. Failing such evidence, a Court may presume that the prior attachment had ceased before the application for a second attachment was made. HAFIZ SULEMAN v. SHEIKH ABDULLAH, 16 A. 133 = 14 A.W.N. (1894) 13 ...

- (4) *Attachment of immoveable property—Order striking off application for execution but maintaining attachment—Appeal.*—A decree-holder in execution of his decree attached certain immoveable property of his judgment debtor; but on his taking no other steps to complete the execution of the decree, the Court struck off the execution-proceedings maintaining the attachment. Against this order the decree-holder appealed. Held, that, inasmuch as the order in question was not a judicial disposal of the application for sale and would not preclude the decree holder from continuing the execution of his decree, an appeal from such order was superfluous and must be dismissed. RATTANJI v. HARI HAR DAT DUBE, 17 A. 243 = 15 A.W.N. (1895) 87 ...

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- (5) *Civil Procedure Code, s. 234—Application to execute decree against alleged representative of deceased judgment-debtor.*—In the case of an application under s. 234 of the Code of Civil Procedure to execute a decree against a person alleged to be the representative of a deceased judgment-debtor, it is for the Court which passed the decree to decide whether the person against whom execution is sought is or is not such representative, but it is for the Court executing the decree to decide to what extent such person is liable as such representative. SETH SHAPURJI NANA BHAI v. SHANKAR DAT DUBE, 17 A. 431 = 15 A.W.N. (1895) 74 ...

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- (6) *Civil Procedure Code, ss. 234, 244, 278, 283—Representative of deceased judgment debtor—Practice—Appeal.*—Certain decree-holders obtained during the life-time of their judgment-debtor attachment of certain immoveable property as belonging to the said judgment-debtor; but, on the decree-holders' seeking to bring the property to sale, one S.D. came forward with an objection that the property was his and was not liable to sale in execution of the decree in question. Pending the decision of the Court on this objection the decree-holders applied to the Court to have the names of S. D. and the widow of the judgment-debtor (who died about the time the previous objection was filed) placed on the record as representatives of the judgment-debtor. S. D. filed a similar objection to this application also; but both objections being heard together on the 6th September 1892 were dismissed, and S. D. was placed on the record as representative of the deceased judgment-debtor. On appeal by S. D. against "the order of the District Judge of Jaunpur of the 6th September, 1892," it was held that the order making S.D. a party to the execution proceedings as representative of the judgment-debtor rendered any order as to his former objection superfluous and that order was appealable under s. 244 of the Code of Civil Procedure. SHANKAR DAT DUBE v. J. G. HARMAN & CO., 17 A. 245 = 15 A.W.N. (1895) 66 ...

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- (7) *Civil Procedure Code, s. 244—Objection by representative of party to the suit to the jurisdiction of the Court which passed the decree.*—S. 244 of the Code of Civil Procedure applies as well to a dispute arising between the parties contemplated by that section in relation to the execution of a decree after it has been executed, as it would to a dispute between such parties relating to the execution of a decree before it had been executed.

It is competent to the Court charged with the execution of a decree to consider the question as to whether the Court which passed the decree had jurisdiction to pass it, unless the decree itself precludes that question. IMDAD ALI v. JAGAN LAL, 17 A. 478 = 15 A.W.N. (1895) 109 ...

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- (8) *Civil Procedure Code, ss. 258, 320—Act No. XV of 1877 (Indian Limitation Act), ss. 19, 20—Execution transferred to the Collector—Acknowledgment in the Court of the Collector of part payment of decretal money—Limitation.*—Where, after a decree had been sent to the Collector for execution under the provisions of s. 320 of the Code of Civil Procedure, the decree-holder and judgment-debtor joined in an application to the Collector in which they stated, on the one hand, that the decree-holder had received Rs. 2,900 in part payment of the decretal amount, and, on the other, that there was a certain balance due from the judgment-debtor under the decree, and that arrangements had been made between the parties for the payment of such balance. *Held*, that the above application was properly made to the Collector as being, within the meaning of s. 258 of the Code of Civil Procedure, "the Court whose duty it is to execute the decree," and that the application was a valid acknowledgment for all purposes and sufficient under ss. 19 and 20 of the Indian Limitation Act, 1877, to save limitation in respect of the execution of the decree. *MUHAMMAD SAID KHAN v. PAYAG SAHU*, 16 A. 228=14 A.W.N. (1894) 55 ... 148
- (9) *Decree as originally framed incapable of execution—Amendment of decree—Limitation—Act No. XV of 1877 (Indian Limitation Act), sch. ii, arts. 178, 179.*—Where a decree as originally framed was found by the High Court to be incapable of execution and was not finally amended by that Court, so as to become capable of execution, until nearly twelve years after it was passed, it was *held* that an application to execute such decree which was made within three years from the date of the amendment of the decree was within time, the rule of limitation applicable being that prescribed by art. 178 of sch. ii of Act No. XV of 1877. *MUHAMMAD SULEMAN KHAN v. MUHAMMAD YAR KHAN*, 17 A. 39=14 A.W.N. (1894) 191 ... 349
- (10) *Decree payable by instalments with proviso as to execution of entire decree on default in payment of instalment—Construction of decree—Limitation.*—Where a decree for money is made payable by instalments with a proviso to the effect that on default being made in payment of the instalments the decree-holder is entitled to execute the decree for the whole amount due, such a decree is to be construed as much as possible in favour of the decree-holder, and unless the decree clearly leaves the decree-holder no option on the happening of a default but to execute the decree once and for all for the whole amount due under it, the decree-holder may execute it on the happening of the first, second or any subsequent default, and limitation will run against him in respect of each instalment separately from the time when such instalment may become due. *SHANKAR PRASAD v. JALPA PRASAD AND OTHERS*, 16 A. 371=14 A.W.N. (1894) 115 ... 241
- (11) *Effect as regards limitation of striking off petition for execution of decree—Second application, without express leave granted when the first was struck off, ss. 373, 649, of the Code of Civil Procedure, inapplicable here—Act No. VI of 1892, ss. 4 and 5.*—It is clear, both from the Code of Civil Procedure itself, and from the provisions of the Limitation Act of 1877, that a succession of applications for execution is contemplated. Section 647 of the Code of Civil Procedure, cannot, on its true construction, be applied to execution of decree, and was inapplicable to petitions for execution before, and independently of, the passing of Act VI of 1892, sections 4 and 5.
- A first application for execution of a decree having been, on the decree-holder's petition, struck off the list of cases pending for hearing, a second application was made within the period of limitation.
- Held*, that the first application, notwithstanding that the order striking it off had been made, was not annulled, but afforded a fresh starting point for limitation.
- Held*, also, that although the petition for execution had been withdrawn without leave to apply again having been expressly granted by the Court, the petitioner's right to renew his petition, within due time, remained. The provisions of s. 373, which could only have applied through the effect of s. 647, had not been rendered applicable thereby to petitions for execution. *THAKUR PRASAD v. FAKIR-ULLAH*, 17 A. 106 (P.C.)=5 M.L.J. 3=22 I.A. 44=6 Sar. P.C.J. 526 ... 393

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- (12) *Limitation—Execution stayed by reason of injunction for more than three years—Revival of previous application.*—A decree-holder in execution of his decree attached a decree held by his judgment-debtor. On the 3rd of July 1888 the decree-holder applied for execution of his decree by enforcement of the second decree, and in pursuance of this application obtained attachment of certain property as belonging to the judgment-debtor under the second decree. Subsequently a suit was filed by the son of such judgment-debtor claiming the property as his own, and in that suit an injunction was granted staying execution under the application of the 3rd of July 1888 until the suit was decided. The application for execution was meanwhile struck off, but the attachment was maintained. On the 19th of March 1892 the suit was dismissed and the injunction came to an end. On the 29th of October 1892 a fresh application was made for execution.

Held that this second application was not barred by limitation, but was to be regarded as an application to renew the proceedings commenced by the former application, which had been suspended by the Act of the Court and not by anything for which the decree holder was responsible. *LAKHMI CHAND v. BALLAM DAS*, 17 A. 425 = 15 A.W.N. (1895) 82 ...

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- (13) *Limitation—Act XV of 1877 (Indian Limitation Act), s. 4—Procedure applicable to execution of decrees—Review—Civil Procedure Code, s. 623.*—It is the duty of a Court to which an application to execute a decree is presented to satisfy itself whether or not such application is barred by limitation. If the Court on such an application omits to decide the question of limitation, or decides it against the judgment-debtor and in his opinion wrongly, the judgment-debtor may either appeal or can apply under s. 623 of the Code of Civil Procedure for review of the Court's order, and this whether notice of the application for execution had been issued to him or not.

A Court in executing a decree should look to the substance rather than to the form of applications presented to it. Where an application was made by a judgment-debtor objecting to the execution of a decree against him on the ground that it was barred by limitation, previous objections to execution having been disallowed; it was *held* that the relief prayed for being one which could only be granted by way of review the application should be treated as one for that purpose. *RAMU RAI AND OTHERS v. DAYAL SINGH*, 16 A. 390 = 14 A.W.N. (1894) 131 ...

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- (14) *Limitation -- Act No. XV of 1877, sch. II, art. 178 -- Application for execution of a different nature from preceding application.*—A decree-holder in execution of his decree applied, on the 11th January 1888, for arrest of the judgment-debtor. On the 25th February 1888, in consequence of the record of the case being required in the High Court, the Court executing the decree struck off that application *suo motu*. On the 23rd February 1892 the decree-holder again applied for execution of his decree, but this time by attachment and sale of the judgment-debtor's property. *Held* that the second application could not be regarded as a continuance of the former application, and that execution of the decree was time-barred. *HAR SARUP v. BALGOBIND*, 18 A. 9 = 15 A.W.N. (1895) 133 ...

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- (15) *Limitation—Act No. XV of 1877, sch. ii, art. 178—Decree for possession of immoveable property, execution being contingent on non-payment of annuity.*—Where a decree was for possession of immoveable property, but its execution was contingent on default being made by the judgment-debtor in the payment year by year of a certain annuity to the decree-holder. *Held* that the decree-holder was not obliged to execute such decree once and for all upon the occurrence of the first default, but might execute it on occasion of any subsequent default; also that the limitation applicable to the execution of such decree was that provided for by art. 178 of sch. ii of the Indian Limitation Act, 1877. *MUHAMMAD ISLAM v. MUHAMMAD AHSAN*, 16 A. 237 = 14 A.W.N. (1894) 61 ...

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- (16) *Order for sale under a decree previously satisfied; such order and the consequent sale ultra vires and nullities.*—An order for sale and a sale under such order are *ultra vires* and nullities if the decree which is ordered to be executed has been satisfied by payment into Court of the decretal money before the order is made. *CHUNNI v. LALA RAM*, 16 A. 5 = 13 A.W.N. (1893) 141 ...

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- (17) *Sale in execution held in pursuance of an attachment made under a wrong section—Civil Procedure Code, ss. 268, 278—Attachment.—Held that a sale of the mortgagee's rights under a mortgage duly held and confirmed was effectual to pass the mortgagee's rights to the auction-purchaser, even though the attachment subsequent to which such sale was held might have been made under a wrong section of the Code of Civil Procedure. SHEO CHARAN LAL v. SHEO SEWAK LAL, 18 A. 469=16 A.W.N. (1896) 154* ... 1018
- (18) See BURDEN OF PROOF, 18 A. 369.
- (19) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 16 A. 1, 11, 165, 286, 418, 483 & 496; 17 A. 42, 82, 99, 162, 222 & 531 and 18 A. 36, 37, 49, 52, 106, 123, 141, 163, 313, 348, 413, 435 437, 461, 479, 481 and 482. ..
- (20) See CONTRACT ACT (IX OF 1872), 17 A. 264.
- (21) See HINDU LAW (JOINT FAMILY), 16 A. 449.
- (22) See LIMITATION ACT (XV OF 1877), 16 A. 75; 17 A. 103 and 18 A. 384.
- (23) See SUCCESSION CERTIFICATE ACT (VII OF 1889), 16 A. 26.
- (24) See TRANSFER OF PROPERTY ACT (IV OF 1882), 16 A. 78.

Expectancy.

See HINDU LAW (WIDOW), 17 A. 125.

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See ACT XII OF 1881 (AGRA RENT), 16 A. 337 & 18 A. 121.

False Charge.

See PENAL CODE (ACT XLV OF 1860), 16 A. 124.

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See SALE, 18 A. 322.

Gambling.

See ACT III OF 1867 (GAMBLING), 18 A. 23.

Gift.

See MUHAMMADAN LAW (GIFT), 18 A. 1.

Guardian and Minor.

- (1) *Liability of minor for act of person without authority purporting to act as the guardian of the minor.—The uncle of a minor Muhammadan purporting, though without authority, to act as the minor's guardian, made a mortgage of certain property belonging to the minor, and subsequently took a lease of the mortgaged property in favour of the minor. The minor having made default in payment, the mortgagee sued to recover rent. Held that the mortgagee was not entitled to recover, although, had the minor sued the mortgagee to avoid the mortgage, he might not have been able to succeed without paying compensation to the mortgagee to the extent to which he or his property had benefited by the money advanced on the security of the mortgage. NIZAM-UD DIN SHAH v. ANANDI PRASAD, 18 A. 373=16 A.W.N. (1896) 99* ... 955

- (2) See GUARDIAN AND WARDS ACT (VIII OF 1890), 17 A. 529.

Guardians and Wards Act (VIII of 1890).

Joint Hindu family—Appointment of guardian of property of minor.—It is not competent to a Court under Act No. VIII of 1890 to appoint a guardian of the property of a minor who is a member of a joint Hindu family. JHABBU SINGH v. GANGA BISHAN, 17 A. 529=15 A.W.N. 1895 119 ... 665

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Suit for—See LIMITATION ACT (XV OF 1877), 18 A. 430.

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(1) See LETTERS PATENT, 18 A. 174.

(2) See STATUTE 24 AND 25 VIC., CAP. 104, 18 A. 4.

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Hindu Law.

- 1.—ADOPTION.
- 2.—CUSTOM.
- 3.—ENDOWMENTS.
- 4.—GIFT.
- 5.—INHERITANCE.
- 6.—JOINT FAMILY.
- 7.—PARTITION.
- 8.—SUCCESSION.
- 9.—WIDOW.

Hindu Law—1.—Adoption.

Benares School — Adoption by one of the regenerate classes of a mother's sister's son.—Held by EDGE, C.J., KNOX, BLAIR and BURKITT, JJ. (BANERJI and AIKMAN, JJ., dissenting).

The Hindu law of the School of Benares does not prohibit an adoption amongst the three regenerate classes of a sister's son, of a daughter's son, or of a son of the sister of the mother of the adopter, and consequently the *onus* of proving that such an adoption is prohibited by usage is upon him who alleges that it is illegal.

The authority in the School of Benares of the Dattaka Mimansa of Nanda Pandita considered. That Mimansa is not on questions of adoption an "infallible guide" in the School of Benares, and is not followed when it imposes on the right of adoption restrictions not to be found in the recognised authorities of the School of Benares.

Held by BANERJI, J. (AIKMAN, J., concurring).—The adoption by a Hindu belonging to one of the three regenerate classes of his mother's sister's son is prohibited according to the Hindu law of the Benares School. Such prohibition is not merely directory, but the adoption is absolutely interdicted and void and cannot be validated by the rule of *factum valet*.

Held also by BANERJI, J.—That the Dattaka Chandrika and the Dattaka Mimansa are works of paramount authority on questions relating to adoption, as well in those parts of India which are governed by the law of the Benares School as elsewhere. BHAGWAN SINGH v. BHAGWAN SINGH, 17 A. 294 (F.B.) = 15 A.W.N. (1895) 167 ...

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2.—Custom.

Jains—Widow—Power of widow to deal with deceased husband's property—Evidence of custom—Judicial decisions.—Held that amongst Agarwala Banias of the Saraogi sect of the Jain religion a widow has full power of alienation in respect of the non-ancestral property of her deceased husband; but that she has no such power in respect of the property which is ancestral. Held also that where a custom alleged to be followed by any particular class of people is in dispute, judicial decisions in which such custom has been recognized as the custom of the class in question are good evidence of the existence of such custom. SHIMBHU NATH AND ANOTHER v. GAYAN CHAND, 16 A. 379 = 14 A.W.N. (1894) 123 ...

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3.—Endowments.

See ACT XX OF 1863 (RELIGIOUS ENDOWMENTS), 18 A. 227.

4.—Gift.

Delivery of deed of gift effectual to pass title.—The delivery to the donee of immoveable property of the deed of gift is sufficient to pass the title to such property to the donee without actual physical possession of such property being taken by the donee. BALMAKUND v. BHAGWAN DAS, 16 A. 185 = 14 A.W.N. (1894) 21 ...

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Hindu Law—5.—Inheritance.

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Mitakshara—“Step-mother”—Custom—Nature of evidence necessary to establish a custom of variance with the general law.—According to the Mitakshara school of Hindu law a step-mother, not being one of the females expressly named in the Mitakshara and not being included under the term “mother” in Chapter II, s. 3, cannot inherit from her deceased step-son. Where it is sought to establish the existence of a custom, modifying or varying the general law, the kind of evidence that ought to be regarded is evidence showing that the right claimed by custom was more or less contested and the contest abandoned by some one who, if the custom had not existed, would have been entitled, or evidence showing that generally in the district the custom was followed to the exclusion of persons who, if it had not been for the custom, would presumably have enforced their right under the general law. *RAMA NAND v. SURGIANI*, 16 A. 221 = 14 A.W.N. (1894) 47 ...

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— — — 6.—Joint family.

(1) *Evidence of separation—Shares separately recorded in village papers—Separate purchases by individual members of family out of joint family funds.*—Where there has existed a joint Hindu family possessed as such of immoveable property, the presumption is that until the contrary is shown such family will continue to be joint.

The fact that in the revenue and village papers individual members of a Hindu family once admittedly joint are recorded as holding each a certain specified portion of property is not, standing by itself, sufficient evidence that a separation has taken place, nor is the fact that specific purchases of immoveable property have been made from time to time in the names of individual members of the family, and that the property as purchased was recorded in each case in the name of the nominal assignee. *GAJENDAR SINGH v. SARDAR SINGH*, 18 A. 176 = 16 A.W.N. (1896) 23 ...

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(2) *Mortgage by a married woman of property inherited from her father—Legal necessity—Expenses of daughter's marriage.*—Ordinarily it is the duty of the father in a Hindu family to provide for his daughter's marriage; but where the father was not possessed of sufficient means to do so, and the mother, to raise money to meet the expenses of the daughter's marriage, mortgaged property of her own which had come to her from her father, it was held that the mortgage was made for legal necessity and was a valid mortgage. *RUSTAM SINGH v. MOTI SINGH*, 18 A. 474 = 16 A.W.N. (1896) 155 ...

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(3) *Partition—Power of father as manager of joint family to refer to arbitration the partition of the joint family property—Civil Procedure Code, ss. 520, 521, 526—Award.*—It is competent to the father of a joint Hindu family in his capacity of managing member of the family to refer to arbitration the partition of the joint family property, and the award made on such a reference, if in other respects valid, will be binding on the sons. In s. 526 of the Code of Civil Procedure, the word “shown” is not equivalent to “alleged,” but it is necessary that one of the grounds mentioned in s. 520 or s. 521 should be proved to the satisfaction of the Court before the Court is justified in refusing to file the award. *JAGAN NATH v. MANNU LAL*, 16 A. 231 = 14 A.W.N. (1894) 60 ...

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(4) *Rights of illegitimate member of the family—Mortgage—Redemption—Suit by legitimate son of illegitimate member of the family to redeem a mortgage made by a previous legitimate owner.*—The right of an illegitimate son in a Hindu family to receive maintenance from the family property is a purely personal right and does not descend to his son.

Held that the legitimate son of an illegitimate member of a Hindu family, who, as such illegitimate son, might have had a right to maintenance from the property of his father, had no such interest in the estate belonging to the family as would entitle him to redeem a mortgage made by a previous rightful and legitimate owner of the estate. *BALWANT SINGH v. ROSHAN SINGH*, 18 A. 253 = 16 A.W.N. (1896) 41 ...

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(5) *Simple money-decree against father alone sought to be executed after his death against joint family property in the hands of the son—Civil Procedure Code, ss. 234, 244—Execution of decree.*—A creditor of a father in a joint Hindu family governed by the law of the Mitakshara who has obtained a

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simple decree for money in a suit against the father alone cannot obtain execution of that decree against the joint family property or any part of it in the hands of the son in a proceeding against the son in execution of that decree instituted after the death of the father, and not being a proceeding in continuation of an attachment of the property effected during the lifetime of the father; the proceeding in execution not being barred by the law of limitation, and the son not being precluded by any estoppel from proving that the property was joint family property at the time of his father's death and is in his hands ancestral property and not assets representing what was at the time of his father's death separate property of his father. But in such a case, if the creditor desires to obtain a remedy against the ancestral property, or any part of it, in the hands of the son, he must seek that remedy in a suit against the son, in answer to which suit, when brought, the son will be entitled to prove that the suit is barred by limitation, that the debt was tainted by immorality, or any other matter that would be a defence against the son. **LACHMI NARAIN AND ANOTHER v. KUNJI LAL AND LACHMI NARAIN AND ANOTHER v. CHOTE LAL AND OTHERS**, 16 A. 449=14 A.W.N. (1894) 169 ...

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- 6) *Suit for possession of property alleged to have been joint family property—Separation—Burden of proof.*—Three brothers, Manohar Singh, Paljhan Singh, and Harnandan Singh once constituted a joint Hindu family. After the death of all of them the descendants of Manohar Singh sued the descendants of Harnandan in effect to obtain their share of the property which had been of Paljhan Singh in his lifetime. In their plaint they alleged that the family was still joint. By their evidence, however, they set up a separation between themselves and Harnandan shortly after the death of Paljhan Singh. The defendants, on the other hand, alleged that some twenty or twenty-five years before suit, after the death of Manohar Singh, there had been a separation between the plaintiffs on the one side and Paljhan Singh and Harnandan Singh on the other. ...

Held that, the plaintiffs having set up a case which was inconsistent with the presumption of the family remaining joint, it was for them to prove that the separation took place as they alleged. **RAM GHULAM SINGH v. RAM BEHARI SINGH**, 18 A. 90=15 A.W.N. (1895) 234 ...

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- (7) *Transfer by one member of his share in the joint family property to another member.*—One member of a joint Hindu family cannot transfer his undivided share in the joint family property to another member of the family without the consent of the rest of the co-sharers. **CHANDAR KISHORE v. DAMPAT KISHORE**, 16 A. 369=14 A.W.N. (1894) 117 ...

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- (8) See **GUARDIAN AND WARDS ACT (VIII OF 1890)**, 17 A. 529.

- (9) See **SUCCESSION CERTIFICATE ACT (VII OF 1839)**, 17 A. 578.

- (10) See **TRANSFER OF PROPERTY ACT (IV OF 1982)**, 17 A. 537.

—7.—Partition.

Of joint family property—See **HINDU LAW (JOINT FAMILY)**, 16 A. 231.

—8.—Succession.

Nihangs in Gorakhpur—Alleged mode of succession to property by survivorship among a brotherhood of Nihangs—Failure to prove that the deceased, who had possessed property, was a member.—The plaintiffs claimed that they as members of a fraternity of Nihangs were, on the decease of another member, entitled to the succession to the property possessed by him according to rules of inheritance prevailing in their religious brotherhood. They thus claimed to exclude the defendant, an alleged son of the deceased. This son, who was a minor, was in possession through his mother and guardian. The Judicial Committee, without deciding as to the alleged mode of succession to property among Nihangs forming this brotherhood, affirmed the decision of the High Court that it had not been proved that the deceased was a member of the sect: and on this ground the dismissal of the suit was maintained. **GAJRAJ PURI v. ACHAIBAR PURI**, 16 A. 191 (P.C.)=21 I.A. 17=6 Sar. P.C.J. 414 ...

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- (1) *Power of widow of sonless Hindu to mortgage ancestral property—Pardahnashin woman, conditions necessary to the execution of a valid deed by—Expectancy—Mortgage purporting to be of property in which one of the professed executants had an interest in expectancy only.*—One Raja Khairati Lal died in 1866 possessed of considerable property both moveable and immoveable. He left surviving him a widow, Rani Hulas Kuar, who died in 1878, a daughter, Rani Achhan Kuar, married to one Raja Lalji, and two grandsons, sons of Achhan Kuar, Kuar Inayat Singh and Kuar Shamsher Bahadur, the latter of whom died some time subsequent to 1881, as did also his father Raja Lalji.

In December 1877, a mortgage-deed was executed over certain of the ancestral property of the family of Khairati Lal, the ostensible executants being Raja Lalji for himself, and Hulas Kuar, Achhan Kuar and Inayat Singh through Lalji as their general attorney. This deed was to secure a debt of Rs. 10,000 stated to be to some small extent for an advance in cash, and as to the balance in respect of certain previous debts and interest thereon. At the date of this bond both Inayat Singh and Shamsher Bahadur were minors.

In April 1881, Hulas Kuar having in the meanwhile died, and Inayat Singh having attained majority, but Shamsher Bahadur being still a minor, a second bond of a similar nature to the former was executed by Lalji, Achhan Kuar and Inayat Singh for Rs. 20,000, this sum being recited as composed of various debts of earlier date with interest thereon, of an advance to pay Government revenue, an advance for expenses of the marriage of Lalji's daughter and a very small balance in cash.

It was not shown that the debts secured by either of these two bonds were debts incurred for legal necessity by the widow or daughter of Khairati Lal, or that the mortgagees after due inquiry had reasonable grounds for believing that such necessity existed, nor was it shown that the mortgages were entered into with the consent of all the husband's kindred under circumstances which might raise a valid presumption that the debts secured by them were properly incurred.

It was further not shown that the power-of-attorney under which Lalji purported to act in executing the bond of 1877 on behalf of Hulas Kuar, Achhan Kuar and Inayat Singh was ever properly explained to the professed executants or that they understood its import: nor was it shown that either of the bonds was duly explained to and comprehended by the professed executants other than Lalji himself, in manner required by law in the case of documents executed by *pardahnashin* woman; nor, though at the date of the execution of the second bond Inayat Singh had attained the age of majority, did it appear that he signed the bond with any clear knowledge of its contents, or of the liability which he was professing to incur thereby, or otherwise than through the influence brought to bear on him by his father, Lalji.

Held, on suit by the mortgagees to bring to sale the ancestral property which had been of Khairati Lal in his lifetime in enforcement of the two mortgages above-mentioned, that the mortgages were not binding on the alleged executants or on the ancestral property at the date of suit in the hands of Achhan Kuar.

Kuar Inayat Singh's interest in the family property in suit could only be affected by the mortgage of the 2nd of April 1881, on proof that the debt was in fact one, or was, on reasonable inquiry by and statements made to the lenders of the money believed by them to be one, in respect of which his mother Rani Achhan Kuar, as a Hindu daughter in possession, could mortgage or charge the family property beyond her own then vested interest in it, or on proof that he, as one of the reversioners, by joining with his mother in executing the documents of mortgage, led the lenders of the money to believe that such a necessity existed for the loan as enabled the Hindu daughter to create a valid mortgage on the family property beyond the extent of her own life interest.

The Hindu law which prevails in these Provinces recognizes no power in a reversioner to sell or mortgage his interest in expectancy, even although he may be the heir apparent.

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It is absolutely necessary, before holding that a *pardalnashin* lady or her property is liable on a contract alleged to have been made by her, or in consequence of an alleged execution by her of a general power-of-attorney, to be reasonably satisfied that the liability she was incurring and the nature of the transaction were explained to her; and more particularly is this the case if it is sought, by reason of her having executed a document, to fix her and her property with a liability to pay a debt, which, if the document had not been executed by her or by an agent appointed by her with adequate power, could not have been enforced against her property. It is also necessary when money-lenders in this country seek to enforce against the property of a Hindu family a contract of mortgage made by a reversioner, who, although of age at the time, was then still of tender years and without experience of business, for the Court, when the question is raised, to be satisfied that the reversioner understood the nature of the transaction and the effect of the contract which he was entering into, or that the reversioner of the family property, in which the reversioner had an estate in expectancy only, was liable for the debt in respect of which the mortgage is sought to be enforced and that no unfair advantage was taken of the reversioner's youth and inexperience. *ACHHAN KUAR v. THAKUR DAS*, 17 A. 125=15 A.W.N. (1895) 24 ...

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- (2) *Revenue due on account of widow's estate paid by lambardar—Remedy of lambardar after death of widow for recovery of money so paid.*—G.D., a separated sonless Hindu, died possessed of certain zamindari property, which passed to his widow, J. During J's possession, the lambardar of the village paid certain Government revenue due by J, in respect of the property left by D.G. J. died, and the property in question passed to S.N. as heir to G.D. On suit by the lambardar to recover from S.N. the money paid on behalf of J., it was *held*, that the only decree to which the lambardar was entitled was a decree against S.N. as J's representative payable out of the assets, if any, which had come to S. N. from J. *SHIAMANAND v. HAR LAL*, 18 A. 471=16 A.W.N. (1896) 154 ...

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- (3) *Sale by a Hindu widow—Whether the reversioner consented that she should sell the whole inheritance, or only her life-estate.*—The sale by a Hindu widow of a share in village lands, of which share her husband had been proprietor, having taken place without justifying necessity, could extend no further than to transfer her interest as a widow, for life, unless the consent of the reversionary heir had been given to her selling the whole inheritance. The appellant's case was that this consent had been given. The evidence of its having been given was the fact that this heir having been appointed the widow's mukhtar for the purpose, had executed, on her behalf, a sale-deed containing words to the effect that the vendee had become (as the English translation on the record expressed it) "absolute" owner of the share sold.

This heir, however, received no consideration to induce him to relinquish the reversionary title; and, on the death of the widow, his descendant claimed the inheritance against the vendee's son, then in possession.

Held, that it had not been made so clear that the conveyance transferred the whole estate of inheritance as to cause it to follow that the reversionary heir, when shown to have consented to the transfer by the widow, must be taken to have consented to a transfer by her of the whole estate of inheritance.

Therefore, the judgment of the appellate Court below, that the transfer extended only to the widow's life estate, must be maintained. *JIWAN SINGH v. MISRI LAL*, 18 A. 146 (P.C.)=23 I.A. 1=6 M.L.J. 47=4 Sar P.C.J. 675 ...

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- (4) *Suit to set aside alienation by Hindu widow—Reversioners—Grandsons of daughter of alienor's deceased husband.*—*Held*, in a suit to set aside an alienation made by a Hindu widow of property which had been of her deceased husband in his lifetime that the sons of the son of a daughter of the alienor's late husband were, their father and grandmother being dead, reversioners, and, as such, entitled to sue to set aside the alienation made by the widow. *SHEOBARAT KUARI v. BHAGWATI PRASAD*, 17 A. 523=15 A.W.N. (1895) 117 ...

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- (5) *Voluntary transfer alleged to have been made by a Hindu widow—Burden of proving her knowledge of her rights—Construction of the Pensions Act (Act No. XVIII of 1871), ss. 3 and 4—Certificate to precede suit for malikana payable by Government.*—Where a voluntary transfer by a Hindu widow is alleged, the burden of proving that it was a free gift, made with knowledge by her of her rights, is on the donee.

The plaintiff, widow of the only son who survived his father, who was the owner of village lands and other property, had become, on her husband's death without issue, entitled, as his widow, to the estate which he had inherited. But she obtained possession of only half of it. The other half was in the recorded possession, when this suit was brought, of the widow of her late husband's younger brother, who died in his father's lifetime.

The case which the latter widow, as defendant, now sought to make, was that she had become entitled to a share in the estate as the result of a series of transactions, by way of family arrangement, in which the two widows, and their mother-in-law, widow of the deceased father, had taken part. These included a reference to arbitration, a release, and dakhil kharij in settlement records. *Held*, that the plaintiff must succeed in the absence of proof, of which the burden was on the defendant, that the plaintiff, when ceding half of the estate to which she was entitled, had knowledge of her right, as widow, to the whole, and had freely made what in effect was a gift.

A village, part of the estate, had been made over to the Government by the parties, who in consideration received a malikana in perpetuity, or, in other words, a grant of a portion of the revenue in lieu of their proprietary right. *Held*, that the right to the malikana was on the construction of ss. 3 and 4 of the Pensions Act, XXIII of 1871, in the absence of a certificate obtained under that Act, excluded from judicial cognizance in this suit. DEO KUAR v. MAN KUAR, 17 A. 1 (P.C.)=4 M.L.J. 272 =22 I.A. 148=6 Sar. P.C.J. 489 ...

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- (6) See EVIDENCE ACT (I OF 1872), 17 A. 465.

- (7) See HINDU LAW (CUSTOM), 16 A. 379.

Insolvency.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 17 A. 156, 218.

Insolvent.

Judgment-debtor—See CIV. PRO. CODE (ACT XIV OF 1882), 16 A. 37.

Interest.

- (1) *Post diem—Construction of bond.*—On the construction of a written contract to repay in two years from its date money with interest at 15 per cent. to be paid half-yearly, arrears of interest being added half-yearly to the principal, the Judicial Committee concurred with the High Court that there was no contract to pay interest at that rate after the date fixed for repayment.

Held, that on that construction the creditor would be entitled, on default made in the repayment, to receive interest, but, technically, as damages assessed; and the rate *prima facie* would be the same as that provided by the contract during the two years, although there is no rule of law making that rate necessarily the measure of the damages. The compounding of the interest after the expiration of the two years was disallowed, and an account was directed on the basis that the interest '*post diem*' should be simple, at 15 per cent., down to the date of the plaint, and after that date at 6 per cent. till payment. CHAJMAL DAS v. BRIJ BHUKAN LAL, 17 A. 511 (P.C.)=22 I.A. 199=6 Sar. P.C.J. 624 ...

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- (2) See ACT XXXII OF 1839 (INTEREST), 17 A. 581.

- (3) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 18 A. 262.

- (4) See MORTGAGE (GENERAL), 18 A. 316.

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Interpretation.

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- (1) *Of documents—Insensible clause—"Fasli year"—"Agricultural year"—Act No. XIX of 1873 (North-Western Provinces Land Revenue Act), s. 3, cl. 8.*
 --The practice adopted by patwaris, in some parts of the North-Western Provinces, of applying the term "Fasli year" to the "agricultural year" as defined in Act No. XIX of 1873, s. 3, cl. 8, is erroneous. Where parties to a deed describe a date as being in such and such a "Fasli" year, they must be taken, in absence of evidence of mutual mistake, to refer to the calendar Fasli year.

In interpreting a document a clause which is inconsistent in any construction thereof with the remaining provisions of the document must be rejected. CHATARBHUJ v. DWARKA PRASAD, 18 A. 388=16 A.W.N. (1896) 123 ...

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- (2) *Of statutes—See STATUTE, 24 AND 25, VIC. CAP. 104, 16 A. 136.*

Invention.

See ACT V OF 1888 (INVENTION AND DESIGNS), 17 A. 490.

Jains.

See HINDU LAW (CUSTOM), 16 A. 379.

Joinder.

Of causes of action—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 16 A. 359.

Joint Property.

- (1) *Trespass—Suit by one co-parcener for possession of a building erected by a stranger on the joint property and purchased by the other co-parceners.—*Where a stranger to the property built upon certain land jointly held by several co-parceners and some of the co-parceners purchased from the stranger the building so erected, it was held that the purchasers were, *quoad* the building in suit, trespassers, and that a suit might be maintained by the remaining co-parcener to be put into joint possession of the building; and this though it was not shown that any special damage had been suffered by the plaintiff by reason of the building. MUHAMMAD ALI JAN v. FAIZ BAKHSI, 18 A. 361=16 A.W.N. (1896) 97 ...

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- (2) See CO-SHARERS, 18 A. 115.

Joint Trial.

See EVIDENCE ACT (I OF 1872), 17 A. 524.

Jurisdiction.

- (1) *Civil and Revenue Courts—Suit by zamindars to eject as trespassers, persons who claimed to be mortgagors of an occupancy tenant, such tenant having died without heirs before suit.—*S. P. and others, zamindars, sued M.K. and others as trespassers to eject them from certain land alleged to form part of the plaintiff's zamindari. The defendants pleaded that they were mortgagees, holding under a mortgage with possession given by one S.G. said to be a tenant at fixed rates of the land in suit. It was found that S. G. had been an occupancy tenant not at fixed rates, and that he had died without heirs prior to the institution of the suit. Held that the suit brought under the above circumstances was cognizable by a Civil Court. MAHABIR KANDU v. SHEO PRASAD RAI, 16 A. 325=14 A.W.N. (1894) 98.
- (2) *Regulation No. IV of 1876—Act No. IV of 1882, s. 88—Civil Procedure Code, ss. 1, 2, 19, 24—Mortgage of property situated partly in the district of Moradabad and partly in the Tarai—Suit for sale in Moradabad Court.—*Held that the Courts of the Moradabad district had no jurisdiction to pass a decree, in a suit for sale on a mortgage, for sale of land situated in the Tarai, to which at the time of the mortgage and of the suit thereon Regulation No. IV of 1876 applied, by reason merely of a portion of the property mortgaged being situate in the Moradabad district. RAM RATAN v. LALTA PRASAD, 17 A. 483=15 A.W.N. (1895) 110 ...

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- (3) See ACT IV OF 1869 (DIVORCE), 19 A. 375.
 (4) See ACT XX OF 1863 (RELIGIOUS ENDOWMENTS), 18 A. 227.
 (5) See ACT XII OF 1887 (BENGAL CIVIL COURTS), 16 A. 286.
 (5-a) See CIVIL AND REVENUE COURTS, 18 A. 340.

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- (6) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 16 A. 359, 17 A. 69, 18 A. 400.
- (7) See COMPANIES ACT (VI OF 1882), 17 A. 252.
- (8) See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 17 A. 36.
- (9) See PARTITION, 18 A. 334.
- (10) See PENAL CODE (ACT XLV OF 1860), 16 A. 124, 18 A. 350.
- (11) See TRANSFER OF PROPERTY ACT (IV OF 1882), 18 A. 325.

Jury.

See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 18 A. 158.

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See COMPANIES ACT (VI OF 1882), 16 A. 53.

Kidnapping.

See PENAL CODE (ACT XLV OF 1860), 18 A. 350.

Lambardar.

See LANDLORD AND TENANT, 18 A. 129.

Land Acquisition Act (X of 1870).

S. 39—*Apportionment of compensation referred to Judge—Denial by one party interested of right of another to share in compensation—Appeal.*—Under s. 35 of Act No. X of 1870 the fact that one of the persons concerned denies altogether the right of another of such persons to share in the compensation awarded will not prevent an appeal lying from the order of a District Judge apportioning compensation. *HUSAINI BEGAM v. HUSAINI BEGAM*, 17 A. 573=15 A.W.N. (1895) 135 ...

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Landlord and Tenant.

(1) *Additions made by tenant to property of landlord without permission—Landlord not bound to interfere or to compensate tenant—Estoppel by conduct.*—Where the lessee of a dwelling-house being fully aware of his position as such lessee made certain additions to the leased premises without the permission of his lessor, but apparently with his knowledge and without any interference on his part, and, subsequently, when the lessor sued to eject him for non-payment of rent, claimed compensation for such additions: *Held* that the lessor was entitled to recover possession from the lessee without paying him compensation. *NAUNIHAL BHAGAT v. RAMESHAR BHAGAT*, 16 A. 328=14 A.W.N. (1894) 99 ...

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(2) *Diluvion, disappearance of land by—Subsequent reappearance of land—Relinquishment of tenancy, evidence of—Act No. XII of 1881 (N. W. P. Rent Act).*—Act No. XII of 1881, and the acts of a like nature which preceded it, assume that a tenancy of agricultural lands once entered upon continues until determined by effluxion of time, or by mutual consent or in one of the ways provided for by statutory enactment, but mere non-payment of rent does not of itself determine the tenancy.

Hence where the lands of certain tenants became submerged by the action of a river and the tenants, though they ceased to pay rent during the period of the submersion, made no overt indication of their intention to relinquish the said lands, but, on the contrary, on the river again shifting its course, laid claim to lands which had emerged and which they alleged to be identical with their former holding; it was *held* that there had been no relinquishment. *MAZHAR RAI v. RANGAT SINGH*, 18 A. 290=16 A.W.N. (1896) 56 ...

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(3) *Lambardar—Irregular appointment of lambardar by Collector—Co-sharer—Right of tenant to pay his entire rent to individual co-sharer.*—*Held* that where the Collector of a district appointed by order one of two co-sharers in a *mahal* to be lambardar and directed the tenants to pay rent to her, no lambardar having been appointed at the settlement of the *mahal*, or at any time by agreement between the co-sharers, such appointment by the Collector did not empower the lambardar, so appointed, to collect the rents of the tenants.

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Held also that in the absence of either an arrangement recorded at the settlement under s. 65 of Act No. XIX of 1873 or a local custom or special contract, one of several co-sharers in a *mahal* could not be taken to have a general right to receive the whole of the rent payable by a tenant in the *mahal*. *PARBATI v. NIADAR*, 18 A. 129 = 16 A.W.N. (1896) 14 ...

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- (4) *Right of tenants to use a plot of their zamindar's land as a threshing floor—Conditions of tenancy—Easement—Evidence.*—On evidence that a tenant has for a great number of years used a particular piece of the zamindar's land along with other tenants as a threshing floor, it is competent to the Court to find, there being no evidence to the contrary, that the right to use the plot of land for that purpose was part of the contract of tenancy. *DALEL v. BHAIJU*, 16 A. 181 = 14 A.W.N. (1894) 15 ...

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- (5) *Zar-i-peshgi lease—Sub-lease by zar-i-peshgi lessee—Default by sub-lessee who lets into possession the original lessor and denies the zar-i-peshgi lessee's title—Suit by zar-i-peshgi lessee for possession in a Civil Court—Form of decree—Civil Procedure Code, ss. 263, 264.*—Two occupancy tenants granted a *zar-i-peshgi* lease of their occupancy holding to one R. L., for a term of sixteen years. R. S. sub-let the holding for a term slightly less than his own. The sub-lessees made default in payment of rent. R. L. distrained their crops. Thereupon the original lessors intervened claiming the crops as theirs. The question of the distraint having been decided by the Court of Revenue against him, R. L. then brought a suit in a Civil Court asking for ejectment of both his lessors and his lessees and to be put into actual possession himself.

Held that the plaintiff was precluded by reason of the lease granted by him, the term of which had not expired, from obtaining actual possession, unless the sub-lessees were ejected, which could only be done through the Court of Revenue. But the plaintiff was entitled to a decree declaring his title as *zar-i-peshgi* lessee and putting him into possession of the rents and profits of the holding as *zar-i-peshgi* lessee; the decree for possession to be executed under s. 264 of the Code of Civil Procedure. *SITA RAM v. RAM LAL*, 18 A. 440 (F.B.) = 16 A.W.N. (1896) 162 ..

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- (6) See ACT XIX OF 1873 (AGRA LAND REVENUE), 16 A. 209.
(7) See ACT XII OF 1881 (AGRA RENT), 16 A. 51; 18 A. 354.
(8) See TRANSFER OF PROPERTY ACT (IV OF 1882), 17 A. 45.

Legal necessity.

See HINDU LAW—JOINT FAMILY, 18 A. 474.

Legal Practitioner.

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Letters Patent.

- (1) S. 8—*Conviction of vakil for criminal offence—Vakil called upon to show cause why he should not be struck off the roll—Argument not allowed to show that conviction was wrong.*—A vakil practising in the High Court was convicted by a Court of Session of the offence punishable under s. 471 of the Indian Penal Code, and the conviction was affirmed by the High Court on appeal. The vakil was subsequently called upon to show cause why he should not in consequence of such conviction be struck off the roll of vakils of the Court. On appearance in answer to this rule it was *held* that the vakil was not entitled to question the propriety in law or in fact of the conviction, but that it was open to him to show, if he could, that his conduct in the matter in respect of which he had been convicted was not such as to render him an unfit person to be retained on the roll of vakils of the Court. *In the matter of RAJENDRO NATH MUKERJI*, 18 A. 174 (F.B.) = 16 A.W.N. (1896) 20.
- (2) S. 8—*"Reasonable cause"*—*Offer to give a gratification, contrary to s. 36 of Act No. XVIII of 1879—Abetment—Act No. XLV of 1860, ss. 41, 116.*—A vakil of the High Court signed and sent letter to another vakil of that Court, who practised in District Courts subordinate thereto. The purport of this, which was one of several printed forms prepared for circulation to vakils practising in districts, was to the effect that the vakil, to whom it was addressed, "could easily send his clients' cases, both civil and criminal," to

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the writer, who would conduct them in that Court. And—"as a remuneration"—the fees paid by the clients would be shared between the writer and the vakil who had sent the cases.

The Judicial Committee concurred substantially in the conclusions of the High Court that this was an incitement within s. 116 (abetment) of the Indian Penal Code to commit an offence made penal by s. 36 (which was a special law within s. 41 of that Code) of Act No. XVIII of 1879, the Legal Practitioners' Act. This misconduct had been aggravated by the appellant's having denied to the Vakils Association, North-Western Provinces, and caused evidence to be called to negative his having signed the printed letter, which he had signed. Thus, there was "reasonable cause" within s. 8 of the Letters Patent of March 17th, 1866, establishing the High Court, for his suspension, to which, for four years from the date of that Court's order, his punishment was reduced. *In the matter of PARBATI CHARAN CHATTERJI*, 17 A. 498 (P.C.) = 22 I.A. 193 = 6 Sar. P. C.J. 635 ...

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- (3) S. 10—Act No VI of 1882, s. 169—*Extension of time for serving notice of appeal—No appeal from order of High Court refusing extension—Discretionary order.*—No appeal will lie under s. 10 of the Letters Patent of the High Court of Judicature for the North-Western Provinces from an order of a single Judge of the Court refusing an application under s. 169 of Act No. VI of 1882 (Indian Companies Act) for extension of time for serving notice of an appeal under that Act; such order not being a judgment within the meaning of s. 10 of the Letters Patent. *R. WALL v. J. E. HOWARD*, 17 A. 438 = 15 A.W.N. (1895) 89 ...

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- (4) S. 10—See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 17 A. 475.
(5) S. 10—See CIVIL PROCEDURE CODE, 1882, 16 A. 443.

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—of Muhammadan widow for dower. See MUHAMMADAN LAW (DOWER), 16 A. 225.

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- (1) Act No. IV of 1882, s. 90—*Application for decree against non-hypothecated property—Starting point of limitation.*—Where in a usufructuary mortgage it was covenanted that if the mortgagee was not given possession he should have a right to obtain the sale of the mortgaged property, the mortgage debt meanwhile being payable on a certain specified date, it was held that in respect of an application under s. 90 of Act No. IV of 1882, the mortgaged property having been sold under the above mentioned covenant and having proved insufficient to satisfy the debt, limitation began to run from the breach of the covenant to pay on due date and not from the breach of the covenant to put the mortgagee in possession. *SHEO CHARAN SINGH v. LALJI MAL*, 18 A 371 = 16 A.W.N. (1896) 107 ...
- (2) See ACT XXXII OF 1839 (INTEREST), 17 A. 581.
(3) See ACT XII OF 1881 (AGRA RENT), 16 A. 28 ; 16 A. 333.
(4) See ANNUITY, 16 A. 180.
(5) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 16 A. 418 ; 17 A. 42 ; 17 A. 198 ; 17 A. 526 ; 18 A. 49 ; 18 A. 206 ; 18 A. 285 ; 18 A. 492.
(6) See COMPANIES ACT (VI OF 1882), 18 A. 12 ; 18 A. 198 ; 18 A. 215.
(7) See EXECUTION OF DECREE, 16 A. 228 ; 16 A. 237 ; 16 A. 371 ; 16 A. 390 ; 17 A. 39 ; 17 A. 106 ; 17 A. 425 ; 18 A. 9.
(8) See LIMITATION ACT (XV OF 1877), 17 A. 103 ; 17 A. 167 ; 17 A. 284 ; 18 A. 160 ; 18 A. 384 ; 18 A. 458.
(9) See MORTGAGE—REDEMPTION, 18 A. 455.
(10) See PRE EMPTION, 17 A. 288.
(11) See SUCCESSION CERTIFICATE ACT (VII OF 1889), 16 A. 26.
(12) See TRANSFER OF PROPERTY ACT (IV OF 1882), 16 A. 65.

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- (1) S. 4—See EXECUTION OF DECREE, 16 A. 390.
- (2) S. 4, Sch. II, art. 104—See CIVIL PROCEDURE CODE (Act XIV OF 1882), 18 A. 206.
- (3) S. 10—*Trust—Suit by representative of settlor against trustee on failure of the object of a trust to recover the trust money for herself.*—S. 10 of Act No. XV of 1877 does not apply to a suit brought on failure of the object of a trust to recover for the plaintiff's own use and not for the purposes of the trust the trust-money remaining in the hands of the trustee. *JASODA BIBI v. PARMANAND*, 16 A. 256=14 A.W.N. (1894) 73 ... 166
- (4) S. 12—See CIVIL PROCEDURE CODE (Act XIV OF 1882), 17 A. 213.
- (5) S. 12—See COMPANIES ACT (VI OF 1882), 18 A. 215.
- (6) S. 19—*Execution of decree—Limitation—Acknowledgment—Admission of liability contained in a memorandum of appeal in a different suit.*—An admission made by an advocate or duly authorized wakil on behalf of his client in a memorandum of appeal in a case not *inter partes* that a certain decree was a subsisting decree capable of execution will amount to an acknowledgment within the meaning of s. 19 of Act No. XV of 1877 so as to give a fresh starting point to limitation for execution of such decree, provided that such admission was necessary for the purposes of the pleadings in the former case. * *Sed quære* whether such admission will have a similar effect if it was not necessary for the purposes of the suit in which it was made. *HINGAN LAL v. MANSA RAM*, 18 A. 384=16 A.W.N. (1896) 101 ... 963
- (7) Ss. 19, 20—See EXECUTION OF DECREE, 16 A. 228.
- (8) S. 20—*Usufructuary mortgage—Redemption—Limitation—Act No. I of 1879 (Indian Stamp Act), ss. 34, 35, 39—Admission of unstamped document in evidence on payment of penalty—Necessity for production of document.*—S. 20 of Act No. XV of 1877 does not have the effect of extending indefinitely the period within which a usufructuary mortgage must be redeemed. Where a Court has occasion to admit a previously unstamped document in evidence upon payment of a penalty under s. 34 and the following sections of Act No. I of 1879, it is necessary that the original instrument should be before the Court. *KALLU v. HALKI*, 18 A. 295=16 A.W.N. (1896) 68 ... 903
- (9) S. 22—See COMPANIES ACT (VI OF 1882), 18 A. 198.
- (10) S. 11, art. 36—See COMPANIES ACT (VI OF 1882), 18 A. 12.
- (11) Sch. II, arts. 57, 120, *Limitation—Loan on security of movable property—Suit to recover money by sale of property pledged and also from the defendant personally*—Where a plaintiff who had lent money on the security of movable property sued to recover the money both by sale of the property pledged and also asked for a decree personally against the defendant, should the amount realised by the sale prove insufficient, it was held that, so far as the plaint prayed for a decree against the defendant personally, art. 57 of the second schedule of Act No. XV of 1877 was applicable; but, so far as the plaintiff sought to enforce his charge against the property pledged, the suit fell within art. 120. *MADAN MOHAN LAL v. KANHAI LAL*, 17 A. 284=15 A.W.N. (1895) 46 ... 508
- (12) Sch. II, arts. 62, 120—*Suit to recover "haq-i-chaharum"—Suit for money had and received—Limitation.*—Held that the limitation applicable to a suit by a zamindar to recover "haq-i-chaharum" alleged to be payable to him by custom on the sale of a house was that prescribed by art. 120 of the second schedule of the Indian Limitation Act, 1877, and not that prescribed by art. 62. *SHAM CHAND v. BAHADUR UPADHIA*, 18 A. 430=16 A.W.N. (1896) 140 ... 992
- (13) Sch. ii, arts. 91, 120, 127—*Limitation—Suit to set aside an instrument—Suit for maintenance of possession in joint family property.*—The plaintiff sued for maintenance of possession in certain joint family property by cancelment, so far as his interest was concerned, of a certain deed of sale by which another co-parcener in the same property had purported to convey the whole to a stranger. Held, that the limitation applicable to such a suit was that prescribed by s. 120 of sch. ii of the Indian Limitation Act, 1877, and not that prescribed by art. 91. *DIN DIAL v. HAR NARAIN*, 16 A. 73=14 A.W.N. (1894) 1 ... 48

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| (14) <i>Sch. II art. 113—Act I of 1877, s. 30—Suit for specific performance an award—Limitation.</i> —A suit for the recovery of a balance of money due under the terms of an award, being virtually a suit for the specific enforcement of the award is, by reason of s. 30 of the Specific Relief Act, 1877, subject to the limitation prescribed by art. 113 of sch. II of the Indian Limitation Act, 1877. <i>RAGHUBAR DIAL v. MADAN MOHAN LAL</i> , 16 A. 3=13 A.W.N. (1893) 179 | 2 |
| (15) <i>Sch. II, art. 116—Limitation—Suit for breach of contract in writing registered.</i> —The plaintiffs purchased certain immoveable property from the defendants by a registered sale deed on the 20th of June 1888. It was stipulated in the sale deed that if the profits of the property should be below Rs. 300, the vendors would make good the deficiency. The vendees sued upon this contract on the 19th of September 1892, alleging that the profits amounted to only Rs. 177-1. <i>Held</i> that the suit as regards limitation was governed by art. 116 of the second schedule of Act No. XV of 1877, and not by art. 65. <i>AMANAT BIBI v. AJUDHIA</i> , 18 A. 160=16 A.W.N. (1896) 15 | 812 |
| (16) <i>Sch. II, art. 116, See ACT XXXVII OF 1839. (INTEREST)</i> , 17 A. 581. | |
| (17) <i>Sch. II, art. 118, Suit for possession of property incidentally necessitating the setting aside of or declaration of invalidity of an adoption.</i> —Article 118 of sch. II of the Indian Limitation Act applies only to suits for a declaration that an adoption is invalid or in fact never took place; it does not apply to a suit for possession of property merely because it may be necessary in order to give effect to the relief claimed in such suit to find that a given adoption is invalid. <i>NATTHU SINGH v. GULAB SINGH</i> , 17 A. 167=15 A.W.N. (1895) 36 | 433 |
| (18) <i>Sch. II, art. 128—See EXECUTION OF DECREE</i> , 16 A. 237. | |
| (19) <i>Sch. II, arts. 131, 132—Suit for payment of annuity—Limitation.</i> —A plaintiff whose right to receive a yearly payment out of the income of certain immoveable property had been settled by arbitration in the course of a suit in 1864, sued in 1890 to recover from the then holder of the property arrears of such allowance for two years preceding the suit. The plaintiff alleged, but failed to prove, that he and his predecessor in title had received payment of the allowance for the intervening years or any of them. <i>Held</i> that the suit was not barred by limitation. <i>GAJPAT RAI v. CHIMMAN RAI</i> , 16 A. 189=14 A.W.N. (1894) 19 | 122 |
| (20) <i>Sch. II, art. 148—Act No XIV of 1859, s. 1, cl. 15—Redemption of mortgage—Acknowledgment.</i> — <i>Held</i> that an acknowledgment of the title of the mortgagor made by one only of two mortgagees would not avail to save the mortgagor's right of redemption being barred by limitation, where the mortgage was a joint mortgage and not capable of being redeemed piecemeal. <i>DHARMA v. BALMAKUND</i> , 18 A. 458=16 A.W.N. (1896) 147 | 1011 |
| (21) <i>Sch. II, arts. 178, 179—See EXECUTION OF DECREE</i> , 17 A. 39; 18 A. 9. | |
| (22) <i>Sch. II, art. 178—See TRANSFER OF PROPERTY ACT (IV of 1882)</i> , 16 A. 23. | |
| (23) <i>Sch. II, art. 179—Limitation—Date of final decree or order of the appellate Court—Execution of decree.</i> —Certain plaintiffs obtained a decree for pre-emption in respect of four villages. The defendant appealed, and the lower appellate Court dismissed the appeal. The defendant again appealed, but in his appeal only questioned the decision of the lower appellate Court in respect of two of the villages in suit. In this second appeal the plaintiff's suit was dismissed as to one of the villages with regard to which the appeal was preferred and the defendant's appeal was dismissed as to the other.
<i>Held</i> that in respect of all the three villages as to which the final decree stood in favour of the plaintiff, limitation began to run against the decree-holders from the date of the decree in second appeal, and not as to two of them from the date of the lower appellate Court's decree. <i>BADI-UN-NISSA v. SHAMS-UD-DIN</i> , 17 A. 103=15 A.W.N. (1895) 20 | 391 |
| (24) <i>Art. 179, cl. (4) Execution of decree—Limitation.</i> — <i>Held</i> that an application made before the passing of Act No. VI of 1892 by a decree-holder to the | |

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Court executing the decree to strike off a pending application for execution with liberty to make a fresh application for execution of the same decree, was an application in accordance with law to take a step in aid of execution of the decree within the meaning of Act No. XV of 1877, sch. ii, art. 179, cl. (4). *RAM NARAIN RAI v. BAKHTU KUAR*, 16 A. 75 = 13 A. W.N. (1893) 219 ...

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Magistrate.

Of the District—Powers of—Criminal Procedure Code, s. 144—Executive powers of Magistrate—Order which might have the effect of interfering with the execution of a decree of a Civil Court.—A District Magistrate has no power, either under s. 144 of the Code of Civil Procedure or in his executive capacity, to make an order for the re-building of a structure on private land which has fallen into disrepair or been pulled down; neither has he power to make any order which would have the direct effect of interfering with the execution of a decree of a Civil Court. In the matter of the petition of RAHMAT-ULLAH, 17 A. 485 (F.B.) = 15 A.W.N. (1895) 96 ...

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———**1.—(General).**

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 18 A. 400.

———**2.—Dower**

(1) *Mortgage by widow in possession in lieu of dower of immovable property which had been of her husband.—A Muhammadan widow in possession of immovable property of her late husband in lieu of her dower has no power to mortgage such property. CHUHI BIBI v. SHAMS-UN-NISSA BIBI, 17 A. 19 = 14 A.W.N. (1894) 193 ...*

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(2) *Widow—Lien of widow for dower—Such lien not acquired by widow taking possession against the consent of the other heirs.—If a Muhammadan widow entitled to dower has not obtained possession of property of her deceased husband lawfully, that is, by contract with her husband, by his putting her into possession, or by her being allowed with the consent of the heirs on his death to take possession in lieu of dower and thus to obtain a lien for her dower, she cannot obtain that lien by taking possession adversely to the other heirs of property to the possession of which they, and she in respect of her share in the inheritance, are entitled. AMANAT-UN-NISSA v. BASHIR-UN-NISSA, 17 A. 77 = 15 A.W.N. (1895) 7 ...*

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(3) *Widow's lien for dower—Consent of heirs to possession of widow.—Where a Muhammadan widow is in possession of the property of her deceased husband, having obtained such possession lawfully and without force or fraud, and her dower or any part of it is due and unpaid, she is entitled as against the other co-heirs of her husband to retain possession of such property until her dower debt is paid. It is immaterial to such widow's right to retain possession that such possession was obtained originally without the consent of the other co-heirs. Mussumat Bebee Bachun v. Sheikh Hamid Hossein (1), Aziz-ullah Khan v. Ahmad Ali Khan (2), and Bibee Tajim v. Syud Wahed Ali (3) referred to. AMANI BEGAM v. MUHAMMAD KARIM-ULLAH KHAN, 16 A. 225 = 14 A.W.N. (1894) 52 ...*

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(4) *Widow's lien for dower—Suit by heir claiming possession without payment of proportionate share of dower—Burden of proof as to nature of widow's possession.—When a Muhammadan widow is in possession, and has been for some time in undisturbed possession of property which had been of her husband in his life-time, and dower is admitted or proved to be due to her, it lies upon the heir who claims partition without payment of his proportion of dower to prove that the Muhammadan widow was not let into possession by her husband in lieu of dower or did not obtain possession in lieu of dower after her husband's death with the consent or by the acquiescence of the heirs. MUHAMMAD KARIM-ULLAH KHAN v. AMANI BEGAM, 17 A. 93 = 15 A.W.N. (1895) 16 ...*

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Validity of gift—Possession—“Musha”.—A deed, which was found in effect to be a deed of gift comprising zamindari and other property, was executed on the 22nd of May 1890. It was registered on the 24th of May, and the donor died on the 26th. The deed recited—“I have placed the aforesaid donees in proprietary possession of the aforesaid property as my representatives.” Mutation of names was subsequently obtained by one of the donees in his favour on the basis of the same deed. *Held* that this was a valid and effectual gift under the Muhammadan law. SAJJAD AHMAD KHAN v. KADRI BEGAM, 18 A. 1=15 A.W.N. (1895) 123 ...

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———— **4.—Pre-emption.**

(1) *Offer by pre-emptor to vendee—Waiver of right of pre-emption.*—Where a pre-emptor continues to assert his pre-emptive right and on the strength of that right, and in his character of pre-emptor offers to take the property from the purchaser by paying him the sale-price, without resorting to, and with a view to avoid litigation, he cannot be said to have acquiesced in the sale and waived his right of pre-emption. MUHAMMAD NASIR-UD-DIN v. ABUL HASAN, 16 A. 300=14 A.W.N. (1894) 91 ...

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(2) *Shafi-i-khalit—Nature of pre-emptive right arising by common enjoyment of rights appended to property.*—In order that two persons may become *Shafi-i-khalits*, or persons having a right of pre-emption in virtue of the common enjoyment of, e g., a road, it is necessary that such road should be a private road and not a thoroughfare. Among persons who are *Shafi-i-khalits* by reason of being sharers in a right of way, all those who are sharers in such right of way have equal rights of pre-emption, although one of them may be a contiguous neighbour. KARIM BAKHSH v. KHUDA BAKHSH, 16 A. 247=14 A.W.N. (1894) 10 ...

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(3) *Talab-i-ishtishhad—Talab-i-mawasibat.*—In making *talab-i-ishtishhad* under the Muhammadan law it is essential to the validity of that proceeding that the person making the demand should in some form or another distinctly state that he had prior thereto, made what is known as the immediate demand (*talab-i-mawasibat*). AKBAR HUSAIN v. ABDUL JALIL AND ANOTHER, 16 A. 383=14 A.W.N. (1894) 122 ...

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(4) See PRE-EMPTION, 16 A. 344; 18 A. 298.

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(1) See ANNUITY, 16 A. 180.

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(1) Of causes of action—See CAUSE OF ACTION, 18 A. 219; 18 A. 432.

(2) Of causes of action—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 16 A. 130, 16 A. 279 and 18 A. 256.

(3) Of causes of action—See PRE-EMPTION, 17 A. 274.

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- 8.—USUFRUCTUARY.

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- (1) *Construction of document—Meaning of the term "Sudi"—Interest post diem—post diem interest decreed as damages not a charge on the property.—*The use of the term "sudi" (bearing interest) in a mortgage deed held not to imply a covenant to pay *post diem* interest, there being a specific agreement to repay the mortgage debt, principal and interest, in seven years.

Where in a suit upon a mortgage bond *post diem* interest is decreed as damages, the payment of such damages does not constitute a charge upon the mortgaged property. *RIKHI RAM v. SHEO PARSHAN RAM*, 18 A. 316 = 16 A.W.N. (1896) 78 ...

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- (2) *Mortgage by mortgagee of his rights as such, but without assignment—Rights of sub-mortgagee as against original mortgagee.—*R and others mortgaged certain immoveable property to N.K. N.K. made a sub-mortgage to C.L. purporting to mortgage to him his rights as mortgagee, but without assigning his mortgage to C. L. Upon this title C. L. sued for sale of the property mortgaged by R and others to N.K.

Held that C.L. was not entitled to bring the property mortgaged to N. K. to sale, but at most to obtain a decree for money against N K., in execution of which he might possibly have attached, if it had not been paid off, the mortgage held by N.K. *GANGA PRASAD v. CHUNNI LAL*, 18 A. 113 = 16 A.W.N. (1896) 8 ...

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- (3) See ACT XXXII OF 1839 (INTEREST), 17 A. 581.
- (3-a) See ACT XII OF 1889 (AGRA RENT), 16 A. 398.
- (4) See BURDEN OF PROOF, 17 A. 428.
- (5) See JURISDICTION, 17 A. 483.
- (6) See LIMITATION ACT (XV OF 1877), 18 A. 295.
- (7) See MUHAMMADAN LAW—DOWER, 17 A. 19.
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- (9) See TRANSFER OF PROPERTY ACT (IV OF 1882), 16 A. 318 ; 17 A. 63, 282 and 537.

— 2.—*By Conditional Sale.*

- (1) See PRE-EMPTION, 17 A. 288.
- (2) See REG. XVII OF 1806 (BENGAL), 16 A. 59.

— 3.—*Equity of redemption.*

*Suit by second mortgagees against purchaser of equity of redemption who had paid off a prior mortgage—Second mortgagees ignoring lien of purchaser of equity of redemption.—*One A. S. purchased the equity of redemption of a property subject to two mortgages, and as part of the transaction paid off the prior mortgage. The mortgagees under the second mortgage sued to bring the mortgaged property to sale making the original mortgagor and the purchaser of the equity of redemption defendants, but omitting any mention of the lien acquired by such purchaser. *Held* that such omission was not a valid reason for dismissing the plaintiff's suit altogether *KALI CHARAN v. AHMAD SHAH KHAN*, 17 A. 48 = 14 A.W.N. (1894) 199 ...

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— 4.—*Foreclosure.*

- (1) *Decree giving future interest—Such interest not a charge upon the land—Act IV of 1882, s. 86—Civil Procedure Code, s. 209.—*Where in a decree for foreclosure interest subsequent to the decree was included in the amount made payable to the plaintiff, it was *held* that such future interest, supposing it could be properly awarded, concerning which no opinion was expressed, could not be treated as a charge upon the land ; but the judgment-debtor was entitled to resist foreclosure on payment within the prescribed

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period of the mortgage-money and interest up to date of decree, the decree-holder being at liberty to recover the future interest only from the judgment-debtor personally. *BHAWANI PRASAD v. BRIJ LAL*, 16 A. 269=14 A.W.N. (1894) 79 ...

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(2) See REG. XVII OF 1806 (BENGAL), 16 A. 59.

—5.—Redemption.

(1) *Mortgage by tenant at fixed rates—Ejectment of mortgagor by zamindar—Suit for redemption against mortgagee in possession of the mortgaged property—Estoppel.*—The rule of law which prohibits a mortgagee or tenant from disputing his mortgagor's or landlord's title does not bar the mortgagee or tenant from showing that the title of his mortgagor or landlord under which he entered has determined.

Hence where a tenant at fixed rates, who having mortgaged his fixed rate holding by a usufructuary mortgage and put the mortgagee in possession, was ejected by the zamindar, subsequently sued the mortgagee, who had remained in possession after his mortgagor's ejectment, for redemption, it was held that the mortgagee could plead successfully that the mortgagor's interest in the holding had determined by the ejectment of the mortgagor. *NAKCHEDI BHAGAT v. NAKCHEDI MISR*, 18 A. 329=16 A.W.N. (1896) 90 ...

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(2) *Prior and subsequent mortgages—Decree giving a defendant, second mortgagee, a right to redeem a prior mortgage within a fixed period—Appeal—Limitation.*—When a decree gives a right of redemption within a certain specified period with a certain specified result to follow if redemption is not made within such period, the mere fact of an appeal being preferred against it will not suspend the operation of such decree, and, unless the appellate court extends the period limited by the original decree, the right of redemption will be barred if not exercised within the period so limited. *CHIRANJI LAL v. DHARAM SINGH*, 18 A. 455=16 A.W.N. (1896) 130 ...

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(3) *Two mortgages between the same parties over the same property—Mortgagor not bound to redeem both together—Consolidation—Act No. IV of 1882 (Transfer of Property Act), ss. 61, 62—44 and 45 Vic., Cap. 41, s. 17.*—A mortgagee held to mortgages over the same property from the same mortgagor, the one being a usufructuary mortgage in respect of interest only, and the other being a simple mortgage. The mortgagor sued to redeem the usufructuary mortgage. The mortgagee objected that the mortgagor was bound to redeem both mortgages. *Held*, that the mortgagor, in the absence of a special contract to redeem both mortgages simultaneously, could not be compelled to do so. *TAJJO BIBI v. BHAGWAN PRASAD*, 16 A. 295=14 A.W.N. (1894) 93 ...

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(4) See SUCCESSION CERTIFICATE ACT (VII OF 1889), 16 A. 259.

(5) See TRANSFER OF PROPERTY ACT (IV OF 1882), 16 A. 65.

—6.—Right of suit.

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—7.—Sale.

Sale by mortgagor of part of the mortgaged property—Such sale not to affect the rights of the mortgagee under his mortgage—Act No. IV of 1882, s. 88.—The right of a mortgagee to bring any portion of the mortgaged property to sale is not curtailed by the mortgagor subsequently to the mortgage selling a portion of the mortgaged property to a third person. *BHIKHARI DAS v. DALIP SINGH*, 17 A. 434.=15 A.W.N. (1895) 83 ...

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—8.—Usufructury.

(1) *Mortgage satisfied out of usufruct—One of several co-mortgagors obtaining possession of the whole property—Adverse possession.*—In the case of a usufructuary mortgage by several co-mortgagors, when such mortgage is satisfied out of the usufruct, each co-mortgagor is not entitled to recover possession of more than his share of the mortgaged property. Consequently where in such a case one of several co-mortgagors gets possession of the whole of the mortgaged property, he does not occupy the position of a mortgagee to his co-mortgagors but his possession is adverse to them. *GOBARDHAN v. SUJAN*, 16 A. 254=14 A.W.N. (1894) 72 ...

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<p>(1) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 18 A. 306.</p>	
<p>(2) See COMPANIES ACT (VI OF 1882), 18 A. 156.</p>	
<p>(3) See PROCEDURE, 18 A. 332.</p>	
Partition.	
<p>(1) <i>Right of joint occupancy-tenants to partition—Civil and Revenue Courts—Jurisdiction.—Held that a joint occupancy-tenant is entitled to sue for, and a Civil Court is competent to grant a decree for partition of the joint occupancy-holding, though, if the zamindar is not made a party to the suit for partition, such decree will not affect the mutual rights and liabilities of the zamindar and the occupancy-tenants as they stood prior to the partition.</i> MUHAMMAD BAKSH v. MANA, 18 A. 334=16 A.W.N. (1896) 82 ...</p>	
<p>(2) <i>Usufructuary mortgage—Mortgage of different shares in an undivided area to different mortgagees—Mortgagees no right of partition "inter se."—Two mortgages held separate usufructuary mortgages, the one of a two-thirds</i></p>	

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share, the other of a one-third share, in an undivided area of muafi land granted by the owners of those shares respectively. *Held* that one mortgagee could not, in a suit to which neither of the mortgagors was a party, obtain partition of the share mortgaged to him. *MANGLI PRASAD v. ISHRI PRASAD*, 18 A. 476=16 A.W.N. (1896) 158 ...

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(3) See ACT XIX OF 1873 (AGRA LAND REVENUE), 18 A. 210.

(4) See PRE-EMPTION, 17 A. 226.

Patent.

See ACT V OF 1888 (INVENTIONS AND DESIGNS), 17 A. 490.

Penal Code (XLV of 1860).

(1) Ss. 41, 116—See LETTERS PATENT, 17 A. 498.

(2) Ss. 75, 457, 511.—*Attempt to commit house-breaking by night after previous convictions—Sentence.*—S. 75 of Act No. XLV of 1860, does not apply to the case of an attempt to commit the offence punishable under s. 457 of the Code, after previous convictions of offences falling within Chapter XII or Chapter XVII, such offence being punishable under s. 511. *QUEEN-EMPRESS v. AJUDHIA*, 17 A. 120=15 A.W.N. (1895) 22 ...

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(3) Ss. 75, 511.—*Attempt to commit an offence after previous conviction—Sentence.*—S. 75 of the Indian Penal Code does not apply to cases which are confined to s. 511 of that Code. The offences which come under s. 511 must be punished entirely irrespective of s. 75. *QUEEN EMPRESS v. BHAROSA*, 17 A. 123=15 A.W.N. (1895) 23 ...

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(4) Ss. 99, 147, 332, 323—*Criminal Procedure Code*, ss. 55, 56, 114—*Public servant in the execution of his duty as such—Arrest without sufficient authority but in good faith—Assault on police making arrest—Right of private defence.*—A warrant was issued by a Magistrate for the arrest of one Dalip under s. 114 of the Code of Criminal Procedure. The warrant was sent to a certain thana to be executed. It was there, after being copied into a book kept for that purpose at the thana, made over to a particular constable for execution. When the constable to whom the warrant had been made over had left the thana, it was discovered that Dalip was in a village other than that, in which he had been supposed to be. Thereupon the officer temporarily in charge of the thana made a copy from the book at the thana, endorsed on the back the names of one Nazir Husain and some other constables, and, having signed the endorsement, sent Nazir Husain and the others out with this paper to arrest Dalip. Nazir Husain and his companions arrested Dalip; but, as they were returning with him in custody, some of Dalip's friends, aided by Dalip himself, attacked them, rescued Dalip and caused hurt to the Police.

Held that the police officers concerned in arresting Dalip under the circumstances above described were not acting in the lawful discharge of their duty within the meaning of s. 332 of the Indian Penal Code, so as to render the accused liable to conviction under that section: but inasmuch as they were acting in good faith under the colour of their office, s. 99 of the Indian Penal Code applied, and Dalip and his associates might be properly convicted under ss. 147 and 323 of the Code.

The words "in the discharge of his duty as such public servant" in the earlier portion of s. 332 of the Indian Penal Code mean in the discharge of a duty imposed by law on such public servant in the particular case, and do not cover an act done by him in good faith under colour of his office. *QUEEN-EMPRESS v. DALIP*, 18 A. 246=16 A.W.N. (1896) 48 ...

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(5) S. 107—*Abetment—Instigation by means of letter—Place where offence may be tried.*—Where one person instigates another to the commission of an offence by means of a letter sent through the post the offence of abetment by instigation is completed so soon as the contents of such letter become known to the addressee, and such offence is triable at the place where such letter is received. *QUEEN-EMPRESS v. SHEO DIAL MAL*, 16 A. 399=14 A.W.N. (1894) 135 ...

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(6) Ss. 159, 160—*Affray—"Public place".*—*Held* that a *chabutra*, which was neither a place to which the public had a right of access, nor a place to which the public were ever permitted to have access, was not, though it

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- adjoined a public road, a "public place" within the meaning of s. 159 of the Indian Penal Code. *QUEEN-EMPRESS v. SRI LAL*, 17 A. 166 = 15 A. W.N. (1895) 42 ... 432
- (7) S. 193—*Fabricating false evidence—Report made by Amin executing Civil Court's decree that he had been obstructed—Similar report to police—Subsequent deposition in Court—Alternative charges.—Held* that a report made by an Amin of a Civil Court deputed to give possession of certain property in execution of a decree as to his having been obstructed in so doing, to the Court executing the decree, and a similar report made to the Police, would not, even if false, amount to the fabrication of false evidence within the meaning of s. 193 of the Indian Penal Code, and consequently, where such Amin was charged in the alternative with making the two reports as above and also a third and inconsistent statement in respect of which he might have been charged under s. 193, that he was wrongly charged, and that it was necessary to prove the falsity of the third statement. *QUEEN-EMPRESS v. AJUDHIA PRASAD*, 17 A. 436 I 15 A.W.N. (1895) 102 ... 602
- (8) S. 193—See ACT XV OF 1872 (INDIAN CHRISTIAN MARRIAGE), 16 A. 212.
- (9) S. 211—*False charge of offence punishable with death—Criminal proceedings not instituted—Jurisdiction of magistrate to try the case.—To constitute the offence defined in the second paragraph of s. 211 of Act No. XLV of 1860, it is necessary that criminal proceedings should be instituted. Where the offence committed does not go further than the making of a false charge to the Police, the making of such charge does not amount to the institution of criminal proceedings, and the offence committed will fall within the first paragraph of s. 211, notwithstanding that the offence so falsely charged may be one of those referred to in the second paragraph of that section.* *QUEEN-EMPRESS v. BISHESHAR*, 16 A. 124 = 14 A.W. N. (1894) 10 ... 80
- (10) S. 297—*Trespass on burial ground—Acts complained of done with permission of owner.—Held* that persons who entered upon a burial place and ploughed upon the graves were liable to be convicted of the offence defined by s. 297 of the Indian Penal Code notwithstanding that their entry on the land was by the consent of the owner thereof. *QUEEN-EMPRESS v. SUBHAN*, 18 A. 395 = 16 A.W.N. (1896) 119 ... 969
- (11) S. 304—*Culpable homicide not amounting to murder—Grave and sudden provocation.—A person accused of murder under s. 302 of the Indian Penal Code pleaded in defence that he had found his sister having illicit connection with a man named Thakuri and had in a fit of passion killed them both on the spot. The statement being accepted was held to be a good plea of grave and sudden provocation so as to reduce the offence to one of culpable homicide not amounting to murder.* *QUEEN-EMPRESS v. CHUNNI*, 18 A. 497 = 16 A.W.N. (1896) 161. ... 1037
- (12) S. 304-A—*Causing death by negligence—Lessee of Government ferry allowing unsound boat to be used on ferry—Criminal liability of lessee.—The lessee of a Government ferry having the exclusive right of conveying passengers across a certain river at a particular spot allowed an unsound boat to be used at the ferry. In consequence of its unsoundness the boat sank while crossing the river and some of the persons in it were drowned. Held* that the lessee of the ferry was properly convicted of the offence provided for by s. 304-A of Act No. XLV of 1860. *QUEEN-EMPRESS v. BHUTAN*, 16 A. 472 = 14 A.W.N. (1894) 182 ... 306
- (13) S. 317—*Exposure of child—Facts constituting the offence defined—Child left in charge of a blind woman and deserted.—A woman who was the mother of an illegitimate child aged at the time about six months, left the child in charge of a blind woman in whose company she was, saying that she was going to get food and would return shortly. She went away to another village and did not return. Apparently she never intended to return. Upon these facts it was held* by Blair and Aikman, JJ., dissentiente Knox, J., that the mother of the child could not properly be convicted of the offence defined by s. 317 of the Indian Penal Code. *QUEEN-EMPRESS v. MIRCHIA*, 18 A. 364 = 16 A.W.N. (1896) 117 ... 949
- (14) Ss. 366, 368—*Criminal Procedure Code, s. 180—Offences committed in different districts in the course of the same transaction—Commitment where to be*

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| <i>made.</i> —Ram Dei, Chajju, Piru and Kamar were committed by the Joint Magistrate of Muzaffarnagar to the Court of the Sessions Judge of Saharanpur. Upon the case which was before the Joint Magistrate it appeared that Ram Dei had committed the offence punishable under s. 366 of the Indian Penal Code in the district of Bijnor, and possibly the other three persons had committed the offence punishable under s. 368 of the Indian Penal Code in the district of Muzaffarnagar; Chajju and Piru also possibly having committed the offence punishable under that section in Bijnor. | |
| Under the above circumstances the High Court, maintaining the order of commitment made by the Joint Magistrate, directed the case to be transferred for trial to the Court for the trial of Sessions cases arising in the Bijnor district, namely, that of the Sessions Judge of Moradabad. QUEEN-EMPRESS v. RAM DEI, 18 A. 350=16 A.W.N. (1896) 96 ... | 940 |
| (15) S. 373— <i>Obtaining possession of minor for purposes of prostitution—Offence defined by above section explained.</i> —To constitute the offence provided for by s. 373 of the Indian Penal Code it is necessary, first, that a minor under sixteen years of age shall be bought, hired or otherwise obtained possession of, and secondly, that the minor shall be bought, hired or otherwise obtained possession of with the intent that the same minor while still under the age of sixteen years shall be employed for the purposes of prostitution, or with the knowledge that it is likely that the said minor while still under the age of sixteen years will be employed or used for an unlawful and immoral purpose. | |
| The offence is complete so soon as the obtaining possession, with the requisite intention or knowledge, of the minor is accomplished, though the minor may not enter upon prostitution until years after she has attained maturity, or may never enter upon such a profession at all. QUEEN-EMPRESS v. CHANDA, 18 A. 24=15 A.W.N. (1895) 141 ... | 720 |
| (16) S. 379— <i>Theft—Removal by creditor of his debtor's property with a view to obtaining payment of his debt.</i> —Held that the removal by a creditor against the will of this debtor of property belonging to such debtor, with the view of compelling such debtor to discharge his debt, amounts to theft within the meaning of s. 379 of the Indian Penal Code. QUEEN-EMPRESS v. AGHA MUHAMMAD YUSUF, 18 A. 88=15 A.W.N. (1895) 233 ... | 764 |
| (17) Ss. 395, 396— <i>Dacoity—Facts necessary to constitute the offence defined in s. 396.</i> —In order to support a conviction under s. 396 of the Indian Penal Code it is necessary to establish, not only that the person accused under that section was committing dacoity conjointly with others, but it must be shown that the murder was committed in his presence. Hence where certain persons were shown to have been concerned in a dacoity in the course of which murder was committed; but it was not shown that they were in the house in which the dacoity was committed at the time the murder took place, and the evidence, if anything, pointed to a contrary conclusion; it was held that the accused could not properly be convicted under s. 396, but only under s. 395 of the Indian Penal Code. QUEEN-EMPRESS v. UMRAO SINGH AND OTHERS 16 A. 437=14 A.W.N (1894) 178 | 284 |
| (18) S. 396— <i>Dacoity in the course of which murder is committed—Facts necessary to establish the offence provided for in s. 396.</i> —When in the commission of a dacoity murder is committed it matters not whether the particular dacoit charged under s. 396 of Act No. XLV of 1860 was inside the house where the dacoity is committed or outside the house, or whether the murder was committed inside or outside the house, so long only as the murder was committed in the commission of that dacoity. QUEEN-EMPRESS v. TEJA, 17 A. 86=15 A.W.N. (1895) 12 ... | 380 |
| (19) S. 405— <i>Criminal breach of trust by banker—Payment of dividends dishonestly out of deposits—Directors—Manager and Accountant—Person entrusted with property or with dominion over property—Banker—Agent—Act XLV of 1860 (Penal Code), ss. 405, 409—Cheating—False and misleading balance-sheet—Inducement to renew deposits—Act XLV of 1860 (Penal Code), ss. 415, 418—S. 191—Act VI of 1882 (Indian Companies Act), s. 215—Practice—Joint or separate trials—Criminal Procedure Code,</i> | |

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s. 239—*Trial of European British subject—Mixed jury—Criminal Procedure Code, s. 451—"Europeans"—Adducing evidence for defence—Documents produced for cross examination of Crown witness—Right of reply—Criminal Procedure Code, s. 292—Evidence—Criminating answer—Act I of 1872 (Evidence Act), s. 132—"Compelled"—Deposition in inquiry under Act VI of 1882, ss. 162, 163.*—When a Bank takes a deposit from its customer, it takes it on the understanding that that deposit is not to be used to pay dividends to shareholders at a time when the Bank is insolvent and cannot legally pay dividends. In the case of a Bank registered under the Indian Companies' Act as a Company limited by shares, and governed by the regulations contained in Table A in the first schedule to the Act, it was held, that the Directors had dominion over the property and the management of the funds of the Bank; that they were bound not to pay dividends except out of the profits of the Bank; and that if they dishonestly, that is, knowingly and intentionally, paid dividends to the shareholders out of deposits when there were no profits, intending to cause gain to themselves or others to which they were not entitled, or to cause wrongful loss to other persons, they were guilty of criminal breach of trust as Bankers under s. 409 of the Penal Code. But that the Manager, and the Accountant or Assistant Manager were not, within the meaning of the section, persons who were entrusted with property or with dominion over property as bankers or agents, and therefore did not come directly under s. 409, though they might be guilty of abetment under s. 409, read with s. 109, by conspiring with the Directors to commit criminal breach of trust, if they assisted the Directors to obtain the sanction of the shareholders to the illegal payment of dividends, and did so for the dishonest purpose of causing wrongful gain or wrongful loss. Whether the illegal payment of dividends under the circumstances stated could be regarded as causing wrongful loss to the Bank as a corporate body, *quære*. Whether moneys deposited in the Bank by its customers and not in any way ear-marked could, after such deposit, be regarded as "property" of the depositors within the meaning of s. 409, *quære*. Held also that if the Directors, Manager, and Accountant dishonestly, that is, to obtain wrongful gain for themselves or to cause wrongful loss to others, put before the shareholders balance-sheets which they knew to be materially false and misleading and likely to mislead the public as to the condition of the Bank, and concealed its true condition, and thereby induced depositors to allow their money to remain in deposit in the Bank, they were guilty of cheating in the aggravated form made punishable by s. 418 of the Penal Code; and if they acted together to put forward such a false balance-sheet, they were guilty of abetment by conspiracy to cheat. *Seemle*, the making of such a false balance-sheet is not an offence within s. 191 of the Penal Code, and, where it is made prior to the commencement of the winding up of the Company, is not an offence within s. 215 of the Indian Companies' Act (VI of 1882). A balance-sheet of a company under the Indian Companies' Act must be a true balance-sheet in the sense that it must represent the actual state of the Company's assets and liabilities. If it falsely states the condition of the company, it is a false balance-sheet, though it follows the accounts as shown in the books of the company, and correctly represents what is in the books. A balance-sheet which showed all the debts owing to the company, amounting to Rs. 28 lakhs, under the head of assets, without specifying, in accordance with the form of balance-sheet annexed to Table A, which of such debts were good and secured, which good and unsecured, and which considered bad and doubtful, and also showed a divisible balance of profits amounting to Rs. 19,000, the facts being that out of the Rs. 28 lakhs some Rs. 13 lakhs were bad and irrecoverable, and that the capital, reserve fund and other provision for bad debts had been lost, and that the company instead of making profits was, and long had been, insolvent, was found to be false and misleading. Having regard to the nature of the charges above referred to, the Court, under s. 239 of the Code of Criminal Procedure, rejected an application by the defence that the accused should be tried separately. The word "Europeans" in s. 451 of the Code of Criminal Procedure means persons born in Europe. The word "compelled" in the proviso to s. 132 of the Evidence Act (I of 1872) applies only where the Court has compelled a witness to answer a question,

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- and not to a case where the witness has not asked to be excused from answering a question, but gives his answer without any claim to have himself excused. A deposition on oath made by one of several accused, as a witness in a previous inquiry under ss. 162, 163 of the Indian Companies' Act (VI of 1882) was admitted in evidence against himself only, and not against the other accused. The action of the defence, during the cross-examination of a witness for the Crown, in tendering a document to such witness and using the same as evidence for the defence was held to entitle the Crown to reply, under s. 292 of the Code of Criminal Procedure. *QUEEN-EMPRESS v. MOSS*, 16 A. 88=14 A.W.N. (1894) 23 ... 8
- (20) S. 409—*Criminal breach of trust—Conviction for criminal breach of trust on general deficiency in account.*—An accused person may be charged with criminal breach of trust in respect of a general deficiency, and it is not necessary in all cases to charge the accused with the embezzlement of a particular sum received on a certain date from some particular person. *QUEEN-EMPRESS v. KELLIE*, 17 A. 153=15 A.W.N. (1895) 37 ... 423
- (21) S. 409—*Criminal breach of trust—Conviction for criminal breach of trust on a general deficiency in accounts.*—Held that a person accused under s. 409 of the Indian Penal Code might be legally convicted of the offence defined in that section on proof of a general deficiency in his accounts, and that it was not necessary that the receipt of, and non-accounting for, specific items should be charged and proved against him. *BUDDHU v. BABU LAL*, 18 A. 116=16 A.W.N. (1896) 11 ... 783
- (22) S. 411—*Evidence—Pointing out stolen property concealed in a place not under the accused's control.*—Where the sole evidence against a person charged with an offence under s. 411 of the Indian Penal Code consisted of the fact that the accused had pointed out the place where some of the stolen property was concealed in the field of another person; held that this was not in itself sufficient evidence to support a conviction under the above-mentioned section. *QUEEN-EMPRESS v. GOBINDA*, 17 A. 576=15 A.W.N. (1895) 226 ... 695
- (23) Ss. 467, 511—*Attempt—Facts necessary to constitute an attempt.*—One Chaturi, calling himself Kehri, the son of Bhupal, Kachhi, went to a stamp-vendor, accompanied by a man named Kalyan Singh, and purchased from him in the name of Kehri a stamp paper of the value of 4 annas. The two men then went to a petition-writer and, Chaturi again giving his name as Kehri, they asked the petition-writer to write for them a bond for Rs. 50 payable by Kehri to Kalyan Singh. The petition-writer commenced to write the bond, but, his suspicions being aroused, did not finish it, but took Chaturi and Kalyan Singh to the nearest thana. Held, that under the above circumstances Kalyan Singh was rightly convicted of an attempt to commit the offence defined in s. 467 of the Indian Penal Code, and Chaturi of abetment of the said attempt. *QUEEN-EMPRESS v. KALYAN SINGH AND ANOTHER*, 16 A. 409=14 A.W.N. (1894) 150 ... 266

Plaint.

- (1) See CAUSE OF ACTION, 18 A. 403.
- (2) See CIVIL PROCEDURE CODE, (ACT XIV OF 1882,) 17 A. 229; 18 A. 396.
- (3) See COMPANIES ACT (VI OF 1882), 18 A. 198.
- (4) See PLEADINGS, 18 A. 125.

Pleadings.

- (1) *Suit, frame of—Plaintiff asking for reliefs inconsistent with each other—Plaint so framed no ground for dismissing suit.*—Held, that the fact that a plaintiff claims in his plaint two alternative reliefs which are inconsistent with each other is no ground in itself for the dismissal of the suit. *JINO v. MANON*, 18 A. 125=16 A.W.N. (1896) 1 ... 789

Pledge.

See LIMITATION ACT (XV OF 1877), 17 A. 284.

Possessory title.

See CIVIL PROCEDURE CODE, (ACT XIV OF 1882), 16 A. 420.

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See INTEREST, 17 A. 511.

Practice.

- (1) *Appeal—Decision based upon ground not specifically urged by appellant—Act No. IV of 1882, s. 41.*—Where a Court sees that the rights of one of two innocent parties must be sacrificed, it is entitled to consider whether anything in the conduct of the party who comes into Court and seeks relief has debarred him from asserting his right. The Court is not precluded from basing its decision upon a ground not specifically pleaded by either of the parties. *THAKURI v. KUNDAN*, 17 A. 280 = 15 A.W.N. (1895) 69 ...
- (2) See CIVIL PROCEDURE CODE, (ACT XIV OF 1882), 16 A. 130 ; 18 A. 163.
- (3) See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 16 A. 207 ; 16 A. 212.
- (4) See EXECUTION OF DECREE, 18 A. 344.
- (5) See WITNESS, 16 A. 84.

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Pre-emption.

- (1) *Civil Procedure Code, s. 44—Misjoinder of causes of action—Zamindari and appurtenant sir land sold by separate deeds—Suit to pre-empt both zamindari and sir.*—Where a zamindari share and the sir land held with it were sold to the same vendee by two separate deeds of sale executed on the same day, it was held that a suit to pre-empt both the zamindari share and the sir land was not liable to be defeated on the ground of misjoinder of causes of action. *AMBIKA DAT v. RAM UDIT PANDE*, 17 A. 274 = 15 A.W.N. (1895) 76 ...
- (2) *Civil Procedure Code, s. 53—Amendment of plaint—Area of property claimed in suit for pre-emption described as less than the true area.*—A Court is not precluded from returning a plaint for amendment because at the time it is returned for amendment, the period of limitation for the suit may have expired.

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The plaintiff in a suit for pre-emption after filing his plaint discovered that the property in suit had been described by mistake as being of a slightly less area than it was in reality. *Held*, that the Court had power and ought to have allowed the plaint to be amended and that the amendment was not precluded by the fact that at the time when the application for amendment was made, the limitation for the suit had expired. *Held* also that such misdescription would not render the suit liable to the objection that the plaintiff had sought to pre-empt only a part of the property sold. *BARKAT-UN-NISSA v. MUHAMMAD ASAD ALI*, 17 A. 288 = 15 A.W.N. (1895) 80 ...

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- (3) *Claim based upon custom—Evidence afforded by obsolete wajib-ul-arz—Rules of the Board of Revenue for the settlement of the Gorakhpur and Basti districts (B.E.C.), 8—1, s. 38.*—The plaintiffs brought their suit in 1890 to pre-empt certain property situated in the Gorakhpur district. Their claim was based upon two grounds; one, an alleged contract said to be recorded in and proved by a *wajib-ul-arz* of 1860 relating to the village in question, and the other a custom of pre-emption alleged to be existing in the village. The period during which the *wajib-ul-arz* of 1860 was in force expired prior to the sale which gave rise to the right of pre-emption sought to be enforced. Subsequently to the expiration of that *wajib-ul-arz*, certain rules had been framed, with reference to the settlement of the Gorakhpur and Basti districts, the material portions of which, for the purposes of the present case, were as follows: "A memorandum of the village customs will be appended to each *khewat* by the Assistant Settlement Officer, when he verifies the *jamabandi*, and it will take the place of the document hitherto known as the *wajib-ul-arz*" * * * "In regard to any custom or constitution peculiar to the *mahal* the following matters should be noticed [class (d), section 25]: (a) Pre-emption (as regards *mahals* which belong to other than Mubammadan proprietors) when the proprietors expressly demand that it may be noted and prove conclusively that the custom exists." At the new settlement made in accordance with these rules, no mention of the right of pre-emption as obtaining in the *mahal* in question was recorded.

Upon these facts, it was held by EDGE, C.J., and BURKITT, J., that, having regard to the rules above-mentioned framed by the Board of Revenue for the settlement of the Gorakhpur and Basti districts, the

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mere absence of any mention of the right of pre-emption in the new memorandum of village customs was in itself no evidence that the custom of pre-emption had ceased to exist, and that the *wajib-ul-arz* of 1860 might be used as evidence of the existence of such a custom. *Per* AIKMAN, J.—The absence from the new memorandum of village customs of any mention of the existence of a right of pre-emption was a circumstance which the Court would be entitled to take into consideration in any conflict of evidence as to whether or no the custom of pre-emption did exist. *SADHU SAHU v. RAJA RAM*, 16 A. 40 (F.B.)=13 A.W.N. (1893) 200 ...

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- (4) *Decree conditional on payment of pre-emptive price within a fixed period—Appeal after expiry of such period.*—Held, that plaintiffs in a pre-emption suit, who had obtained a decree conditioned on payment by them of the pre-emptive price within a certain fixed period, could, after the expiration of such period, appeal against such decree on the ground that a condition of the contract out of which their right to pre-empt arose had not been embodied in the decree. *WAZIR KHAN v. KALE KHAN*, 16 A. 126=14 A.W.N. (1894) 3 ...

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- (5) *Limitation—Sale with subsequent agreement for re-purchase.—Mortgage by conditional sale.*—On the 6th of June, 1887, one R. K. sold a certain zamindari share to S. On the 18th of May, 1888, B brought a suit for pre-emption of that share. Pending the suit, on the 6th of July 1888, the vendor, the vendee, and the pre-emptor entered into an agreement, by which the vendee, recognizing the pre-emptive right of the plaintiff, agreed to re-transfer the property to the vendor or the pre-emptor on payment by either of them on the full-moon of Jeth in any year of the price paid by him. On the 20th of June, 1891 the vendor, affecting to treat the transaction of the 6th of June, 1887, as a mortgage, made an application purporting to be under s. 63 of the Transfer of Property Act, accompanied by payment of the price of the property into Court, and prayed for redemption. The vendee refused to take out the money deposited by the vendor; and subsequently, on the 13th of November 1891, R. K. applied for repayment to him of the said money, stating that he wished the vendee to remain in possession and asking that the agreement of the 6th of July, 1888, might be considered null and void. On the 1st of September 1892 one R. S. filed a suit for pre-emption of the said property.

Held, that the original transaction of the 6th of June 1887 was an out and out sale, and was not, and could not be, by the subsequent agreement between the parties, turned into a mortgage by conditional sale; and in consequence that the suit brought by R. S. was barred by limitation. *RAM DIN v. RANG LAL SINGH*, 17 A. 451=15 A.W.N. (1895) 103 ...

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- (6) *Muhammadan law—Claim for pre-emption based upon a transaction which was a good sale under the Muhammadan law, but not according to the Transfer of Property Act, 1882—Act No. IV of 1882, s. 54—Act No. XII of 1887, s. 37.*—Where a Sunni Muhammadan transferred certain immoveable property exceeding in value Rs. 100, under such circumstances that the price was paid and possession of the property delivered to the transferee, but no sale deed was executed; on a suit for pre-emption based upon such transfer being brought, it was held by the Full Bench (*BANERJI, J.* dissenting), that the Muhammadan law was to be applied in considering whether or not a right of pre-emption arose, and that, inasmuch as the transaction in question was a complete sale under that law, a right of pre-emption did arise. Case law, prior and subsequent to Act No. IV of 1882, considered. *Per BANERJI, J., contra*:—"In the absence of fraud no claim for pre-emption under the Muhammadan law applicable to persons of the Hanifa sect can arise in respect of the sale of immoveable property of the value of one hundred rupees and upwards, unless such sale has been effected according to the provisions of s. 54 of Act No. IV of 1882." *BEGAM, v. MUHAMMAD YAKUB*, 16 A. 344 (F.B.)=14 A.W.N. (1894) 101 ...

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- (7) *Muhammadan Law—Demand made "on the premises"—Demand made within an undivided village a share in which was the subject of sale.*—Where certain persons claimed pre-emption in respect of a share in an undivided village and proved that they made an immediate assertion of their intention to pre-empt in the presence of witnesses within the area of the zamindari to which the share sold belonged, it was held that, in the absence of

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- any indication that the demand was not made *bona fide*, the demand of pre-emption was a good demand made "on the premises" within the meaning of the Muhammadan law. *KULSUM BIBI v. FAQIR MUHAMMAD KHAN*, 18 A. 298 = 16 A.W.N. (1896) 71 ... 905
- (8) *Talab-i-ishtishhad*—Demand made to vendee not in possession—Demand made by agent of pre-emptor.—Held, that if the *talab-i-ishtishhad* is made in the presence of the vendee, it is not necessary that such vendee should at the time the demand is made be actually in possession of the property in respect of which pre-emption is claimed.
Held, also, that the ceremony of *talab-i-ishtishhad* need not necessarily be performed by the claimant for pre-emption in person, but may be performed by a duly constituted agent on his behalf. *ALI MUHAMMAD KHAN v. MUHAMMAD SAID HUSAIN*, 18 A. 309 = 16 A.W.N. (1896) 76 ... 912
- (9) *Wajib-ul-arz*—Construction of document—Co-sharer—Holder of resumed *muafi*—Act No. XIX of 1873, s. 62—Rules of the Board of Revenue, 1870, Department I, Rules 30 and 51.—The plaintiff, a co-sharer in the village of Deobarampur, sued for pre-emption of certain land, being 'resumed revenue-free land' in the village, which had been sold to a stranger. The clause of the *wajib-ul-arz* under which pre-emption was claimed was as follows:—"When any co-sharer (*hissadar*) is bent upon selling or mortgaging his right (*haqqiyat*), then first that co-sharer who is nearest to the sharer bent on transfer can take it; after that any other person who is interested (*sharik*) in the village rank by rank can take it. If no person interested in the village takes it, then a stranger may take it."
Held that, under the circumstances of the case, the plaintiff had no right of pre-emption in respect of the land claimed by him, the vendor not being, within the meaning of the *wajib-ul-arz*, a co-sharer in the village by virtue of his possession of a portion of the resumed *muafi*. *KALLIAN MAL v. MADAN MOHAN*, 17 A. 447 = 15 A.W.N. (1895) 93 ... 609
- (10) *Wajib-ul-arz* - "Co-sharer"—"Proprietor"—Transferee of lands in a village who has not obtained mutation of names in his favour—Dedication—Cessation of private ownership.—In a suit for pre-emption under a *wajib-ul-arz* which gave a right of pre-emption to "co-sharers" in the village; held, that the word "co-sharer" included a person who had acquired lands in the village, which were not merely *sir* of a co-sharer and were not grove lands held by a licensee from a zamindar, but lands belonging to a zamindar and in his occupation, notwithstanding the fact that he had not yet obtained a mutation of names in respect thereof.
Held, also that the mere fact of the owner of land having erected a temple and planted a grove thereon did not of itself, without any further evidence, indicate a dedication to the God and a cessation of the rights of private ownership in respect of such land. *DAKHNI DIN v. RAHIM-UN-NISSA AND ANOTHER*, 16 A. 412 = 14 A.W.N. (1894) 134 ... 268
- (11) *Wajib-ul-arz*—Partition of village, originally one, into three separate mahals.—New record of village customs framed on partition.—Rules of the Board of Revenue of the 13th November 1875—Act No. XIX of 1873, s. 257.—Where at the settlement of a village constituting a single mahal a record-of rights was framed giving certain pre-emptive rights to the co-sharers in the village, but subsequently the village was divided by perfect partition into three separate mahals, and, in accordance with the rules of the Board of Revenue of the 13th November 1875, issued under s. 257 of Act No. XIX of 1873, a new record of village customs was framed which did not give to the sharers in any one of new mahals any right of pre-emption in respect of land situated in another mahal, it was held that the latter record of village customs was a valid and binding document and no right of pre-emption existed in favour of the co-sharers in any one mahal in respect of land situated in another mahal.
Per *AIKMAN, J.*—Where a village originally one, is divided by perfect partition into two or more mahals, unless at the time of partition a right of pre-emption is specifically reserved by the co-sharers in respect of lands lying outside any given mahal, such right of pre-emption is not to be presumed from the mere fact that when the village formed but one mahal the co-sharers had pre-emptive rights against each other.

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- Under the above circumstances the mere retention of a community of interest in certain property such, *e.g.*, as roads, &c., will not give the sharers in one mahal any right of pre-emption over land situated in another. *GHURE v. MAN SINGH*, 17 A. 226 = 15 A.W.N. (1895) 70 ... 470
- (12) *Wajib-ul-arz* — *Right of pre-emption not forfeited by breach on a former occasion of the provisions of the wajib-ul-arz relating to pre-emption.* — *Semble*, that a claimant for pre-emption under a *wajib-ul-arz* would not forfeit his right to pre-emption if upon a former occasion he had violated the provisions of the *wajib-ul-arz* by mortgaging his share to a stranger. *UJAGAR LAL v. JIA LAL*, 18 A. 382 = 16 A.W.N. (1896) 112 ... 962
- (13) *Wajib-ul-arz* — "*Stranger*." — Under the terms of a *wajib-ul-arz* successive pre-emptive rights were given, first to 'own brothers' secondly to 'near cousins,' thirdly, to 'share-holders.' *Held* the parties being Muhammadans that in regard to a sale of land to which this *wajib ul-arz* applied a nephew (brother's son) of the vendee was a 'stranger' and his joinder as co-vendee would vitiate the sale and let in other persons having a right of pre-emption. *AMJAD ALI v. MUSHTAQ AHMAD*, 17 A. 454 = 15 A.W.N. (1895) 95 ... 614
- (14) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 18 A. 223, 18 A. 262.
- (15) See COURT FEES ACT (VII OF 1870), 16 A. 496.
- (16) See MUHAMMADAN LAW (PRE-EMPTION), 16 A. 247, 300, 16 A. 383.

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- (1) See STATUTE 24 AND 25 VIC., CAP. 104, 16 A. 136.
- (2) See SUCCESSION CERTIFICATE ACT (VII OF 1889), 17 A. 578.

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See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 17 A. 475, 18 A. 260.

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- (1) *Parties—Appeal* — Civil Procedure Code, s. 32 — *Party added in appeal who was not a party to the suit nor representative of such a party.* — When a Court hearing an appeal is of opinion that a person not a party to the suit and not entitled to be brought on the record in a representative capacity should be a party to the record, its proper course is to remand the case to the Court of first instance, and to direct that Court to bring on the particular person as a defendant, or as a plaintiff if he consents, give him time to file his statement and opportunity to produce his evidence, and try the issues, raised between him and the opposite side. *MIHIN LAL v. IMTIAZ ALI*, 18 A. 332 = 16 A.W.N. (1896) 91 ... 927
- (2) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 16 A. 342; 17 A. 117, 17 A. 162; 18 A. 396.
- (8) See SUCCESSION CERTIFICATE ACT (VII OF 1889), 16 A. 259.

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See STAMP ACT (I OF 1879), 17 A. 55.

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Provincial Small Cause Courts Act (IX of 1887).

- (1) S. 25 — Civil Procedure Code, s. 622 — *Revision—Grounds upon which an application for revision under s. 25 of Act No. IX of 1887 will be entertained.* — It is no ground for revision under s. 25 of Act No. IX of 1887 that the Court whose order it is sought to revise may have come to an erroneous decision on a point of limitation. *SARMAN LAL v. KHUBAN*, 17 A. 422 = 15 A.W.N. (1895) 112 ... 592

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(2) <i>S. 25—Revision—Small Cause Court suit—Application of s. 25—Civil Procedure Code, s. 622.</i> —Section 25 of Act No. IX of 1887 was not intended to give what would practically be an appeal in every case from the decision of a Court of Small Causes, but the discretion to be exercised thereunder should be guided by the same considerations as those which govern the application of s. 622 of Act No. XIV of 1882. <i>SARMAN LAL v. KHUBAN AND OTHERS</i> , 16 A. 476 (F.B.) = 14 A.W.N. (1894) 183	309
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(1) See REGISTRATION ACT (III OF 1877), 18 A. 338.	
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Registration Act (III of 1877).	
(1) <i>S. 17, clause (n)—Mortgage—Receipt purporting to extinguish mortgage—Receipt only covering interest of one co-mortgagee—Registration.</i> —The provisions of s. 17, cl. (n) of Act No. III of 1877 do not apply to a receipt which purports to extinguish not the entire mortgage but only the rights under the mortgage of one of the co-mortgagees. <i>SRI RAM v. KESRI MAL</i> , 18 A. 338 = 16 A.W.N. (1896) 92	931
(2) <i>Ss. 59, 60</i> —See BURDEN OF PROOF, 17 A. 428.	
(3) <i>S. 77—Registration—Lease—Suit to compel registration.</i> —Certain lessees, whose lessor had refused to be a party to registering the lease, without applying for registration to the sub-registrar or registrar, brought a suit within four months of the execution of the lease claiming that the lessor might be ordered to cause the lease to be registered; <i>held</i> that such a suit would lie independently of the Indian Registration Act (Act No. III of 1877) and that s. 77 of the said Act would not apply so as to render the suit barred by limitation. <i>ABDULLAH KHAN v. JANKI</i> , 16 A. 303 = 14 A.W.N. (1894) 94	197
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<i>S. 8—Mortgage by conditional sale—Foreclosure—Procedure—Demand of payment—Parwanah—"Official signature"—"Stipulated period."</i> —In proceedings for foreclosure of a mortgage under Bengal Regulation No. XVII of 1806, it is not necessary that the fact that a demand for payment was made before the petition for foreclosure was presented should appear on the face of the proceedings; it is sufficient if the plaintiff in his suit for possession shows that the demand was so made. A <i>parwanah</i> issued under the provisions of s. 8 of the above-mentioned Regulation is not signed as required by that section with the "official signature" of the Judge when it bears merely the initials of that officer. The term "stipulated period" as used in s. 8 of Regulation No. XVII of 1806, means the full term on the expiry of which the mortgage money is payable, notwithstanding that under the strict terms of the mortgage the mortgagee might be entitled to foreclose at an earlier period. <i>KUBRA BIBI v. WAJID KHAN</i> , 16 A. 59 = 13 A.W.N. (1893) 209	39
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(2) See EXECUTION OF DECREE, 16 A. 390.

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(1) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 18 A. 119, 18 A. 163.

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(3) See PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), 16 A. 476; 17 A. 422.

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Contract—Of immoveable property—Misdescription of area sold—Suit for damages—Fraud.—A purchaser of certain immoveable property sued his vendors to recover compensation or damages on account of a deficiency in the actual area of land purchased by him as compared with the area stated in his sale-deed. There was no covenant in the sale-deed to make compensation in case of misdescription.

Held that the plaintiff in order to succeed must make out a fraudulent misrepresentation which he accepted as true, and which induced him to enter into the contract, and which caused him damage. **ABDULLAH KHAN v. ABDUR RAHMAN BEG**, 18 A. 322=16 A.W.N. (1896) 81 ...

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(1) For costs—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 18 A. 101.

(2) For performance of decree of Appellate Court—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 17 A. 99.

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(1) See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 17 A. 67; 18 A. 301.

(2) See PENAL CODE (ACT XLV OF 1860), 17 A. 120, 17 A. 123.

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See SPECIFIC RELIEF (ACT I OF 1877), 16 A. 423.

Specific Relief Act (I of 1877).

- (1) S. 22 - *Compromise*—*Specific relief granted in respect of an agreement concerning which both parties had at the time of making it equal means of knowledge, though their relative legal positions were subsequently discovered to be different from what they had supposed at the time.*—Naubat Ram, a large landed proprietor, died without issue in 1867. His widow Ganesh Kuar, held possession of the estates down to her death in 1878. Then, after some disputes as to the succession, one Naraini Kuar, claiming as widow of an alleged adopted son of Naubat Ram, was put into possession by the Revenue authorities. Against Naraini Kuar two suits were brought for the property left by Naubat Ram. The first suit was brought in April 1879, by one Chandi Din claiming as sister's son of Naubat Ram. Chandi Din being a pauper, sold a portion of the property in suit to one Nawab Mashuq Mahal for Rs. 20,000, and made Mashuq Mahal a co-plaintiff in the suit. The second suit against Naraini Kuar was instituted in May 1879 by Shib Lal and others, the defendants-appellants in this present suit, who claimed title as the nearest sapindas of the deceased Naubat Ram. In each of these two suits the plaintiff or plaintiffs were successful. In each the defendant appealed. In the case of Chandi Din the defendant was successful and the plaintiff's suit was dismissed by the High Court on the 7th of December 1886; in the other case, the parties on the 25th of July 1885, settled their disputes by a compromise.

While the two suits above mentioned were pending, Shib Lal and his co-plaintiffs instituted a suit on the 2nd of July 1883, against Chandi Din and Mashuq Mahal, asking for a declaration that they were entitled to succeed to the property of the deceased Naubat Ram. In January 1884, the female defendant having died, the Collector of Bareilly was brought on to the record of this suit as guardian of her minor children and on the 19th of January 1885 a compromise was entered into between the Collector, on behalf of the minor children of Mashuq Mahal and one adult daughter of Mashuq Mahal on the one hand, and the plaintiffs on the other, whereby the representatives of Mashuq Mahal relinquished the suit and consented to a decree being passed in favour of the plaintiffs, and the plaintiffs agreed that when they got possession of the property they would make over certain villages and a certain sum of money to the representatives of Mashuq Mahal.

As has been mentioned, Chandi Din's claim to the property was finally disallowed by the High Court in December 1886. On the 6th of January 1888, the Collector of Bareilly instituted a suit for specific performance of the compromise of the 19th January 1885.

The Court of first instance decreed the plaintiffs' claim. On appeal by the defendants to the High Court it was *held* that there was nothing in s. 22 of the Specific Relief Act which would stand in the way of a decree for specific performance of the compromise. The compromise when entered into in 1885, was not without consideration, and the subsequent course of litigation could not affect the position of the parties as regards the present suit based thereon. SHIB LAL AND OTHERS v. THE COLLECTOR OF BAREILLY, 16 A. 423 = 14 A.W.N. (1894) 161

- (2) S. 30. See LIMITATION ACT (XV of 1877), 16 A. 3.

- (3) S. 42—*Suit for a declaration—Further relief.*—The plaintiffs were purchasers at a sale held in execution of a decree for money, and had obtained possession. Before that decree had been executed the property in question was mortgaged to two other persons. After the purchase by the plaintiffs the mortgagees, with knowledge of the auction-purchaser's rights, brought a suit for sale upon their mortgage without making the former auction-purchasers parties. They obtained a decree, and brought the mortgaged

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property to sale, and it was purchased by N. S. and another. The former auction-purchasers thereupon sued the purchasers under the decree upon the mortgage for a declaration that they and their interests were not affected by the suit for sale and by the decree for sale and the sale in execution of that decree.

Held, the plaintiffs in that suit were not bound either to tender the mortgage money, or to offer to redeem, or to frame their suit as a suit for redemption, and that their not having done so did not deprive them of their right to a declaration. *NATHU SINGH v. GUMANI SINGH*, 18 A. 320=16 A.W.N. (1896) 86 ...

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(4) S. 42—See CIVIL PROCEDURE CODE (Act XIV of 1882), 17 A. 174.

Stamp.

See STAMP ACT (I OF 1879), 16 A. 132; 17 A. 55, 17 A. 211; 18 A. 295.

Stamp Act (I of 1879).

(1) S. 3, sub-s. (4), cl. (b)—*Stamp—Bond—Promissory note.*—*Held* that a document by which the executant promised to pay to the person named therein a certain sum of money on a certain date with interest was not "attested by a witness" within the meaning of cl. (b) of sub-s. 4 of s. 3 of Act No. I of 1879, merely by reason of its bearing on the face of it a statement by the scribe of the document that the document was correct and was written by his pen. REFERENCE UNDER ACT NO. I OF 1879, s. 49, 17 A. 211 (F.B.)=15 A.W.N. (1895) 61 ...

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(2) S. 3, cl. (13), s. 7—*Stamp—Lease or mortgage.*—A zamindar leased certain land in his village to some cultivators at a rent of Rs. 365 per annum in cash and of certain cartloads of straw and grass, by a document which also contained an agreement by the lessees hypothecating certain other property belonging to them for the purpose of securing the payment of the agreed rent and for the performance of the engagement for the delivery of the other articles. *Held* that the document above referred to should be stamped as a mortgage-deed according to the definition contained in s. 3, cl. 13 of Act No. I of 1879, and also that it fell within the second paragraph of s. 7 of the above Act. REFERENCE UNDER ACT NO. I OF 1879 (INDIAN STAMP ACT), s. 49, 17 A. 55 (F.B.)=14 A.W.N. (1894) 204 ...

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(3) Ss. 34, 35, 39—*Admission of unstamped document in evidence on payment of penalty—Necessity for production of document.*—Where a Court has occasion to admit a previously unstamped document in evidence upon payment of a penalty under s. 34 and the following sections of Act No. I of 1879, it is necessary that the original instrument should be before the Court. *KALLU v. HALKI*, 18 A. 295=16 A.W.N. (1896) 68 ...

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(4) Sch. ii, art. 15 (b)—*Stamp—Payment of money without consideration—Receipt for Counsel's fees.*—A receipt given by counsel for a sum above Rs. 20 paid to him as a fee for professional services is exempt from stamp duty. STAMP REFERENCE FROM THE BOARD OF REVENUE, N.W.P. AND OUDH, 16 A. 132 (F.B.)=14 A.W.N. (1894) 12 ...

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Statute 24 and 25 Vic., Cap. 104.

(1) Ss. 7 and 16—*Interpretation of statutes—"On the happening of a vacancy"—Nature of power conferred by s. 7 of 24 and 25 Vic., Cap. 104, discussed—Evidence—Presumption of law arising from the exercise de facto of the functions of a Judge of a High Court.*—The words—"Upon the happening of a vacancy in the office of any other Judge"—in s. 7 of the Statute 24 and 25 Vic., Cap. 104, mean upon the happening of a vacancy in the office of a Judge appointed to his office by Her Majesty. They are not applicable to the case of a vacancy caused by a person appointed to act as a Judge under the provisions of the second part of the above mentioned section ceasing to perform the duties of such office. The words above quoted further mean that the power conferred by s. 7 must be exercised within a reasonable time, that is to say, a practicable time, after the happening of a vacancy. It cannot be held that the power conferred by the above-mentioned section can be held in suspense for several years and then be legally exercised. Where a person had in fact for a period of more than a year been exercising all the functions of a Judge of the High Court in virtue of an appointment purporting to be made by the Lieutenant-Governor of the North-Western Provinces and Chief Commissioner of Oudh

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under sanction of Her Majesty's Secretary of State for India; it was held that though, so far as the validity of the appointment depended upon the provisions of ss. 7 and 16 of the Statute 24 and 25 Vic., Cap. 104, the appointment was apparently *ultra vires*, it must nevertheless be presumed, in the absence of fuller information, that the appointment was legally made in the exercise of some power unknown to the Court vested in the Secretary of State for India. *QUEEN-EMPRESS v. GANGA RAM*, 16 A. 136 (F.B.) = 14 A.W.N. (1894) 39

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- (2) S. 15—*Civil Procedure Code*, s. 622—*Powers of superintendence exercisable by the High Court*.—Where a Subordinate Court had signally failed to do its duty, and there had been no patent neglect on the part of the petitioner, held, on an application for revision, that it is competent for the High Court under the general powers of supervision vested in it by section 15 of 24 and 25 Vic., Cap. 104, to direct the Subordinate Court to do its duty, and complete the case according to law. *ABDULLAH v. SALARU*, 18 A. 4 = 15 A.W.N. (1895) 124

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S. 3—See ACT IV OF 1869 (DIVORCE), 18 A. 375.

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S. 17—See MORTGAGE (REDEMPTION), 16 A. 205.

Sub-Mortgage.

See MORTGAGE (GENERAL), 18 A. 113.

Subordinate Judge.

Powers of—See ACT XII OF 1891 (AGRA RENT), 16 A. 363.

Succession.

See ACT XII OF 1881 (AGRA RENT), 17 A. 33.

Succession Certificate Act (VII of 1889).

- (1) S. 4—*Act No. XXVII of 1860*, s. 2—*Act No. I of 1868*, s. 6—*Procedure—Act No. IV of 1882*, s. 88—*Suit for sale on a mortgage—Suit by representative of deceased mortgagee—Production of certificate of succession a condition precedent to decree*.—S. 4 of Act No. VII of 1889 made no change in the substantive law, but enacted merely a rule of procedure. Inasmuch, therefore, as "no one has a vested right in any particular form of procedure" the abovementioned section is applicable to suits instituted before the coming into force of Act No. VII of 1889. Section 4 of Act No. VII of 1889 applies to suits for sale under s. 88 of the Transfer of Property Act, 1882. *FATEH CHAND v. MUHAMMAD BAKSH*, 16 A. 259 (F.B.) = 14 A. W.N. (1894) 74

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- (2) S. 4—*Joint Hindu family—Suit by survivor for debt due to joint-family—Evidence—Presumption as to nature of debt where the family is joint*.—Where a debt is advanced from the funds of a joint Hindu family and is due to that family, no certificate under Act No. VII of 1889 is necessary to enable the survivor of such family to recover the said debt.

Such debt as above being a bond-debt, it is not necessary that it should appear in the bond that the funds were those of a joint family. *PATESH-URI PARTAP NARAIN SINGH v. BHAGWATI PRASAD*, 17 A. 573 = 15 A. W.N. (1895) 132

- (3) S. 4 (b)—*Execution of decree—Application for execution made before production of certificate*.—In cases where a certificate of succession is required before execution of a decree can be taken out, all that is necessary is that the certificate should be produced before an order for execution can be made. It is not necessary that the certificate should be produced along with the application for execution. *KALIAN SINGH v. RAM CHARAN*, 18 A. 34 = 15 A.W.N. (1895) 148

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- (4) S. 4. sub-s. (1), cl (b)—*Execution of decree—Application for execution unaccompanied by certificate*.—Though under certain circumstances a Court may be prohibited by Act No. VII of 1889 from granting execution of a decree unless a certificate of succession as provided by the Act is produced before it, it does not therefore follow that under such circumstances an application for execution is a bad application because it is unaccompanied by a certificate. *MANGAL KHAN v. SALIM-ULLAH KHAN*, 16 A. 26 = 13 A.W.N. (1893) 197

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- (5) S. 6—*Certificate not necessarily to collect all the debts of the deceased*—A Court may legally grant to an applicant, under Act No. VII of 1889, a certificate for the collection of a specified debt or specified debts of a deceased person. The Court is not bound to grant a certificate only for the collection of the whole of the debts of the deceased. **IN THE MATTER OF THE PETITION OF INDARMAN**, 18 A. 45=15 A.W.N. (1895) 152 .. 735
- (6) S. 7, cl. (4)—*Certificate for collection of debts—Grant of certificate not to be partial*.—A District Court acting under S. 7 of Act No. VII of 1889 must, if there are several applicants, elect to which, if any, a certificate should be granted. It is not competent to such Court to grant separate certificates to different persons for partial collection of the debts in respect of which a certificate is sought. **SHITAB DEI v. DEBI PRASAD**, 16 A. 21=13 A.W.N. (1893) 191 ... 15

Suit.

- (1) Array of parties in a—See **CIVIL PROCEDURE CODE (ACT XIV OF 1882)**, 18 A. 86, 18 A. 306.
- (2)—by auction purchaser to confirm sale set aside by the Collector—See **CIVIL PROCEDURE CODE (ACT XIV OF 1882)**, 18 A. 437.
- (3)—for a declaration—See **SPECIFIC RELIEF ACT (I OF 1877)**, 18 A. 320.
- (4)—for a settlement of accounts—See **ACT NO. XII OF 1881 (AGRA RENT)**, 16 A. 333.
- (5)—for a share in the profits of a mahal—See **ACT XII OF 1881 (AGRA RENT)**, 16 A. 333.
- (6)—for breach of contract in writing registered—See **LIMITATION ACT (XV OF 1877)**, 18 A. 160.
- (7)—for money had and received—See **LIMITATION ACT (XV OF 1877)**, 18 A. 430.
- (8)—for possession of immoveable property and for mesne profits—See **COURT-FEES ACT (VII OF 1870)**, 16 A. 401.
- (9) Frame of—See **PLEADINGS**, 18 A. 125.
- (10)—*in forma pauperis*—See **CIVIL PROCEDURE CODE (ACT XIV OF 1882)**, 18 A. 419.
- (11)—to compel registration—See **REGISTRATION ACT (III OF 1877)**, 16 A. 303.
- (12)—to remove trustees of Hindu religious endowment—See **ACT XX OF 1862 (RELIGIOUS ENDOWMENT)**, 18 A. 227.
- (13) See **BENAMIDAR**, 18 A. 69.

Talab-i-ishtishhad.

See **PRE-EMPTION**, 18 A. 309.

Tenancy.

Conditions of—See **LANDLORD AND TENANT**, 16 A. 181.

Theft.

See **PENAL CODE (ACT XLV OF 1860)**, 18 A. 88.

Thekadar.

See **ACT XII OF 1881 (AGRA RENT)**, 18 A. 240.

Transfer.

- (1) Of appeal in a Rent Court suit. See **ACT XII OF 1881 (AGRA RENT)**, 16 A. 363.
- (2) See **CRIMINAL PROCEDURE CODE (ACT X OF 1882)**, 16 A. 9.

Transfer of Property Act (IV of 1882).

- (1) Ss. 3, 85—*Notice—Registration equivalent to notice to prior mortgagee of subsequent incumbrance*.—For the purposes of s. 85 of the Transfer of Property Act, a mortgagee will be deemed to have notice of a subsequent registered incumbrance affecting the property mortgaged to him, inasmuch as it is the duty of such prior mortgagee before suing on his mortgage to search the registry for record of any such subsequent incumbrance, and if he has not done so, he must be taken either to have wilfully abstained from an inquiry or search which he ought to have made, within the meaning of s. 3 of the abovementioned Act, or have omitted to do an act which a reasonably prudent mortgagee about to bring a suit on his